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Transcripts
of
Records
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Supreme Court U. States
114th Ohio
515—554

14-5-18

OFFICE SUPREME COURT U. S.
FILED
APR 18 1881
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

PETITION

OF

FREDERICK GORDON FOR A WRIT OF PROHIBITION.

STEWART BROWN,

ARTHUR GEO. BROWN,

Of Counsel for Petitioner.

WM. K. BOYLE, PRINTER, BALTIMORE.

To the Honorable the

JUSTICES OF THE SUPREME COURT

of the United States.

The Petition of Frederick Gordon respectfully represents:

That he is a subject of Her Majesty the Queen of Great Britain and Ireland, and a resident of Sunderland, in England, and that he is the sole owner of the steamer "Leversons," her boats, engines, machinery, tackle, apparel and furniture.

That the said steamer is a registered British vessel of about nine hundred and sixteen tons English measurement, and that Charles William Woodruff is the master thereof.

That on the 7th day of March, A. D., 1881, Leana L. Hubbard, widow, and Edna C. Hubbard, an infant by said Leana L. Hubbard, her mother and next friend, Amanda B. Tall, Laura Tall and Alice C. Tall, George W. Tall and Otis I. Tall, the two last named infants appearing by Amanda B. Tall, their mother and next friend, Andrew J. Hubbard, Thomas Hubbard and Lottie P. Hubbard, all of the City of Baltimore, in the State of Maryland, exhibited and filed a libel in the District Court of the United States for the District of Maryland against the said steamer, her boats, engines, machinery, tackle, apparel and furniture, then lying in the port of Baltimore, in a cause of collision civil and maritime, wherein the said libellants set forth that on the night of February 25th, 1881, the schooner David E. Wolfe, then on a voyage upon the high seas from Baltimore, in the State of Maryland, to Portsmouth, in the State of Virginia, was sunk in the Chesapeake Bay, in water five fathoms deep, in consequence of a collision which occurred in said Bay, one of the waters of the United States, near the York Spit Light, between said schooner and the said steamer "Leversons," which was on a voyage from Europe to Baltimore; that Rigby L. Hubbard, George Tall and Thomas Hubbard were on board of said schooner at the time of said collision and that they were all drowned in consequence thereof; that said collision was caused by the fault, carelessness, mismanagement and want of

skill of those in charge of said steamer; that the libellant Leana L. Hubbard is the widow, and the libellant Edna C. Hubbard is the daughter of the said Rigby L. Hubbard; that at the time of said collision said libellants were dependent on him for support, protection and society, and that by his death they have sustained damages to the amount of fifteen thousand dollars; that the libellant Amanda B. Tall is the widow, and the libellants Laura Tall, Alice C. Tall, George W. Tall and Otis I. Tall are the children of the said George Tall; that they were dependent on him for support, protection and society, and that by his death they have suffered damages to the amount of fifteen thousand dollars; that the libellant Andrew J. Hubbard is the father, the libellant Thomas Hubbard is the brother, and the libellant Lottie P. Hubbard is the sister of said Thomas Hubbard, and that they are damaged by his death to the amount of five thousand dollars; that the damages of the libellants, arising from the fault of said steamer and the said collision resulting therefrom between her and the said schooner amount in the aggregate to thirty-five thousand dollars; and libellants prayed that process in due form of law might issue against said steamer, her boats, engines, machinery, tackle, apparel and furniture, and that the said District Court would decree for the aforesaid claims.

That thereupon the said District Court issued a warrant of attachment directed to the Marshal of the said District, commanding him to seize and safely keep the said steamer, and said Marshal under said writ did seize and take into his custody the said steamer.

That thereafter the said Charles William Woodruff claimed the said steamer in behalf of your petitioner as the owner thereof, the said Woodruff acting in that behalf as the master of the said steamer and the lawful bailee thereof for your petitioner.

That thereafter the said Woodruff, as master and claimant of said steamer filed in said Court in said cause certain exceptions to the said libel, wherein he alleged

1. That the said libel is insufficient and does not set forth a cause or causes of action within the jurisdiction of said Court.

2. That the said libellants are not entitled and no one or more of them is or are entitled to sue for or recover in said Court the damages or any part thereof, claimed to have been suffered by them respectively as alleged in said libel.

3. That the libellants are not entitled and no one or more of them is or are entitled to sue for or recover in that form of action,

the damages or any part thereof claimed to have been suffered by them respectively as alleged in said libel.

4. That there is no lien upon the said steamer for any of the damages claimed in said libel and the said Court has no jurisdiction to enter any decree or decrees therefor against said steamer.

That thereafter on the 14th day of April, A. D., 1881, the said District Court, having heard and considered the said exceptions, passed an order overruling them and each of them, and further ordered the said claimant to plead or answer to the said libel on or before the first Tuesday in June next.

And your petitioner herewith files a certified copy of the said libel, exceptions and order overruling the same, marked "Exhibit F. G," and prays that the same may be taken as part hereof.

And your petitioner now further avers and respectfully submits that the said libel does not set forth any cause or causes of action cognizable by the said District Court as a Court of Admiralty and maritime jurisdiction, and that the said Court is without jurisdiction in the premises.

And your petitioner apprehends and believes, and he therefore avers and charges that unless prohibited and restrained by your Honorable Court, the said District Court will proceed in said cause notwithstanding that in law it has no jurisdiction nor right to proceed as aforesaid.

Wherefore your petitioner prays that a writ of prohibition may be issued out of this Honorable Court restraining and prohibiting the said District Court of the United States for the District of Maryland as a Court of admiralty and maritime jurisdiction, and the Honorable Thomas J. Morris, the Judge thereof from proceeding further in the said cause, and from entering any decree therein except to dismiss the said libel, and that your petitioner may have such other and further relief as his case may require.

And your petitioner will ever pray, &c.

FREDERICK GORDON,
Petitioner,
By BROWN & BRUNE,
his Attorneys and Proctors.

STEWART BROWN,
ARTHUR GEO. BROWN,
Of Counsel for Petitioner.

UNITED STATES OF AMERICA,

DISTRICT OF MARYLAND, TO WIT:

I hereby certify that on this sixteenth day of April, A. D., 1881, before me, the subscriber, a Commissioner of the Circuit Court of the United States for the District of Maryland, personally appeared George F. Patterson and Robert Ramsay, agents of Frederick Gordon, the within named petitioner, acting for and representing in this behalf the said Gordon, and consignees of the said steamer Leversons, and made oath in due form of law that the matters and facts set forth and contained in the foregoing petition are true as therein stated to the best of their knowledge, information and belief.

{ Commissioner's Seal. } Witness my hand and official seal.

ROBERT LYON ROGERS,

U. S. Commissioner for Maryland.

"EXHIBIT F. G."

LIBEL.

TO THE HONORABLE

THOMAS J. MORRIS,

Judge of the District Court of the United States, for the District of Maryland.

Leana L. Hubbard, widow, and Edna C. Hubbard, an infant, by said Leana L. Hubbard, her mother and next friend, Amanda B. Tall, Laura Tall and Alice C. Tall, George W. Tall and Otis I. Tall, the two last named being infants, and appearing herein by Amanda B. Tall, their mother and next friend, Andrew J. Hubbard, Thomas Hubbard and Lottie P. Hubbard, all of the City of Baltimore, State of Maryland, exhibit this, their libel against the Steamer Leversons, her boats, engines, machinery, tackle, apparel and furniture, now lying in the port of Baltimore, within the admiralty and maritime jurisdiction of this Honorable Court, in a cause of collision, civil and maritime. And thereupon the libellants allege and articulately propound as follows:

First, that on the night of February the 25th, 1881, the schooner David E. Wolfe, then on a voyage upon the high seas, from Balti-

more, in the State of Maryland, to Portsmouth, in the State of Virginia, was sunk in the Chesapeake bay, in water five fathoms deep, in consequence of a collision which occurred in said bay, one of the waters of the United States, near the York Spit Light, between said Schooner and the said Steamer Leversons, which was on a voyage from Europe to Baltimore.

Second, that Rigby L. Hubbard, George Tall and Thomas Hubbard were on board of said Schooner at the time of said collision, and that they were all drowned in consequence thereof.

Third, that said collision was caused by the fault, carelessness, mismanagement and want of skill of those in charge of said Steamer.

Fourth, that the libellant, Leana L. Hubbard, is the widow, and the libellant, Edna C. Hubbard, is the daughter of the said Rigby L. Hubbard. That at the time of said collision the said libellants were dependent on him for support, protection and society; and that by his death they have sustained damages to the amount of fifteen thousand dollars.

Fifth, that the libellant, Amanda B. Tall, is the widow and the libellants, Laura Tall, Alice C. Tall, George W. Tall and Otis I. Tall, are the children of the said George Tall. That they were dependent on him for support, protection and society; and that by his death they have suffered damages to the amount of fifteen thousand dollars.

Sixth, that the libellant, Andrew J. Hubbard, is the father, the libellant, Thomas Hubbard, is the brother, and the libellant, Lottie P. Hubbard, is the sister of said Thomas Hubbard; and that they are damaged by his death to the amount of five thousand dollars.

Seventh, that the damages to the libellants arising from the fault of said Steamer and the said collision resulting therefrom, between her and said Schooner amount in the aggregate to thirty-five thousand dollars, and they seek reparation therefor in this suit.

Eighth, that all and singular the premises are true. Wherefore the libellants pray that process in due form of law may issue against said Steamer Leversons, her boats, engines, machinery, tackle, apparel and furniture; that this Honorable Court will decree for the aforesaid claims, amounting in the aggregate to thirty-five thousand dollars and costs, and grant to them such other relief as they may require.

JOHN H. THOMAS.
Proctor for Libellants.

"EXCEPTIONS."

In the District Court of the United States, for the Maryland District, in Admiralty.

LEANA L. HUBBARD,
et al.
vs.
STEAMER LEVERSONS.

TO THE HONORABLE

THOMAS J. MORRIS,

Judge of the said Court:

Charles William Woodruff, master and claimant of the Steamer Leversons, in behalf of Frederick Gordon, the owner thereof, prays leave to except to the libel filed by Leana L. Hubbard, widow, and Edna C. Hubbard, infant, by said Leana L. Hubbard, her mother and next friend, Amanda B. Tall, Laura Tall and Alice C. Tall, George W. Tall and Otis I. Tall, the two last named infants appearing by Amanda B. Tall, their mother and next friend, Andrew J. Hubbard, Thomas Hubbard and Lottie P. Hubbard:

1. For that the said libel is insufficient, and does not set forth a cause or causes of action within the jurisdiction of this Honorable Court.

2. For that the said libellants are not entitled, and no one or more of them is or are entitled to sue for or recover in this Honorable Court the damages or any part thereof claimed to have been suffered by them respectively as alleged in said libel.

3. For that the libellants are not entitled, and no one or more of them is or are entitled to sue for or recover in this form of action the damages or any part thereof claimed to have been suffered by them respectively as alleged in said libel.

4. For that there is no lien upon the said Steamer for any of the damages claimed in said libel, and this Honorable Court has no jurisdiction to enter any decree or decrees therefor against said Steamer, wherefore the said claimant prays that the said libel may be dismissed, with costs.

BROWN & BRUNE,
Proctors for Claimant.

"ORDER OF COURT."

In the District Court of the United States, for the Maryland District, in Admiralty.

LEANA L. HUBBARD,
et al.
vs.
STEAMER LEVERSONS,

The exceptions to the jurisdiction of the Court and the other exceptions filed in this cause by Charles William Woodruff, master and claimant of the Steamer Leversons, having been duly heard and considered, it is by the Court this 14th day of April, A. D., 1881, adjudged, ordered and decreed that the said exceptions, and each of them respectively, be and they are hereby overruled; and it is further ordered that the claimant plead or answer to the said libel on or before the first Tuesday in June next.

THOMAS J. MORRIS.

In testimony, that the aforegoing, is a true copy of the original libel, exceptions and order of Court overruling the same, now on file and of record in said Court, I hereunto subscribe my name and affix the seal of the said District Court this 14th day of April, in the year of our Lord, one thousand eight hundred and eighty-one.

JAMES W. CHEW,
Clerk District Court U. S.

Seal of District Court.

ADDITION TO RECORD.

No. 5.—ORIGINAL.

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1 Supreme Court of the United States. No. 9. Original. October term, 1880.

EX PARTE IN THE MATTER OF FREDERICK GORDON, PETITIONER. } Petition for a writ of prohibition.

On consideration of the petition of Frederick Gordon, it is hereby ordered that cause be shown by the judge of the district court of the United States for the district of Maryland, before this court, at Washington, in the District of Columbia, on the 11th day of October, 1881, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of prohibition should not issue restraining and prohibiting him from proceeding further, and from entering any decree, except to dismiss the libel, in the case of Leana L. Hubbard et al., libellants, vs. The Steamer Leversons, her engines, &c., Charles William Woodruff, master and claimant.

18TH APRIL, 1881.

2 True copy.
Test:
[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court U. S.

BALTIMORE, *April* 26, 1881.

The within copy of the order of the Supreme Court of the United States, dated April 18, 1881, in the case of the matter of the petition of Frederick Gordon, ex parte, was this day served upon me by Arthur Geo. Brown, who left with me a copy of said order.

THOS. J. MORRIS,
U. S. District Judge for the D't of Md.

(Endorsed:) Supreme Court U. S. 1880, October term. No. 9. Original. Ex parte in the matter of Frederick Gordon. Rule to show cause and proof of service. Filed 30th April, 1881.

3 Supreme Court of the United States. No. 9. Original. October term, 1880.

EX PARTE IN THE MATTER OF FREDERICK GORDON, PETITIONER. } Petition for a writ of prohibition.

The *the* honorable the Supreme Court of the United States:

The answer of Thomas J. Morris, judge of the district court of the United States for the district of Maryland, to the rule requiring him to

show cause why a writ of prohibition should not issue restraining and prohibiting him from proceeding further, and from entering any decree except to dismiss the libel, in the case of Leana L. Hubbard et al. libellants, and the Steamer Leversons, her engines, &c., Charles William Woodruff, master and claimant, respectfully alleges and states that the libel referred to in the petition on which said order was
4 passed alleges and sets forth, in the opinion of the respondent, causes of action which are cognizable by the said district court as a court of admiralty and maritime jurisdiction.

That the honorable Salmon P. Chase, when he was Chief Justice of the United States, presiding over the circuit court of the United States in this district, and hearing appeals therein, so decided in a similar case, that of the Sea Gull, reported in Chase's Decisions, p. 145, and that said district court is bound to administer the law as announced in that decision unless and until it shall be otherwise instructed by the Supreme Court of the United States.

Wherefore the respondent prays that this honorable court will hear proctors for the said Leana L. Hubbard and others in support of the jurisdiction they have invoked, and will direct this respondent
5 whether he shall or not proceed further in said cause.

THOS. J. MORRIS,
U. S. District Judge for Md.

(Endorsed:) Supreme Court U. S. 1881, October term. No. 5. Original ex parte. Frederick Gordon, petitioner. Return to rule. Filed 6 June, 1881.

OFFICE SUPREME COURT U. S.
FILED
OCT 11 1881
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

EX PARTE

FREDERICK GORDON.

No. 5 ORIGINALS.

OCTOBER TERM, 1881.

BRIEF ON BEHALF OF PETITIONER.

STEWART BROWN,
ARTHUR GEO. BROWN,
Of Counsel for Petitioner.

WM. K. BOYLE, PRINTER, BALTIMORE.

Ex Parte
FREDERICK GORDON.

IN THE
Supreme Court of the United States
No. 5 Originals.
OCTOBER TERM, 1881.

BRIEF ON BEHALF OF PETITIONER.

The references herein thus made, (p —,) are to the petition of Gordon, and the Exhibits therewith as printed.

Frederick Gordon, a British subject, and sole owner of the steamer "Leversons," which is a registered British vessel, by his petition, (p. 1,) prayed this Court to restrain, by its writ of prohibition, the District Court of the United States, for the District of Maryland, as a Court of Admiralty and Maritime jurisdiction, and the Honorable Thomas J. Morris, the Judge thereof, from proceeding further in the cause of Leana L. Hubbard, et al., *vs.* Steamer Leversons, therein depending, and from entering any decree therein, except to dismiss the libel, and that said petitioner might have such other and further relief as his case might require. (p. 3.)

Petitioner alleges that the District Court has not jurisdiction in the premises. (p. 3.)

The libel, (p. 4,) is in rem. and is exhibitsd against the Steamer Leversons, her boats, etc., and it invokes "the Admiralty and Maritime jurisdiction" of the District Court, "in a cause of collision, civil and maritime." It alleges, (p. 5,) that the Schooner David E. Wolfe, on the night of February 25th, 1881, "was sunk in the Chesapeake Bay, in waters five fathoms deep, in consequence of a collision which occurred in said bay, one of the waters of the United States, near the York Spit Light, between said schooner and the said steamer Leversons, which was on a voyage from Europe to Baltimore."

"Second. That Rigby L. Hubbard, George Tall and Thomas Hubbard were on board of said schooner at the time of said collision, and that they were all drowned in consequence thereof.

"Third. That said collision was caused by the fault, carelessness, mismanagement and want of skill of those in charge of said steamer.

"Fourth. That the libellant, Leana L. Hubbard is the widow, and the libellant, Edna C. Hubbard is the daughter of the said Rigby L. Hubbard. That at the time of said collision, the said libellants were dependent on him for support, protection and society; and that by his death they have sustained damages to the amount of fifteen thousand dollars.

"Fifth. That the libellant, Amanda B. Tall, is the widow, and the libellants, Laura Tall, Alice C. Tall, George W. Tall and Otis I. Tall, are the children of the said George Tall. That they were dependent on him for support, protection and society; and that by his death they have suffered damages to the amount of fifteen thousand dollars.

"Sixth. That the libellant, Andrew J. Hubbard, is the father, the libellant, Thomas Hubbard, is the brother; and the libellant, Lottie F. Hubbard, is the sister of said Thomas Hubbard; and that they are damaged by his death to the amount of five thousand dollars."

To said libel, Charles Wm. Woodruff, master and claimant of the said steamer, filed in the District Court certain exceptions as follows: (p. 6.)

"1. For that the said libel is insufficient, and does not set forth a cause or causes of action within the jurisdiction of this Honorable Court.

"2. For that the said libellants are not entitled, and no one or more of them, is or are entitled to sue for or recover in this Honorable Court, the damages or any part thereof claimed to have been suffered by them respectively as alleged in said libel.

"3. For that the libellants are not entitled, and no one or more of them is or are entitled to sue for or recover in this form of action, the damages or any part thereof claimed to have been suffered by them respectively as alleged in said libel.

"4. For that there is no lien upon the said steamer, for any of the damages claimed in said libel, and this Honorable Court has no jurisdiction to enter any decree or decrees therefor against said steamer, wherefore the said claimant prays that the said libel may be dismissed with costs."

The learned Judge of the District Court passed an order on April 14th, 1881, overruling said exceptions, and each of them respectively, (p. 7,) and ordered the claimant of the steamer to plead or answer to the said libel on or before the first Tuesday in June, 1881.

Thereupon, on April 18, 1881, the petitioner prayed this Court to issue the writ of prohibition, and the Court laid a rule on the Judge of the District Court, to show cause why said writ should not issue; in response to which he has filed his answer claiming jurisdiction.

Petitioner denies that said Court has jurisdiction, as the said exceptions fully show, and he contends:

I.

This being purely and simply a proceeding *in rem*, it can only be justified by showing that a maritime lien upon the steamer Leversons, existed in favor of the libellants.

A lien and the right to proceed in the Admiralty *in rem*, are necessarily and inseparably connected together, and there can be no procedure *in rem*, except to enforce a valid lien.

A lien is the foundation upon which a proceeding *in rem* must rest.

In The Rock Island Bridge, 6 Wallace, 213, the Court said page 215.

"A Maritime lien, unlike a lien at common law, may in many cases exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosesoever hands it may pass. The only object of the proceeding *in rem*, is to make this right where it exists available to carry into effect. It subserves no other purpose.

"The lien and the proceeding *in rem*, are therefore correlative—where one exists the other can be taken and not otherwise. Such is the language of the Privy Council in the decision of the case of *The Bold Buccleugh*, (7 Moore, 284.)

"A Maritime lien," says that Court, "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attached; and whilst it must be admitted

that where such lien exists, a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process."

In The Edith, 4 Otto, 523, the Court defined "a proceeding *in rem*," as "proceeding on the ground of a lien."

In The Sabine, 11 Otto, 384, the Court said, p. 388: "Actions *in rem* are prosecuted to enforce a right to things arrested, to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party, but actions *in personam,* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other."

II.

Under the common law, not only was there no lien in a case like the present, but no right of action even existed for the death of a human being, or for any damages suffered by any person in consequence of such death.

In Insurance Co. *vs.* Brame, 5 Otto, 754, the Court said at page 756,

"The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English Courts, and in many of the State Courts, and no deliberate well considered decision to the contrary is to be found," and at page 759,

"By the common law actions for injuries to the person abate by death, and cannot be revived or maintained by the executor or heir."

To the same effect is Railway Co. *vs.* Whitton, 13 Wallace, 285.

In Dennick *vs.* R. R. Co., 13 Otto, 11, the Court said at p. 21, "The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon Statutes of the different States."

In Osborn *vs.* Gillett, L. R., 8 Ex., 88, Chief Baron Kelly said, p. 99. "No decision is to be found in the books from the earliest times by which an action for this cause has been sustained. No dictum is to be found by any Judge, or upon any competent authority that such an action is maintainable."

III.

All the text writers of recognized authority on Admiralty law, who make any reference to the question, it is believed, hold that the maxim "*actio personalis moritur cum personâ*," applies also in Admiralty.

Dunlap's Adm. Prac., p. 87, marg.
Hall's Adm. Prac., p. 22.
2 Parson's Ship & Adm., pp. 350, 351.
Benedict's Adm., 2nd Ed., § 309.

IV.

In England, the Admiralty Court Act of 1861, (24 Victoria, ch. 10,) provided by its 7th section, that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," and by its 35th section, that "The jurisdiction conferred by this Act on the High Court of Admiralty, may be exercised by proceedings *in rem*, or by proceedings in *personam*."

By virtue of the express powers conferred on it by Statute, taken in connection with "Lord Campbell's Act," (9 and 10 Vict., ch. 93,) the High Court of Admiralty has in some recent cases, entertained jurisdiction of suits by the executors or administrators of deceased persons, to recover damages for death caused by collision.

In The Guldfaxe Law Rep., 2 A. & E., 325, Sir Robert Phillimore entertained jurisdiction in such a case, "though not without doubt and hesitation," (p. 329,) and later in The Franconia, Law Rep., 2 P. D., 163.

The judgment in the latter case was affirmed on appeal by a divided Court.

Law Rep., 2 P. D., 170.

The Judges who were in favor of the affirmance said, (p. 172,) "It is admitted that if the Court of Admiralty had any such

jurisdiction, it was conferred upon it by the Admiralty Jurisdiction Act."

V.

Congress has passed no Statute applicable to the case.

VI.

The libel alleges that the collision occurred in Chesapeake Bay, "near the York Spit Light." (p. 5.)

The place where the alleged wrong was done was, therefore, within the State of Virginia.

The Code of Virginia, (1873,) provides chap. 145, sec. 7, 8, 9.

7. "Whenever the death of a person shall be caused by the wrongful act neglect or default of any person or corporation, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured, or, if she be a married woman her husband, either separately or together with her to maintain an action and recover damages in respect thereof, then and in every such case the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to a felony, provided that in no case shall the recovery exceed the sum of ten thousand dollars.

8. "Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve calendar months after his or her death.

The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased."

9. "The amount recovered in any such action shall after the payment of costs and reasonable attorney's fees be paid to the wife, husband, parent and child of the deceased, in such proportion as the jury may have directed, or, if they have not directed, according to the Statute of distributions, and shall be free from all debts and liabilities of the deceased, but if there be no wife, husband, parent or child, the amount so received shall be assets in

the hands of the personal representatives to be disposed of according to law."

It is obvious that libellants' case derives no support from this enactment which does not create, allow, contemplate or in any way imply the existence of a lien. Under it one action may be maintained by the executor or administrator against the wrong doer *in personam;* while the libellants individually and respectively each in his own right seek to recover separately for their several damages *in rem*, without regard to the limitation as to amount imposed by the Statute. The person designated in the Statute must sue.

Hagen *vs.* Kean, 3 Dill., 124.

VII.

The libel was filed in Maryland by citizens of that State, (p. 4.)

The Revised Code of Maryland (1878) provides Article 67, Title 15, p. 724.

1. "Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued,) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to felony."

2. "Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered after deducting the costs not recovered from the defendant, shall be divided amongst the above mentioned parties, in such shares as the jury by their verdict shall find and direct: Provided, that not more than one action shall lie for and in respect of the same subject-matter of complaint: and that every such action shall be com-

menced within twelve calendar months after the death of the deceased person."

3. "In every such action the equitable Plaintiff, on the record shall be required, together with the declaration to deliver to the Defendant or his attorney, a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

This Statute is equally inapplicable with that of Virginia, and for the same reasons—Indeed if a suit had been brought in this case in the name of the State of Maryland in one of her Courts, and strictly in accordance with the requirements of the law, a sufficient answer would have been found in the lack of jurisdiction, for it was decided in State, use of Allen *vs.* Pitts. & Conn. R. R., 45 Md., 41, that the Statute did not apply to the case of a wrongful act or neglect occurring in another State whereby death had been caused.

It is to be remarked, that if the Statute of Virginia or that of Maryland above quoted, which are copied from "Lord Campbell's Act," could by any possibility be so construed as to give to a Court of Admiralty, jurisdiction to proceed *in rem*, then Lord Campbell's Act itself must have conferred that jurisdiction upon the High Court of Admiralty in England.

That it did not, was expressly decided in the cases of The Guldfaxe and The Franconia referred to above.

In the same connection reference is made to Smith *vs.* Brown, Law Rep. 6 Q. B., 729, in which the Court of Queen's Bench entirely denied jurisdiction in such cases to the High Court of Admiralty, under a construction of the Statutes, and granted a writ of prohibition.

VIII.

Such Statutes as those of Virginia and Maryland above referred to are not to be extended by construction so as to cover cases and suits which were not contemplated by them.

In Shaw *vs.* Railroad Company, 11 Otto, 557, in discussing an important remedial Statute, the Court said, p. 565, "No Statute is to be construed as altering the common law farther than its words

import. It is not to be construed as making any innovation upon common law which it does not fairly express."

While it is a principle established by the decisions of this Court that "a party forfeits nothing by going into a Federal tribunal," (ex parte McNeil, 13 Wall., 243,) it is equally true that his rights are not thereby enlarged.

"Jurisdiction having attached his case is tried there upon the same principles, and its determination is governed by the same considerations as if it had been brought in the State tribunal of the same locality."

Ex parte McNeil, 13 Wall., 243.

To the same effect are Rwy. Co. *vs.* Whitton, 13 Wall., 285, and Dennick *vs.* R. R. Co., 13 Otto, 11, 17, 21.

The decisions in the two leading cases relating to pilotage, that have come before this Court, strikingly exhibit the scrupulous care with which it has confined both rights and remedies within the limits of the State Statutes which created them.

Cooley *vs.* Board of Wardens, 12 How., 299, (which was a suit at law, p. 300.)

Ex parte McNeil, 13 Wall., 236, (in which the libel was *in personam*, top p. 237.)

See also The Edith, 4 Otto, 523.

The same is true of the complicated cases relating to repairs and supplies furnished to vessels in their home ports; and in no case has this Court sanctioned a proceeding *in rem*, except to enforce a lien recognized by the general Admiralty law or expressly given by Statute.

IX.

Under the civil law it is believed that no right of action was recognized for the death of a free man, although it did admit liability for the death of a slave.

This was the conclusion of the Supreme Court of Louisiana in two cases which were decided after most elaborate and learned arguments, in which all the authorities bearing on the points are collected.

Hubgh *vs.* New Orleans and Carrollton R. R. Co., 6 La. Ann., 495.

Herman *vs.* Same, 11 La. Ann., 5.

See also Abbott on Ship., p. 503, marg.

Referring in part to the civil law, this Court in a late case, (ex parte Easton, 5 Otto, 70,) said—"In order therefore to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject, three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest:

"1. That the jurisdiction of the District Courts is not limited to the particular subjects, over which the Admiralty Courts of the parent country exercised jurisdiction when our Constitution was adopted.

"2. That the jurisdiction of those Courts does not extend to all cases which would fall within such jurisdiction, according to the civil law and the practice and usages of Continental Europe.

3. "That the nature and extent of the admiralty jurisdiction conferred by the Constitution, must be determined by the laws of Congress and the decisions of this Court, and by the usages prevailing in the Courts of the States at the time the Federal Constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the Constitution, than those which were then in force in the respective States, and which they were accustomed to see in daily and familiar pratice in the State Courts."

Tested by these clearly defined rules, or by those laid down in the Lottawana, 21 Wall., pp. 574, 576, 577, 578, it is believed that the libellants' case will he found to be untenable, and that the concluding remarks of the Court on the question of jurisdiction in the last mentioned case, may be with propriety applied to this; that "according to the maritime law as accepted and received in this country," "no such lien exists as is claimed in this case."

X.

The first reported case in which a libel *in rem* was sustained in a case like the present was The Sea Gull, Chase's Decisions, 145.

In that case the libellant sought to recover damages for the death of his wife, who was killed by a collision in Chesapeake Bay.

A plea to the jurisdiction was filed in the District Court for Maryland, and sustained by the late Judge Giles.

The libellants appealed, and the late Chief Justice Chase in the Circuit Court reversed the decree below, and decreed in favor of the libellants.

The authorities referred to by the Chief Justice in support of his conclusions are:

1. Certain remarks of Sir Leoline Jenkins, the sense of which is given, but which are not correctly quoted in the opinion. The letter referred to is to be found on p. 774, of Wynne's Life (Ed., 1724.) It is not dated, but from the context was apparently written in 1673 or 1674, and is as follows:

"To the Right Hon. the Lords
Commissioners of the Admiralty.

"My Lords:

"The Merchants, Freighters of the two *English* vessels, the *Dove* of *Bridlington,* and the *Elizabeth* of *Yarmouth,* as also the respective owners and masters of those vessels have, as I conceive, a good Action of Spoil and Damage, as we here term it against the *Dutch* Caper that detained and robbed them. Nor do I know that this Action can be anywhere but before your Lordships in the Court of Admiralty, where the Merchants and Owners are to proceed by Process against the Man of War and Commander, in order to be repaired; the first for the loss of their Goods laden on and taken out of the several vessels; the other of their Loss of Time, and the Violences whereby they were forced out of their Course. And tho' what the *English* have been forced by Torture to confess should be true in Fact, viz: that their Lading did belong to *French* subjects, yet this Caper was not to meddle with them, it being express in the 35th Article of the Marine Treaty of *Breda,* that *English* Bottoms shall make their Goods free who happen to be Enemies with the *Dutch.*

"This being the Case, your Lordships will I doubt not find cause to assert an Article so beneficial at this Time to the *English* Trade and not suffer so open a violation of it to go unpunish'd.

"As for the way of punishing the Captain for his Violences and Menaces of Torture and Death; as also those of his Officers for torturing our Pilot with such barbarous and unmanly Cruelties; the regular way is at a Sessions of Oyer and Terminer for the Admiralty. There we proceed by Jury, and in all things according to the Course of the Common Law; but the commission we had always on Foot for that effect is upon the Resignation of his Royal Highness, no longer in Force, and as I humbly conceive, must be renewed in your Lordships' Names.

"In the meantime, these Men may be committed to the *Marshalsea*, and their Ship continue under Arrest, 'till the Owners of *Flushing* do give Bail to the Action of the Merchants, or else may be sold by Decree of the Court to prevent its perishing, in case the Setters out appear not to defend it. All which, &c."

"L. JENKINS."

2. The Maverick, 1 Sprague 23.

That case is stated by the reporter thus, p. 24. "This was a libel for a tort. The Maverick, a steamboat, was plying as a ferry-boat, between one part of Boston and another part called East Boston. The brig Southern, of which the libellant was mate, had run a warp across the usual track of the steamer, and near the head of the dock. In her passage, the steamer ran against the warp, and by means thereof broke the leg of the libellant, and inflicted other injuries."

3. Cutting *vs.* Seabury, 1 Sprague, 522, in which a libel seems to have been filed *in personam*. Judge Sprague's conclusion, (p. 525,) is, "I cannot consider it as settled, that no action can be maintained for the death of a human being; but I am not under the necessity of deciding that question, because there is another objection which is fatal to this suit."

(In Crapo *vs.* Allen, 1 Sprague, 184, Judge Sprague had himself decided that actions in the Admiralty for mere personal torts, *do not survive* the death of the person injured. That also appears to have been a libel *in personam*.)

In regard to these three authorities so referred to, it may be said with all the respect due to the Chief Justice, that the first and second simply state the familiar principle that one who has suffered personal injury from a marine tort, may *himself* libel *in rem* the offending ship, and that the third, which is the only one that makes any reference to the point under discussion, simply says that Judge Sprague "cannot consider it settled," (although in Crapo *vs.* Allen, he had held that it was.)

The next case, The Highland Light, Chase's Dec., 150, was also decided by the late Chief Justice, who remarked, p. 154, "I perceive no more ground for denying redress in admiralty in this case than in Hiner *vs.* the Sea Gull," and relied upon that case and the provisions of the Maryland Code which have already been discussed.

The remarks of the Chief Justice on pp. 148 and 152 of Chase's Decis., seem to indicate that in deciding both of those cases, he was moved rather by the feeling that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy," and by the conviction that "the admiralty may be styled not improperly the human providence which watches over the rights and interests of those 'who go down to the sea in ships and do their business on the great waters,'" than by precedent or authority.

The late Chief Justice of the United States, presiding in the Circuit Court, having so decided, and by the weight of his high authority, imposed the doctrine set forth in those decisions upon the District Court for Maryland, the judges of that Court, have, in a number of later cases followed those precedents.

In other District and Circuit Courts, there have been similar decisions which will be found to rest for the most part on the authority of Chief Justice Chase, and his decisions in the case of The "Sea Gull" and The "Highland Light."

The Charles Morgan, 18 Am. Law Reg., (N. S.,) 624.

The Towanda, 34 Leg. Int., 394, (referred to 18 Am. Law Reg., N. S., 629.)

Coggins *vs.* Mary Helms, 23 Int. Rev. Rec., 384, (referred to 18 Am. Law Reg., N. S., 627.)

The Clatsop Chief, 8 Fed. Rep., 163.

In The City of Brussels, 6 Ben., 370, the libel was *in rem* by an administrator; but the decision was put on the ground that the cause of action arose from *breach of contract*, and might be sued for "in like manner as if the deceased had sustained an injury *short of death*, through the negligence of those in charge of the vessel and in breach of the contract of carriage, and had sued *in rem*, therefor."

The case of Holmes *vs.* O. & C. Ry. Co., 5 Fed. Rep., 75, was a suit in admiralty *in personam* by an administrator under the Statute of Oregon; and several other cases may be found in which libels have been filed in the admiralty to recover damages for the

death of persons, but it is believed that they are all in *personam.*

Opposed to these cases are the text-writers and authorities hereinbefore referred to and

Crapo *vs.* Allen, 1 Sprague, 184.
Plummer *vs.* Webb, 4 Mason, 380.
(Reversing Judge Ware in 1 Ware, 75.)

and the unreported case of Thomas *vs.* Sherlock, et al., referred to in 18 Am. Law Reg., (N. S.,) 627, 629.

XI.

This subject was incidentally somewhat discussed, but only to express doubt and suggest some of the many apparent difficulties, in Steamboat Company *vs.* Chase, 16 Wall., 522, 531, 532.

It is to be observed, also, that the action in that case was in a State Court, at law, and *in personam.*

In Sherlock, et al. *vs.* Alling, Admr., 3 Otto, 99, the Court, p. 102, said "The position of the defendants, as we understand it is that as by both the common and maritime law, the right of action for personal torts dies with the person injured, the statute which allows action for such torts when resulting in the death of the person injured, to be brought by the personal representatives of the deceased enlarges the liability of parties for such torts, and that such enlarged liability applied to cases of marine torts, would constitute a new burden upon commerce," and then considered the point involved in the last part of the sentence, without discussing or controverting the proposition that "by both the common and maritime law, the right of action for personal torts dies with the person injured."

In Railway Co. *vs.* Whitton, 13 Wall., 285, the Court said "It is undoubtedly true that *the right of action exists only by virtue of the statute.*"

In Dennick *vs.* R. R. Co., 13 Otto, 11, the Court said p. 21. "The right to recover for an injury to the person resulting in death is of very recent origin, *and depends wholly upon statutes of the different States,*" and at p. 17, "It is indeed a right dependent solely on the Statute of the State."

Even if the Act of Virginia (ante p. 6) had in express terms given a lien, petitioner contends that it could not have conferred jurisdiction on the admiralty Court of the United States, even in Virginia.

The Moses Taylor, 4 Wall., 411.
The Hine *vs.* Trevor, 4 Wall., 555.
The Belfast, 7 Wall., 624.

How can a State enlarge or abridge the admiralty jurisdiction of the United States?

The admiralty law should be uniform throughout the United States: not one thing in Virginia and another thing in Maryland.

Upon these grounds petitioner relies in support of his prayer for the writ of prohibition.

STEWART BROWN,
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Of counsel for Petitioner.

SUPREME COURT U.S.
FILED
OCT 11
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the U. S.

IN THE MATTER OF

THE PETITION OF FREDERICK GORDON, FOR A WRIT OF PROHIBITION.

BRIEF AND POINTS, AGAINST GRANTING THE WRIT ASKED FOR.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

IN THE

Supreme Court of the United States.

IN THE MATTER OF

THE PETITION OF FREDERICK GORDON, FOR A WRIT OF PROHIBITION.

Brief and Points, against the granting of the Writ asked for.

A libel was filed in the District Court of the United States, for the District of Maryland, against the steamer Leversons, by the respective widows, children, and other near relatives of three men, who were drowned on the schooner David E. Wolf, in consequence of a collision between those vessels, in the Chesapeake Bay, alleged in the libel to have been caused entirely by carelessness, mismanagement and want of skill on the part of those in charge of the steamer.

The petitioner appeared, as owner of the steamer, filed exceptions to the libel, which were overruled, and then filed the above mentioned petition. It raises only the question whether a Court of Admiralty has jurisdiction to enforce, against an offending vessel, such claims for damages, arising from the deaths of persons whom it has tortiously killed.

POINTS.

First.

It will be contended, on behalf of the petitioner, that independently of statutes, the right to redress for personal injuries dies with the victim, and that Courts do not indemnify the relatives of one who has been wrongfully killed, for the damage resulting to them from his death.

It may be worthy of remark, that as late as 1818, in England, an "appeal of murder" was a recognized process by which the widow or heir of a murdered man might bring the murderer to justice. "And even pecuniary satisfaction, like the barbaric *weregild*, might be obtained indirectly by this method."

See Wilson's History of Modern English Law, pp. 112, 113, 166, 167.

12 Central Law Journal, p. 468.

2 Thompson on Negligence, 1274–5.

This is historical evidence that the widow and the child had, at common law, a legal interest in the life of the husband and the father, for the violation of which Courts gave such rude redress as, in early times, they were then in the habit of administering.

It must be admitted however, although there are strong authorities to the contrary, that, in the common law Courts of England and this country, the right of action for injuries resulting in death, does not survive to the relatives of the deceased, unless expressly given by statute. The evil and injustice resulting from the application of this purely technical principle have been recognized by all the modern courts which have applied it, and so universally by legislators, that, in England and in nearly every State in this country, statutes have been enacted for the correction of them.

It is submitted, however, that the civil law and Courts of Admiralty, whose principles and procedure are derived from it, have never been hampered by this restraint, but have always denounced it as artificial and unjust. *They* have given such redress as is sought for in this case, on general principles, without reference to any statute authorizing and requiring them to do so.

Grotius, one of the earliest and most trustworthy commentators on the principles on which the civil and maritime laws were founded, says:

"He that kills a man unjustly is bound to physicians and surgeons, if any be made use of, and *to make such reparation to those whom the deceased person was obliged in duty to maintain, such as parents, wife and children, as the hope of that maintenance (regard being had to the age of the deceased) amounts to.*"

Grotius on the Rights of War and Peace, book 2, ch. 17, p. 372.

Rutherford, agreeing with Grotius as to the *right to reparation*, which alone is involved in the motion we are considering, says, in reference to the measure of damages:

"Grotius here distinguishes between the murder of a free man and the murder of a slave. The life of the former cannot, he says, be reckoned, in settling the damage done by his death, because no person has any claim to it but himself, but the life of the latter is to be reckoned, because had he been alive, the master might have sold him, and consequently his life itself is of value to the master. But if we observe that the life of the slave can no otherwise be looked upon as the master's property then as he had an interest in it we shall find that there is no reason for this distinction, since as far as the relatives of a free man had an interest in his life, the person who murdered him *is obliged to make them reparation.* So that in either case, in settling the damages, the life of the deceased is estimated according to the interest which those who survive him might have in it."

Rutherford's Institutes on Natural Law, book 1, ch. 17, s. 9.

The civil code announces the right to reparation for *all damages*, in terms broad enough to cover the point now under consideration. "Tout fait quelconque de l'homme que cause â autrui un dommage, oblige celui par la faute duquel il est arrivè à la reparer. Chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa negligence, ou par son imprudence." Secs. 1382, 1383.

In Scotland, whose law is derived from the civil law, redress has been given by its Courts, to the widow and children of one who had been killed, for the damage resulting to them from his death. Brown v. McGregor. 17 Fac. Col. 2 82. referred to in Widow and Children, &c. vs. Wallace & Co. 1 M. Queen, 75[illegible]

These authorities seem clearly to establish that the redress sought for in this case is in accordance with the principles of the civil law. The following authorities, all either sustain that view, or give redress in admiralty without reference to it

The Sea Gull, Chase's Decisions, 146.

Rusk vs. Steamboat Charles Morgan, 18 Am. Law Reg., 624.

Steamship Tonowanda, 34 Leg. Int., 394.

Coggins vs. Mary Helms, 23 Int. Rev. Rec., 384.

Cutting vs. Seabury, 1 Sprague, 523; 1 Cushing, 480.

Brinneck vs. Sea Gull, 16 Pitts. L., 9, 194.

The Garland, 5 Fed. Rep., 924.

Holmes vs. R. R. Co., 5 Fed. Rep., 75–79.

SECOND.

If the right does not exist, on general principles of Admiralty Law, it is conferred by the statute of Maryland, by that of Virginia, or by Lord Campbell's act, whichever may be held by the Court to be applicable to the case.

The Maryland statute is as follows:

"1. Whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to felony.

"2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the State of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury by their verdict shall find and direct; *provided*, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of the deceased person.

"3. In every such action, the equitable plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

The statute of Virginia is as follows:

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would (if death had not ensued)

have entitled the party injured, or if she be a married woman, her husband, either separately or together with her, to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony; provided, that in no case shall the recovery exceed the sum of ten thousand dollars.

"Every such action shall be brought by, and in the name of the personal representative of such deceased person, and within twelve calendar months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the wife, husband, parent, and child of the deceased.

"The amount recovered in any such action shall after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may have directed, or if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent, or child, the amount so received shall be assets in the hands of the personal representatives, to be disposed of according to law."

Code of Virginia, 1873. Tit. 44. chap. 145, secs. 7, 8 and 9, p. 996.

Lord Campbell's Act, 9 and 10 Victoria, ch. 93, is, in this respect, similar to these statutes and was the model on which they were framed. Its provisions are as follows:

"Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him; Be it therefore enacted by the

Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same, that whensoever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would, (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case *the person* who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. And be it enacted that every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the Executor or Administrator of the person deceased; and in every such action the Jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the Defendant, shall be divided among the before-mentioned parties in such shares as the Jury by their verdict shall find and direct.

"3. And be it enacted that in every such action the Plaintiff on the Record shall be required, together with the Declaration, to deliver to the Defendant or his Attorney a full Particular of the Person or Persons, for whom and on whose behalf such action shall be brought, and the nature of the claim in respect of which damages shall be sought to be recovered."

9 and 10 Victoria, ch. 93. 9 Revised Statutes, p. 1306.

THIRD.

Federal Courts have authority to enforce rights arising under State statutes, or foreign statutes, when the residence of the parties

is such as to give jurisdiction as between them, or the locality of the tort, as in this case, is such as to give jurisdiction over the subject matter of the complaint.

R. R. Co. vs. Whitton, 13 Wall., 270.
Dennick vs. R. R. Co., 103 U. S., 11.
The Maggie Hammond, 9 Wall., 456.

They have enforced liens given by State statutes, upon vessels, for repairs done in their home ports; and pilotage claims arising from the same source.

The Lottawana, 21 Wall., 559–78 and 9.
Ex parte, McNiel, 13 Wall., 236.

They have enforced claims, like that in this case, arising under similar State statutes, by suits *in rem*, as well as *in personam*.

The Garland, 5 Fed. Rep., 924.
Holmes vs. O. & C. R. R. Co., 5 Fed. Rep., 75.

Especial attention is called to the opinion of Judge Deady, in the case last referred to, as containing an accurate review of all the cases preceding it on this point, and an able argument in support of all the positions contended for in this Brief.

FOURTH.

Objection may be made that these statutes provide only for a suit *in personam*, to be brought in a common law Court, some in the name of the State, some in the name of the personal representatives of the deceased, for the use of the parties in interest, and not for one *in rem*, in an Admiralty Court. Judge Deady thus disposes of that objection. "But the point is made by counsel for the defendant that the Oregon statute provides that damages for the death shall be recovered by an *action at law*, and therefore they cannot otherwise be obtained, as by a suit in

Admiralty. But the right conferred by the statute, in whatever form of words, is essentially separate and distinct from the remedy, and it may be enforced in the proper national court according to the procedure of that forum."

Holmes vs. O. & C. R. R., 5 Fed. Rep., 81.

Chief Justice Chase thus disposes of it: "The right is quite separate from the remedy. The right, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in Admiralty, by its own processes. It is not necessary to pursue the statutory remedy to enforce the statutory right. It is clear, therefore, that for an injury such as that proven in this case, the wife and son of the man killed may have redress in Admiralty. The jurisdiction for marine torts in Admiralty may be said to be co-extensive with the subject. It depends on the locality of the wrong, not upon its extent, character or the relations of the persons injured. Their right to compensation is a natural right."

The Highland Light, Chase's Decisions, 150, 152, 154.

A suit was brought in a Federal Court, under a statute of Wisconsin, which attempted to impose the following limitation upon the mode in which the right thereby given could be enforced,— "provided that such suits be brought in some court established by the laws of this State." The jurisdiction of a Federal Court to enforce it was nevertheless maintained. Mr. Justice Field, after admitting that the right of action only existed in virtue of the statute which contained the proviso above quoted, says "in all cases where a general right is thus conferred, it can be enforced in any Federal Court, having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal Court by any provision of the State Legislature, that it can only be enforced in its State Courts. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal Court, in a case between proper

parties, is a matter of course, and the jurisdiction of the Court in such case is not subject to State limitation."

Ry. Co. vs. Whitton, 13th Wall., 285–6.

In another case, Mr. Justice Swain, speaking for the Supreme Court, says: "It is urged that a State law cannot give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal Court; but that is not the question in this case. A State law may give a substantial right, of such character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a Court of Equity, of Admiralty, or of Common Law. The statute in such cases does not confer jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence."

Ex parte, McNiel, 13 Wall., 243.
See also Clarke vs. Smith, 13 Pet., 195.
Fitch vs. Crichton, 24 H., 159–160–162.
Sherlock vs. Atling, Admr., 93 U. S., 99.

If a suit *in personam* only, were maintainable, the owner of the steamer being a resident of England, beyond the reach of process from our courts, the remedy, as to him, would be practically worthless. But the steamer itself is regarded in law as an offender, amenable to the proper process, for the enforcement of such claims against her. "By the maritime law, the vessel as well as the owner, is liable to the party injured, for damages caused by its torts. By that law, the vessel is deemed to be an offending thing, and may be prosecuted, without any reference to the adjustment of responsibility between the owners and employès, for the negligence which resulted in the injury."

Sherlock vs. Atling, 93 U. S., 108.

"The vessel itself is deemed a principal as a Defendant."
The Moses Taylor. 4 Wall. 427.

FIFTH.

Although Lord Campbell's Act provides only for suits against "*any person*," libels *in rem*, in Admiralty, against the offending vessel, have been constantly maintained under it. No English Court has doubted the creation by it of a *lien* against the vessel, which is guilty of the tort. Their only doubt has been whether their Admiralty Act vested their Admiralty Courts with jurisdiction to enforce it. They *have*, nevertheless, enforced it, not only against their own vessels, but even against foreign vessels, for torts committed on the high seas, elsewhere than in the waters of their own country.

The Franconia, L. R., 2 Prob. Div., 163.

~~The Sylph, L. R., 2 A. & E., 325.~~

The Guldfaxe, L. R., 2 A. & E., 325.

The Explorer, L. R., 3 A. & E., ~~325~~ 289-90

It is true that the Court of Exchequer once granted a writ of prohibition against such an action in Admiralty. This was, however, not upon the ground that there was no *lien;* but that their Admiralty Act gave jurisdiction only to enforce claims for "*damages*," and that "*injuries*," although resulting in damage, were not embraced by the word "*damages*."

Smith vs. Brown, L. R., 6 Q. B., 721.

But the force of this decision is weakened, if not entirely destroyed, by that of Sir Robert Phillimore, in the latest English decision I have been able to find on the subject, in which he reviews all of the previous decisions, shows that his doctrine has been affirmed by the Privy Council, and himself, reaffirms it.

The Franconia, L. R., 2 Prob. Div., 163.

On appeal to the High Court of Appeals, he was sustained by a divided Court- Justices Bragallay & James concurring with him. (L. R. 2 Prob. Div. p 170-172. & 178.—)

SIXTH.

It would not be consonant with the principles of Admiralty law, or of the most approved practice of Admiralty Courts, to bring such suits in the name of the State of Maryland, as provided in the Maryland statute, or of the personal representatives of the deceased, as provided in the Virginia statute and in Lord Campbell's Act. Admiralty practice disregards the incumbrance of useless technicalties, and requires suits to be brought, as this one was, in the names of the parties really interested, and for whose use the suits are intended.

"In Admiralty, the party entitled to relief should always be made libellant, and the practice of instituting a suit in the name of one person for the benefit of another to whom the right has been transferred, only obtains in particular cases. But all persons entitled, on the same state of facts, to participate in the same relief, may join as libellants, whether the suit be *in rem* or *in personam*."

Fretz vs. Bull, 12 H., 468.

Where an insurance company, which has insured against marine risks, pays to an injured party the damages resulting from collision, it becomes subrogated to the rights of the party so paid. By *some* form of action it is entitled to recover from the wrongdoer, who inflicted the injury. At common law, the suit for that purpose must be in the name of the insured, to the use of the insurer. In Admiralty the impediment of such useless machinery may be dispensed with. Its Courts do not, like common law Courts, deal in fictions, but in realities. They reach results directly, not circuitously. Suitors *in them* are required to seek redress in the same way, in the name of the person for whom it is sought, not in that of a *nominal* party, who has no interest in it. The insurer therefore, if he sues in Admiralty, *may*, and *ought to* sue, in his own name, not in that of the insured, for its use.

The Propeller Monticello vs. Mollison, 17 H., 155.
The Atlas, 93 U. S., 310.
The Frank G. Fowler, 8 Fed. Rep., 261.

SEVENTH.

Jurisdiction in Admiralty has been, as before stated, maintained under Lord Campbell's Act, against a *foreign ship*, for damages resulting from a collision on the high seas, beyond the waters of Great Britain and Ireland.

The Explorer, L. R., 3 Ad. & Ec., 289, 290.

Sir Robert Phillimore, in delivering the opinion in this case says, p. 290, that the case of the Guldfaxe, (L. R., 2 Ad. & Ec., 324,) a suit under Lord Campbell's Act, in which jurisdiction in Admiralty was maintained, was also against a *foreign ship*. The report of the case does not show what was the nationality of the vessel, or the locality of the tort; but Sir Robert Phillimore delivered the opinion in both cases, and what he says in the case of the Explorer supplements, in this particular, the report of the Guldfaxe.

The Franconia, an Admiralty suit *in rem*, under Lord Campbell's Act, was also against a foreign ship, for damages resulting from a collision in the Straits of Dover. Sir Robert Phillimore again maintained the jurisdiction, and especially referred to the case of the Explorer, as one against a foreign ship.

The Franconia, L. R., 2 Prob. Div., 163–5–6–7.

EIGHTH.

The Chesapeake Bay, where this collision occurred, is within the territorial limits of Maryland, or of Virginia, and subject to the legislation of one or the other of those States. Each of these States, respectively, has legislated in reference to these waters.

Maryland, for example, has legislated in reference to crimes committed on that Bay, and has prescribed where they shall be tried. It also limits the time and mode in which fish may be caught in its waters or game may be killed thereon.

Revised Statutes, p. 831 secs. 11–12.
" " " 156 " 1–2.
" " " 172 " 16.
Smith vs. Maryland, 18 How., 71–2.

NINTH.

It is not necessary to decide, at this stage of the case, from which of these sources the rights claimed are derived. If from one or the other of the statutes, it is suggested that the law of the forum should govern.

The Explorer, L. R., 2 A. & E., 290.
The Franconia, L. R., 2 Prob. Div., 163–5–6–7.

Whether the rights of the libellants in this case be derived from the general principles of Admiralty law, from the statute of Maryland, that of Virginia, or from Lord Campbell's Act, the result is the same, as to the motion for a Prohibition. If the rights exist, Admiralty will enforce them by its own appropriate processes.

JOHN H. THOMAS,
Atty. and Proctor for Libellants.

OFFICE SUPREME COURT U. S.
FILED
NOV 30 1881
JAMES H. MCKENNEY, Clerk.

IN THE

Supreme Court of the United States.

IN THE MATTER OF
THE PETITION OF FREDERICK GORDON, FOR A WRIT OF PROHIBITION.

SUPPLEMENTAL BRIEF,

CONTAINING ADDITIONS TO BE MADE TO THAT ALREADY FILED AGAINST THE MOTION.

Immediately after the authorities on 1st point, p. 4, add as follows:

In re Long Island Transportation Co., 5 Fed. Rep., 601–6–7–8–9–10.
The Clatsop Chief, 8 Fed. Rep., 767–8.
The Epsilon, 6 Ben., 381.

The text writers referred to by the counsel in support of the motion, under their 3d point, on p. 5 of their brief, are not sustained by the authorities they cite, upon the point for which they are quoted. Dunlap's Adm. Prac., p. 87, Marg., cites the three cases hereinafter mentioned. On examination, it will be found that neither of them touches or professes to decide the point involved in the motion now under consideration. In Penhaller

vs. Doane's Admrs., 3 Dall., it was alleged, on appeal, that the party in whose favor the decree had been rendered was dead at the time of its rendition. The Judges, in deciding upon the effect of this allegation, if true, show that Admiralty Courts are *Civil Law Courts*, and governed by the principles of the Civil Law, not those of the Common Law, a principle which will go very far towards deciding, against, not in favor of the motion, the point involved in this case. One of the counsel, in his brief, thus states the point: "That there is no abatement by death of parties in a Spiritual Court. This being a Court of Civil Law, the principle equally applies," pp. 77–78. Patterson, J., says: "We are to view the proceedings as if before a Court of Admiralty, which is not governed by the rigid principles of the Common Law," p. 79. Iredell, J., says: "A Court of Prize being equally grounded on the law of nations as a Court of Admiralty, and proceeding also as that Court does on principles of the Civil Law, must in common reason, have the same authority," pp. 97–98—see also 101 and 107. This decision does not even *tend* to establish the doctrine that in Courts of Admiralty the right of action dies with the person. It establishes, on the contrary, that even under circumstances in which it would do so at Common Law, *in Admiralty* it survives, in favor of the representatives of the deceased.

Dobson vs. Scott, 2 Roll's Rep., 18, only decides that by the Spiritual Law, the death of a party pending an action, does not cause an abatement of it. Pollexfen vs. Pollexfen, 2 Lev., 6, only decides that the death of an appellant, pending an appeal, does not cause an abatement.

Hall, in his Admiralty Practice, p. 22, does not, it is submitted, assert the proposition for which he is quoted. The kind of personal actions which he says die with the person "are actions or causes for defamation, or matrimonial, and such like." The wrongs complained of in them are such as can not, in the nature of them, damage any one but the deceased. In the case at bar, the libellants had pecuniary interests in the lives of the deceased, and were pecuniarily damaged by the killing of them. Benedict's

Adm., p. 309, refers to the decision of Judge Sprague, in Crapo vs. Allen, 1 Sprague, 184, which sustains the text book. But it does not refer to the later case of Cutting vs. Seabury, 1 Sprague, 523, in which the same judge ably reconsiders the point and comes to a conclusion precisely the opposite of that for which Benedict cites him as authority. 2d Pars. Sh. and Ad., (pp. 350–51,) in the notes, quotes both decisions, leaving the reader at liberty to adopt the reasoning and conclusions of the later and abler of the two.

At the bottom of page 10 of Brief, add as follows, viz:

It is not necessary that the statute should, in terms, give a lien against the vessel, for a tort. "A maritime lien arises from the jurisdiction, not the jurisdiction from the lien."

Smith vs. Brown, 24 L. T. Rep., 812.

S. C. 1 Asp. M. L. C., 59, referred to in 6 Ben., 389.

"A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and while it must be admitted that where such a lien exists a process *in rem* may be had, it is equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be enforced by legal process."

Harmer vs. Bell, 22 E. L. & E., 72.

JOHN H. THOMAS,
Atty. and Proctor for Libellants.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

17-519

SUPREME COURT

—OF THE—

UNITED STATES.

Ex Parte THE DETROIT RIVER FERRY COMPANY.

Petition for Writ of Prohibition.

H. C. WISNER,
Attorney for Petitioner.

DETROIT:
GULLEY PRINTING HOUSE, 12, 14, 16 EAST LARNED ST.
1881.

To the Supreme Court of the United States:

The petition of the Detroit River Ferry Company respectfully shows:

That it is a Corporation created and existing under the laws of the State of Michigan, and is the owner and claimant of the steamer Garland hereinafter mentioned. That on the 26th day of August, A. D. 1880, one James H. Cuddy filed in the District Court of the United States for the Eastern District of Michigan, a libel against the said steamer Garland, her engines, boats, tackle, apparel and furniture, and against all persons intervening for interest therein, in a cause of damage for deaths from collision, civil and maritime, wherein he set forth that said steamer Garland and the steam yacht Mamie were vessels of twenty tons burthen and upwards, used in inland navigation in the business of ferriage and excursions on the Detroit River and adjacent waters; that on 22d day of July, 1880, a collision took place between the said steamer Garland and the said yatch Mamie, and which said collision was occasioned by the carelessness and negligence of the officers and crew of the said steamer Garland; that David and William H. Cuddy, the sons of the said libelant, came to their death by drowning at the time of said collision, and which said deaths were directly the result of the negligence of said steamer Garland in causing said collision, whereby the libelant was wrongfully deprived of the earnings, services and society of his said sons, who were alleged to be minors, and he claimed damages from said steamer Garland in the sum of four thousand dollars, for which he claimed to have a lien upon said vessel enforceable in said District Court; and libelant prayed that process in due form of law, according to the course and practice of said District Court in cases of admiralty and maritime jurisdiction, might issue against the said steamer Garland, her engines, boats, tackle, apparel and furniture, and that all persons having an interest therein might be cited to appear and answer all and singular the premises, and that said District Court would decree the

payment of the damages aforesaid, with costs, and the said vessel be condemned and sold to pay the same.

That Thomas H. Doran, Bartholomew Donovan, Daniel Toomey, Lawrence Nolan, Michael Kelley, Elizabeth J. Monaghan, Peter Howe, William Cosgrove, Anthony McLogan, Joseph J. Greusel and Frederick Martin filed intervening libels in the cause so commenced by the filing of said libel of James H. Cuddy, which said libels were filed to recover like damages occasioned by the same collision against said steamer, and said Court thereupon made an order that all of said libels be consolidated in one cause.

That said District Court thereupon issued a writ or warrant of attachment, directed to the Marshal of said Court, and commanding him to seize and hold in custody the said steamer Garland; and said Marshal, under said writ, did seize and take into custody the said steamer Garland.

That on January 17th, 1881, your petitioner filed in said Court in said cause so commenced by the filing of said libel of James H. Cuddy, and ordered by the Court to be consolidated with said other mentioned libels, its claim to said steamer Garland, her engines, tackle, &c.

That on February 14th, 1881, your petitioner, as claimant of said vessel, filed in said District Court its exceptions to the libels aforesaid, wherein it alleged that the said libels were insufficient and the Court had not jurisdiction to entertain the same and enter any decree thereon, and in respect thereto the claimant said,

1. That the libelants are not entitled to recover in said Court the damages claimed by them to have been suffered, as alleged in said libels;

2. That the deaths alleged in said libels in consequence of the collision therein mentioned having, as appears by said libels, occurred at the time of said collision, the said libelants are not entitled to have or prosecute any action against said steamer Garland for damages claimed to have been suffered by reason thereof.

3. That by law there is no lien upon the steamer Garland for the damages claimed in said libels, and the said Court has not jurisdiction to enter decree therein against the said steamer.

4. That the said libels did not set forth a cause of action within the jurisdiction of said Court.

That on the 21st day of February, 1881, the said District Court, by order entered in said cause, permitted the libelant James H. Cuddy to file a supplemental libel in said cause against the said steamer, wherein the libelant James H. Cuddy sets forth that after the filing of his said original libel and on the 4th day of October, 1880, he had been appointed administrator of the estates of his sons David and William H. Cuddy, the persons who came to their deaths by drowning at the time of the collision with the said yacht Mamie, as set forth in said original libel, and that by the laws of the State of Michigan he was entitled to recover damages by reason of the negligence of the officers and crew of the said steamer Garland, whereby said collision was occasioned, and he claimed to recover against said steamer Garland his said damages, to the amount of four thousand dollars.

That on the same day the said Court entered an order vacating and setting aside its said order above mentioned consolidating said libels, and your petitioner, then as claimant, filed exceptions to the said supplemental libel of James H. Cuddy, wherein it alleged that said District Court had not jurisdiction to entertain the same or enter any decree thereon, and in respect thereto it alleged,

1st. That the said libelant is not entitled to recover in this Court the damages claimed by him to have been suffered, as administrator of the estates of said David and James H. Cuddy, as alleged in his said supplemental libel;

2d. That by law there is no lien upon the said steamer Garland for the damages claimed in said supplemental libel, and that that Court had not jurisdiction to enter decree therefor against the said steamer;

3d. That the said libel does not set forth a cause of action within the jurisdiction of said District Court.

That on the same day the matter of the exceptions to said original libel and said supplemental libel came on to be heard before the District Court, and the same having been duly considered by said Court, the said exceptions were over-

ruled, and your petitioner was ordered to answer to said libel within twenty days thereafter.

Copies of said original libel and said supplemental libel, the exceptions respectively thereto, the claim filed by your petitioner and the order of the Court overruling said exceptions are hereunto annexed and made a part hereof.

Your petitioner respectfully submits that neither the said original nor said supplemental libel gave said District Court of the United States for the Eastern District of Michigan, in Admiralty, jurisdiction to proceed, arrest and condemn said steamer Garland for the damages claimed by said libelant; but your petitioner fears that unless restrained by this Court the said District Court will proceed in said cause, notwithstanding that in law it hath not jurisdiction, as above stated.

Your petitioner prays that a writ of prohibition may be issued out of this Court, restraining and prohibiting the said District Court of the United States for the Eastern District of Michigan, in Admiralty, from proceeding further in said cause and from entering any decree therein, excepting to dismiss said libels.

And your petitioner will ever pray, &c.

[Signed,] DETROIT RIVER FERRY CO.,
By ALEX. McVITTIE, Sec'y.

EASTERN DISTRICT OF MICHIGAN } ss.

Alexander McVittie, being duly sworn, says he is the Secretary of the Detroit River Ferry Company, and that he is authorized to sign the above petition in its behalf. That he has read the foregoing petition, and that the same is true.

[Signed,] A. McVITTIE.

Subscribed and sworn to before me March 17, 1881.

[Signed,] JNO. GRAVES,
U. S. Circuit Court Commissioner Eastern Dist. Michigan.

{ Commissioner's Seal. }

ORIGINAL LIBEL.

IN ADMIRALTY.

To the Hon. Henry B. Brown, Judge of the United States States District Court for the Eastern District of Michigan:

The libel of James H. Cuddy, of Detroit, against the steamer Garland, whereof George D. Horn is master, her engines, boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein in a cause of damages for death from collision, civil and maritime. And thereupon the libelant doth allege and propound as follows:

1st. That your libelant at the time when the cause of action hereinafter stated arose, was the father of David and William H. Cuddy, and that said David and William H. Cuddy on the night of July 22, 1880, were passengers upon the steam yacht Mamie, which said steam yacht, as well as the aforesaid steamer Garland, were vessels of twenty tons burthen and upwards, used in inland navigation in the business of ferriage and excursions on the Detroit River and adjacent waters.

2d. That on the 22d day of July, A. D. 1880, the said steam yacht Mamie being then, and also at the time of the collision hereinafter mentioned, tight, staunch, strong and in every respect well manned, tackled, appareled and appointed, and having the usual and necessary compliment of officers and men stationed at their proper posts, upon the look-out, for the protection and safety of said vessel, and with all her lights in their proper places and brightly burning, was bound up the Detroit River, from the City of Monroe to the City of Detroit, returning from a pleasure excursion, and when said steam yacht had reached a point about abreast of Mammy Judy light, the evening being clear and bright moonlight, and it being about ten o'clock in the evening of said day, she sighted the steamer Garland coming down the river, also on a pleasure excursion from Detroit, down the Detroit River and back, and overloaded, with about twelve hundred excursionists on board, which steamer was then between one and two miles away and showing her green and white lights;

that the said Mamie continued in her proper course until said Garland, when between half a mile and a mile from the Mamie, changed her course by porting her wheel, and showing all three of her lights, and steering directly for the Mamie and down the river; that the Mamie thereupon blew one blast of her whistle and put her wheel to port so as to pass the said steamer Garland upon her port hand, and the said steamer Garland responded to said signal by blowing one whistle; but by the gross carelessness and negligence of the officers and crew of said steamer Garland, failed to port her wheel as she ought to have done, but, on the contrary, continued on her course and swung over to the other side of the channel, across the course which the Mamie was properly pursuing, and struck said steam yacht Mamie upon the port side, aft of the pilot house, crushing and breaking her down to the water's edge, so that within five minues said Mamie sank.

That said steamer Garland had no look-out whatever on board at the time of said collision, and that George D. Horn, master, and Henry W. Buff, pilot of said Garland, were wholly unfit and incompetent to perform the duties of said positions; that the life boats and other boats of said Garland were not in a fit or proper condition for use as by law they were bound to be, and that the crew of said Garland were incompetent to perform their duties, and not sufficient in number to attend properly to the management of said steamer, said crew consisting only of master, engineer and fireman, a wheelsman and one deck hand.

That by reason of the collision aforesaid, and the sinking of said steam yacht Mamie, and by the carelessness and negligence of the steamer Garland, her officers and crew, and the failure to keep a proper look-out on board of said steamer, and to employ proper persons for officers, and to provide a sufficient and competent crew, and to keep the life boats and other boats of said Garland in a proper and fit condition for use, said David and William H. Cuddy, sons of said libelant, came to their death by drowning, and their said death was the direct result of the negligence of said steamer Garland in causing said collision, and fifteen other persons, passengers on the said steam yacht Mamie, were drowned at the same time.

And your libelant by reason of the premises was wrongfully deprived of the earnings, services and society of his said minor sons. That said sons were of the ages of ten and a half and thirteen and a half years respectively at their death. That your libelant was put to a large expense in searching for and recovering the bodies of his said sons, and in and about the funeral and burial of said bodies, to wit $200 or thereabouts.

And libelant thereupon claims from said steamer Garland the sum of four thousand dollars, for which your libelant claims to have a lien upon said vessel, enforceable in this honorable Court.

That the aforesaid collision was occasioned solely by the negligence, unskillfulness and carelessness of the persons navigating the said steamer Garland.

That since the aforesaid collision your libelant has applied in a friendly manner to the owner of the said steamer Garland, and requested her to settle for the damages sustained by your libelant, as above mentioned, but the said owner has taken no notice of the application.

That all and singular, the premises are true, and that the said steamer Garland is now lying at the port of Detroit, in the district aforesaid.

That the libelant demands a trial by jury.

Wherefore, Your libelant prays that process in due form of law, according to the course and practice of this Honorable Court, in cases of Admiralty and Maritime Jurisdiction may issue against the said steamer Garland, her boats, tackle, apparel and furniture; and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with costs; and that the said vessel may be condemned and sold to pay the same; and that your libelant may have such other and further relief as in law and justice they are entitled to receive.

J. H. CUDDY, *Libelant.*

JAMES CAPLIS,
ALFRED RUSSELL, } *Libelant's Proctors.*

ALFRED RUSSELL, *of Counsel.*

EASTERN DISTRICT OF MICHIGAN, ss.

Be it Remembered, That on this 26th day of August, A. D. 1880, before me at Detroit, personally appeared the within named James H. Cuddy and made solemn oath that he has heard read the foregoing libel and knows the contents thereof, and that the same is true as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes it to be true.

CHARLES FLOWERS,
U. S. Commissioner Eastern District of Michigan.

SUPPLEMENTAL LIBEL.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MICHIGAN.

IN ADMIRALTY.

To the Hon. Henry B. Brown, Judge of said Court:

The supplemental libel of James H. Cuddy, of Detroit, shows:

1. That your libelant exhibited his original libel in this Court against the steamer Garland, her engines, &c., and against all persons intervening, in a cause of damages for death from collision, civil and maritime, on the 26th of August, 1880;

2. That afterwards the said vessel was duly arrested, and upon application of the Detroit River Ferry Company, the claimant, duly appraised and delivered to said claimant upon bond;

3. That afterwards, on the 18th day of December, said claimant appeared and received a copy of the libel and on the 10th day of January, A. D. 1881, filed and served a claim and plea, and thereupon, on the 22d day of said January, an amendment to the libel in the nature of a special replication was filed by your libelant, and thereafter claimant obtained leave to withdraw his said plea and except to the libel, and the cause stands upon libel and exception for want of jurisdiction.

4. That on the 4th day of October, 1880, by the order of the Probate Court of the County of Wayne, in the State of Michigan, in which county the said collision occurred and said David and William H. Cuddy, the sons of libelant, died in consequence of said collision, your libelant was duly appointed administrator of the estates of said David and William, and herewith shows his letters of administration to the Court, and that your libelant is entitled to recover damages for the said deaths against said steamer Garland, not only by virtue of his relationship as father of the said decedent, but also in his character of personal representative of said deceased persons for his exclusive benefit as the father, and therefore the next of kin of said deceased persons under the law of Michigan touching decedents; and your libelant shows to the Court that his right in this behalf is created by the law of the State of Michigan, which was in force at the time and place of said collision, being chapter 212 of the Compiled Laws of 1871, entitled "An Act Requiring Compensation for Causing Death by Wrongful Act or Default." And libelant claims damages under said Act against said steamer for the pecuniary injury resulting from said deaths to him as the sole next of kin of said deceased in the same sum of four thousand dollars;

5. To the end, therefore, that your libelant may have the benefit of the said original libel, and may have relief against said Garland by establishing a lien upon her for damages for the deaths aforesaid accruing to him as personal representative and next of kin, as well as father of said deceased persons, without further process of law against said steamer, your libelant prays that claimant may answer the premises, and that the Court may decree the payment of damages, with costs, against said steamer, and that libelant may have such other and further relief as to the Court may seem meet.

JAMES H. CUDDY, *Pr. A. R.*

JAMES CAPLIS,
ALFRED RUSSELL,
Libelant's Proctors.

ALFRED RUSSELL,
Of Counsel for Libelant.

EASTERN DISTRICT OF MICHIGAN, ss.

Be it Remembered, That on this 26th day of August, A. D. 1880, before me at Detroit, personally appeared the within named James H. Cuddy and made solemn oath that he has heard read the foregoing libel and knows the contents thereof, and that the same is true as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to those matters and things he believes it to be true.

CHARLES FLOWERS,
U. S. Commissioner Eastern District of Michigan.

SUPPLEMENTAL LIBEL.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MICHIGAN.

IN ADMIRALTY.

To the Hon. Henry B. Brown, Judge of said Court:

The supplemental libel of James H. Cuddy, of Detroit, shows:

1. That your libelant exhibited his original libel in this Court against the steamer Garland, her engines, &c., and against all persons intervening, in a cause of damages for death from collision, civil and maritime, on the 26th of August, 1880;

2. That afterwards the said vessel was duly arrested, and upon application of the Detroit River Ferry Company, the claimant, duly appraised and delivered to said claimant upon bond;

3. That afterwards, on the 18th day of December, said claimant appeared and received a copy of the libel and on the 10th day of January, A. D. 1881, filed and served a claim and plea, and thereupon, on the 22d day of said January, an amendment to the libel in the nature of a special replication was filed by your libelant, and thereafter claimant obtained leave to withdraw his said plea and except to the libel, and the cause stands upon libel and exception for want of jurisdiction.

4. That on the 4th day of October, 1880, by the order of the Probate Court of the County of Wayne, in the State of Michigan, in which county the said collision occurred and said David and William H. Cuddy, the sons of libelant, died in consequence of said collision, your libelant was duly appointed administrator of the estates of said David and William, and herewith shows his letters of administration to the Court, and that your libelant is entitled to recover damages for the said deaths against said steamer Garland, not only by virtue of his relationship as father of the said decedent, but also in his character of personal representative of said deceased persons for his exclusive benefit as the father, and therefore the next of kin of said deceased persons under the law of Michigan touching decedents; and your libelant shows to the Court that his right in this behalf is created by the law of the State of Michigan, which was in force at the time and place of said collision, being chapter 212 of the Compiled Laws of 1871, entitled "An Act Requiring Compensation for Causing Death by Wrongful Act or Default." And libelant claims damages under said Act against said steamer for the pecuniary injury resulting from said deaths to him as the sole next of kin of said deceased in the same sum of four thousand dollars;

5. To the end, therefore, that your libelant may have the benefit of the said original libel, and may have relief against said Garland by establishing a lien upon her for damages for the deaths aforesaid accruing to him as personal representative and next of kin, as well as father of said deceased persons, without further process of law against said steamer, your libelant prays that claimant may answer the premises, and that the Court may decree the payment of damages, with costs, against said steamer, and that libelant may have such other and further relief as to the Court may seem meet.

JAMES H. CUDDY, *Pr. A. R.*

JAMES CAPLIS,
ALFRED RUSSELL,
Libelant's Proctors.

ALFRED RUSSELL,
Of Counsel for Libelant.

EXCEPTIONS TO ORIGINAL LIBEL.

The exceptions of the Detroit River Ferry Company, claimant to the libels of James H. Cuddy, Thomas H. Doran, Bartholomew Donovan, Daniel Toomey, Lawrence Nolan, Michael Kelley, Elizabeth J. Monahan, Peter Howe, William Cosgrove, Anthony McLogan, Joseph J. Greusel and Frederick Martin, filed in this Court against the steamer Garland, allege that the said libels are insufficient and the Court hath not jurisdiction to entertain the same and enter any decree thereon, and in respect thereto the said claimant says:

1. That the said libelants are not entitled to recover in this Court the damages claimed to have been suffered by them as alleged in said libels;

2. The deaths alleged in said libels in consequence of the collision therein mentioned having, as appears by said libel, occurred at the time of said collision, the said libelants are not entitled to have or prosecute any action against said steamer for damages claimed to have been suffered by reason thereof;

3. That by law there is no lien upon the said steamer Garland for the damages claimed in said libels, and the Court hath not jurisdiction to enter decree therefor against the said steamer;

4. That the said libels do not set forth a cause of action within the jurisdiction of this Court.

Wherefore, the said claimant prays that the said libels may be dismissed with costs.

WISNER & SPEED,
Proctors for Claimant.

EXCEPTIONS TO SUPPLEMENTAL LIBEL.

The exceptions of the Detroit River Ferry Company, claimant, to the supplemental libel of James H. Cuddy, filed in this Court against the steamer Garland allege:

1. That the said libelant is not entitled to recover in this Court the damages claimed by him to have been suffered as administrator of the estate of said David and William H. Cuddy, as alleged in his said supplemental libel;

2. That by law there is no lien upon the said steamer Garland for the damages claimed in said supplemental libel, and that that Court hath not jurisdiction to enter decree therefor against the said steamer;

3. That the said libel doth not set forth a cause of action within the jurisdiction of said District Court.

WISNER & SPEED,

Proctors for Claimant.

CLAIM.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

IN ADMIRALTY.

JAMES H. CUDDY AND OTHERS INTERVENING,
vs.
THE STEAMER GARLAND.

CLAIM OF THE DETROIT RIVER FERRY COMPANY TO THE SAID STEAMER GARLAND.

And now comes the Detroit River Ferry Company and says it is a corporation existing under the laws of Michigan, and said company claims the said steamer Garland, her engines, tackle, &c., and says it is the true and *bona fide* owner thereof, and that no other person is the owner thereof.

DETROIT RIVER FERRY COMPANY,

By A. McVITTIE, Secretary and Treasurer.

EXCEPTIONS TO ORIGINAL LIBEL.

The exceptions of the Detroit River Ferry Company, claimant to the libels of James H. Cuddy, Thomas H. Doran, Bartholomew Donovan, Daniel Toomey, Lawrence Nolan, Michael Kelley, Elizabeth J. Monahan, Peter Howe, William Cosgrove, Anthony McLogan, Joseph J. Greusel and Frederick Martin, filed in this Court against the steamer Garland, allege that the said libels are insufficient and the Court hath not jurisdiction to entertain the same and enter any decree thereon, and in respect thereto the said claimant says:

1. That the said libelants are not entitled to recover in this Court the damages claimed to have been suffered by them as alleged in said libels;

2. The deaths alleged in said libels in consequence of the collision therein mentioned having, as appears by said libel, occurred at the time of said collision, the said libelants are not entitled to have or prosecute any action against said steamer for damages claimed to have been suffered by reason thereof;

3. That by law there is no lien upon the said steamer Garland for the damages claimed in said libels, and the Court hath not jurisdiction to enter decree therefor against the said steamer;

4. That the said libels do not set forth a cause of action within the jurisdiction of this Court.

Wherefore, the said claimant prays that the said libels may be dismissed with costs.

WISNER & SPEED,
Proctors for Claimant.

EXCEPTIONS TO SUPPLEMENTAL LIBEL.

The exceptions of the Detroit River Ferry Company, claimant, to the supplemental libel of James H. Cuddy, filed in this Court against the steamer Garland allege:

1. That the said libelant is not entitled to recover in this Court the damages claimed by him to have been suffered as administrator of the estate of said David and William H. Cuddy, as alleged in his said supplemental libel;

2. That by law there is no lien upon the said steamer Garland for the damages claimed in said supplemental libel, and that that Court hath not jurisdiction to enter decree therefor against the said steamer;

3. That the said libel doth not set forth a cause of action within the jurisdiction of said District Court.

WISNER & SPEED,

Proctors for Claimant.

CLAIM.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

IN ADMIRALTY.

JAMES H. CUDDY AND OTHERS INTERVENING,
vs.
THE STEAMER GARLAND.

CLAIM OF THE DETROIT RIVER FERRY COMPANY TO THE SAID STEAMER GARLAND.

And now comes the Detroit River Ferry Company and says it is a corporation existing under the laws of Michigan, and said company claims the said steamer Garland, her engines, tackle, &c., and says it is the true and *bona fide* owner thereof, and that no other person is the owner thereof.

DETROIT RIVER FERRY COMPANY,

By A. McVITTIE, Secretary and Treasurer.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

On this 27th day of December, 1880, personally appeared before me Alexander McVittie, who, being duly sworn, says he is the Secretary of the Detroit River Ferry Company, and that he is duly authorized to put in said claim in its behalf, that he has read the foregoing claim, and that the same is true of his own knowledge.

(Signed) A. McVITTIE.

Subscribed and sworn to before me,
December 27th, 1880.

(Signed) FRED. C. HARVEY,
Notary Public, Wayne Co., Mich.

ORDER OVERRULING EXCEPTIONS.

At a session of the District Court of the United States for the Eastern District of Michigan, held at the District Court Room in the City of Detroit, on Monday, the twenty-first day of February, one thousand eight hundred and eighty-one.

Present, Hon. HENRY B. BROWN, District Judge.

JAMES H. CUDDY AND
JAMES H. CUDDY, ADMR.,
vs.
THE STEAMER GARLAND. } IN ADMIRALTY.

Exceptions to the jurisdiction of the Court under the original and supplemental libels having this day been filed by the claimant herein, and the same having been brought on to be heard, and counsel for the respective parties having been heard, Ordered, adjudged and decreed that said exceptions be and the same are hereby overruled, and it is further ordered that claimants plead or answer to said original and supplemental libels within twenty days.

ORDER TO SHOW CAUSE.

Supreme Court of the United States, No. 7, Original, October Term, 1880.

EX PARTE: IN THE MATTER OF THE DETOIT RIVER FERRY COMPANY, *Petitioner.* } *Petition for Writ of Prohibition.*

On consideration of the petition of the Detroit River Ferry Company, it is hereby ordered that cause be shown by the Judge of the District Court of the United States for the Eastern District of Michigan, before this Court at Washington, in the District of Columbia, on the 11th day of October, 1881, at 12 o'clock, noon, of that day, or as soon thereafter as counsel can be heard, why a Writ of Prohibition should not issue restraining and prohibiting him from proceeding further, and from entering any decree, except to dismiss the libels in the case of James H. Cuddy, et al., libelants vs. the Steamer Garland, her engines, &c., the Detroit River Ferry Company, claimant.

30th March, 1881.

True copy. Attest, JAMES H. MCKINNEY,
Clerk Supreme Court U. S.

Service admitted, May 3, 1881.

H. B. BROWN, *Dist. Judge.*

STATE OF MICHIGAN, EASTERN DIST. OF MICH., } ss.

Henry C. Wisner being duly sworn says that on the 3d day of May, 1881, he served the order of which the foregoing is a true copy, upon the Hon. Henry B. Brown, Judge of the District Court of the United States for the Eastern District of Michigan, personally, at which time the said District Judge indorsed the above admission of service with his own hand.

HENRY C. WISNER.

Subscribed and sworn to before me July 27th, 1881.

JNO. GRAVES,
U. S. Comm'r Eastern Dist. Michigan.

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

IN ADMIRALTY.

JAMES H. CUDDY,
vs.
THE STEAMER GARLAND.

Opinion of Hon. HENRY B. BROWN, District Judge:

The original libel in this case claims damages for the loss of the services of two minor sons of the libelant killed in a collision between the steamers Garland and Mamie in the Detroit River, on the 22d of July last. The collision is alleged to have been occasioned by the fault and negligence of the Garland.

On the 15th of February, 1881, a supplemental libel was filed, setting up the appointment of libelant as the administrator of his sons' estate, and claiming to recover in this capacity under an Act of the Legislature of this State requiring compensation for death by wrongful act, neglect or default. Exceptions are filed to both libels on the ground that a Court of Admiralty has no jurisdiction of the subject matter.

Can an original libel be maintained for the loss of services? Ever since the case of Baker vs. Bolton (1 Camp. 493), it has been a settled doctrine of the common law that the death of a human being cannot be complained of as an injury in any court of civil jurisdiction. In such case the liability of the defendant ceases with the life of the person injured. This rule has remained undisturbed by a single well considered opinion, except that of Sullivan vs. the Union Pacific Railway Company (3 Dill. 334), for over seventy years, and although it seems to be based upon technical grounds, and does not commend itself to one's sense of natural justice, it is too firmly established to be shaken by judicial ruling. Such was also the opinion of the Supreme Court of the United States in The Insurance Company vs. Brame (95 U. S., 754).

Were this an original question, then, I should feel compelled to hold that this libel could not be maintained. But other Courts of Admiralty in this country have furnished so many precedents for a contrary ruling I do not feel at liberty

to disregard them, although I am at a loss to understand why a rule of liability differing from that of the common law should obtain in these courts. The earliest case upon the subject is that of Plummer vs. Webb (1 Ware, 75), in which Judge Ware upheld a libel by a father for the death by ill-treatment of his adopted son. On the question being first presented to Judge Sprague he held, in Crapo vs. Allen (1 Sprague, 184), that "for mere torts the right of action by the general maritime law, as by the civil law, dies with the person injured," citing Hall's Admiralty Practice, 21; Dunlap's Admiralty Practice, 87. But on reconsidering the subject in Cutting vs. Seabury (1 Sprague, 522), he thought it could not be considered as settled law that no action could be maintained for the damage occasioned from the death of a human being; but no decided opinion was pronounced upon the point, and the libel was dismissed on other grounds. Notwithstanding the learned judge made no attempt to distinguish between a Court of Common Law and a Court of Admiralty, his decision in Cutting vs. Seabury has been cited in a large number of cases as a precedent for holding that a Court of Admiralty would sustain such a suit, though a Court of Common Law would not.

The Sea Gull, Chase's Decisions, 143.
The Highland Light, Ibid, 150.
The Towanda, 23 Int. Rev. Rec., 384.
The Charles Morgan, 27 Law Reg., 624.

The whole subject is exhaustively discussed by the learned judge of the district of Oregon in the case of Holmes vs. the O. and C. Railway Company (51 Fed. Rep. 75), and the jurisdiction sustained. Against this concurrence of co-ordinate courts I do not feel at liberty to set up my own opinion, particularly in view of the fact that the common law rule seems to be consonant neither with reason nor justice.

I find less difficulty in sustaining libelant's claim under his supplemental libel. By chapter 212 of the Compiled Laws of this State: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the per-

son who, or the corporation which, would be liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The second section provides that the action shall be brought by the personal representatives of the deceased person for the exclusive benefit of his widow and next of kin. The tort in this case occurred upon navigable waters, and had the deceased survived there is no question that he could have maintained the libel, irrespective of any State statute. In the Steamboat Company vs. Chase, (16 Wall., 532), Mr. Justice Clifford expressed a doubt whether a State statute could be regarded as applicable in such a case to authorize the legal representatives of the deceased to maintain such an action for the benefit of the next of kin, giving as a reason that State laws cannot extend or restrict the jurisdiction of Admiralty Courts. I had supposed from the reading of other cases that where a State statute gave a right of action a Federal Court would administer the remedy where the requisite jurisdictional averments could be made, and if the action was maritime in its nature a Court of Admiralty would be a proper tribunal. Thus, in ex parte McNeil (13 Wall, 243), a libel was sustained under a State statute allowing pilotage fees to the pilot who first tenders his services. In delivering the opinion Mr. Justice Swayne observes: "The State law cannot give jurisdiction to any Federal Court. But that is not the question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a Court of Equity, of Admiralty, or of Common Law. The statute in such cases does not confer the jurisdiction that exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence." Other cases in the same court announce a similar doctrine. But this question is also so thoroughly reviewed in the case of Holmes vs. the A. and C. Railway Company, to which attention has already been

called, that any further consideration of the subject will result in a useless repetition of Judge Deady's reasoning, in which I fully concur.

In England the question whether a suit will lie in the Admiralty Courts under Lord Campbell's Act is still unsettled. Sir Robert Phillimore sustained the jurisdiction, with some hesitation, in the case of the Guldfaxe (L. R. 2, Ad. and Ec. 335), and again in the Explorer (L. R. S. Ad. and Ec. 355). These rulings were affirmed by the Privy Council in the Beta (L. R. 2 P. C. 447). The question again arose in the case of the Franconia (3 Asp. Maritime Law Cases, 415, 435), wherein the Court of Admiralty again asserted its jurisdiction. On appeal to the new Appellate Court the lord justices were equally divided in opinion. In a similar case (Smith vs. Brown, L. R. 6 Q. B. 720), the Court of Queen's Bench issued a writ of prohibition to the Admiralty Court.

See Marsden on Collisions, 64.

The whole controversy turned upon the construction to be given to the word "damage" in the Admiralty Court Act, the Court of Queen's Bench contending that the application of this word should be limited to cases of damage to property, while the Privy Council considered that it applied equally to injuries to persons. As the jurisdiction of Admiralty Courts in this country is not fixed or limited by any similar statute, these decisions throw but little light upon the question.

Upon the whole, I think the exceptions should be overruled. If I am in error, the Supreme Court will, upon application for a writ of prohibition, afford a summary and speedy relief.

Supreme Court of the United States.

Ex Parte THE DETROIT RIVER FERRY COMPANY.

Answer of Henry B. Brown, Judge of the District Court of the United States for the Eastern District of Michigan, Respondent, to the order to show cause, heretofore issued.

This respondent respectfully shows that the matters set forth in the petition of said Detroit River Ferry Company are true, and that the District Court of the United States for the Eastern District of Michigan, in Admiralty, still retains jurisdiction of the cause in said petition mentioned. And this respondent respectfully submits that said petitioner in and by his said petition hath not made or stated such a case as entitles him to the relief prayed.

And respondent therefore prays that said petition may be dismissed.

HENRY B. BROWN,

Judge of the Dist. Court of the U. S. for the Eastern Dist. of Michigan.

OFFICE SUPREME COURT U. S.
FILED
OCT 11 1881
JAMES H. MCKENNEY, CLERK.

SUPREME COURT

—OF THE—

UNITED STATES.

Ex Parte THE DETROIT RIVER FERRY COMPANY.

Brief of Petitioner.

H. C. WISNER,
Attorney for Petitioner.

DETROIT:
GULLEY PRINTING HOUSE, 12, 14, 16 EAST LARNED ST.
1881.

THE SUPREME COURT

OF

The United States,

IN THE MATTER OF THE PETITION OF THE DETROIT RIVER FERRY COMPANY, OWNERS OF THE STEAMER "GARLAND," FOR A WRIT OF PROHIBITION.

BRIEF FOR PETITIONER

ON RETURN OF ORDER TO SHOW CAUSE WHY A WRIT OF PROHIBITION TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SHOULD NOT ISSUE.

It appears from the petition that the original libel was filed by James H. Cuddy as the father of David and William H. Cuddy, against the Steamer Garland, to recover damages to the amount of $4,000, on account of their death, which, it is alleged, was caused by a collision between the "Garland" and the steam yacht "Mamie" on the Detroit River, on the 22d day of July, 1880:

Exceptions to the jurisdiction of the Court under this libel were filed by the claimant of the "Garland," who is the petitioner in this case. Subsequently, by leave of the Court, the libelant filed what is called a supplemental libel, seeking to recover damages for the death of his sons, the said David and William H. Cuddy, as *administrator, by virtue of the statute of the State of Michigan*, entitled "An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default." Exceptions for want of jurisdiction were also filed to this so-called supplemental libel. The exceptions to the original and supplemental libel were both overruled by

the District Court, which is now about to proceed to the hearing of the cause. It appears from the petition, that eleven intervening libels were filed of the same nature, to recover a like amount of damages, as the original libel above mentioned, and that the causes thereon are now pending in the District Court. The writ of prohibition is asked for upon the ground, that the District Court has no jurisdiction in rem to entertain such causes, there being no lien upon the vessel either by the general maritime law or by local statute.

In support of the application we submit :

I:

It is settled that at the common law no right of action is recognized for the death of a human being, caused by the negligence or wrongful act of another, and no civil action can be maintained by any person, to recover damages resulting to him in consequence of such death.

Baker vs. Bolton, 1 Camp., 493.
Hyatt vs. Adams, 16 Mich., 180.
Whitford vs. Railroad Company, 23 N. Y., 465.
Kearney vs. Railroad Corporation, 9 Cushing, 109.
Kramer vs. Railroad Company, 25 Cal., 434.
Cooley on Torts, 15, 16, 262.
Conn. Mutual Life Insurance Co. vs. Railroad Company, 25 Conn., 265.

This is the recognized rule, we believe, in all of the States of this Union, and in England.

In *Osborn vs. Gillett, Law Rep. 8 Exch. 88*, Kelly, C. B., said: "No decision is to be found in the books from the earliest times, by which an action for this cause has been sustained. No dictum is to be found by any judge, or upon any competent authority that such an action is maintainable. All the authority that exists is against it."

In the case of *Insurance Company vs. Brame, 95 U. S. 754*, this court says : "The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question."

In *Hyatt vs. Adams*, the Michigan Supreme Court says : "It is admitted on all hands, and cannot be denied that, at the common law, no civil action could be maintained for the death of a human being, caused by the wrongful act or negligence of another, or for any damages suffered by any person in consequence of such death."

Neither did the civil law recognize any such right of action. This was expressly so ruled in *Hubgh vs. New Orleans and Carrollton Railroad Company, 6 La., Ann., 495*, and in *Hermann vs. the New Orleans and Carrollton Railroad Company, 11 La., Ann. 5.* And inasmuch as the case of the *Insurance Company vs. Brame*, arose in the State of Louisiana, where the civil law prevails, and in which the Insurance Company claimed to recover by virtue of the civil law rule, this Court in effect, decided that no civil action lies under the civil law, for an injury resulting in death.

The adoption of Lord Campbell's act by Parliament, was a legislative declaration that no such right of action was known anywhere to the jurisprudence of England. The preamble of that act being as follows : "Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him," etc.

Osborn vs. Gillett, 2 Law Rep., 8 Exch. 88.

Lord Campbell's Act created a change in the common law in favor of the persons specified in the Act, and the same alteration in the prevailing law has been made by the adoption of substantially the language of Lord Campbell's Act, in most, if not all of the States of this Union, which is a legislative declaration by each State that no such right of action existed under the *lex non-scripta* of that State. In other words, that the legislation on this subject which has been adopted in England and in this country, *created a new right of action, a right previously unknown to our jurisprudence.*

It was not a mere want of a remedy, or of want of power, on the part of the Common Law Courts to enforce an existing right. There was an entire absence of the right itself.

In *Cooley on Torts, p. 15*, it is said: "This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous. When, therefore, it was concluded that public policy demanded the giving of the right of action in these cases, *a new law* was obviously essential." And at p. 28 Judge Cooley, also says "that Lord Campbell's Act, which gave an action for the benefit of a surviving husband or wife, parent or child of the person whose death should be occasioned by the wrongful act, neglect or default of another, and allowed the value of the life to be assessed by way of compensation, was an Act which gave *new and important rights*. It gave to husband, wife, parent and child, in addition to the rights recognized by the common law, a *new* and important interest in each other's life."

It is therefore settled that neither the civil nor the common law gave such a right of action.

II.

Neither is such a right of action recognized in Admiralty by the Elementary writers.

2 Parsons, S. and A. 350.
Benedicts Ad. 35.

1. No such right is known, and the Admiralty Court has no such jurisdiction under the maritime law, so far as any settled case shows. Aside from certain decisions in the District and Circuit Courts no cases are to be found, either in England or in this country upon this question. And the case is now presented for the first time for adjudication in this Court.

2. The jurisdiction of the High Court of Admiralty of England, over all torts on the high seas was as extensive and as complete as the jurisdiction of the Admiralty Courts of this country.

Benedict's Ad. 60.
Abbott on Shipping, p. 131, note.

The English Admiralty is governed by a rule in all respects the same as that of the common law.

The Guldfaxe Law Rep., 2 Ad. and Ecc. 324.
The Franconia, Law Rep. 2 P. D. 162.
The Explorer, 3 L. R., Ad. and Ecc. 289.
Smith vs. Brown, L. R., 6 Q. B., 728.
Harris vs. owners of Franconia, Law Rep. 2 C. P. D. 173.

And the fact that no reported case is to be found, in which such an action was sustained or sought to be sustained, is strong evidence that no such right of action is recognized. And as accidents must have frequently occurred on the high seas, resulting in loss of life on account of the negligence of the owners or masters of vessels, it is altogether probable—nay, morally certain—that actions would have been brought in the English Admiralty if the existence of any such right of action was ever recognized.

In *Le Caux vs. Eden, 2 Doug. 601*, which was an action for trespass for taking a vessel at sea as a prize, upon the question being made whether such an action could be maintained, it was held that "inasmuch as there never had been an action brought in such a case, a case that must have frequently occurred if such an action would lie, that circumstance went strongly to show the general opinion of the profession that no such action would lie."

In *Duke of Newcastle vs. Clark, 8 Taunton 620*, which was an action of trespass brought by the Commissioners of Sewers, Dallas, C. J., said that "there have been no instances referred to, either since the time of Henry VIII., or before that time, which made it appear that any action of this description has ever been brought, though the occasion for bringing such an action must very often have occurred. The argument of negative usage, as applicable to this case, though not decisive, is extremely strong."

In *Costigan vs. Railroad Company, 2 Denio 609*, it was held that the novelty of the peculiar action or defense, where the facts on which it is founded are of common occurrence, is a strong argument that it cannot be upheld.

Campbell vs. Rogers, 2 Handy 111.

To ascertain what the jurisdiction of the Admiralty Court in this case under the maritime law is, we must look to the reports of adjudged cases and to the commentaries of recognized authors, and as we find no decision or commentator who asserts it, we therefore conclude that the Admiralty has no jurisdiction of such a case under the general maritime law.

The Lottawanna, 21 Wall 576.

It would be difficult to show why a right of action, in such a case as this, should be recognized in Admiralty and not by the Courts of Common Law. The collision by which the Cuddys lost their lives took place in Detroit River within less than half a mile of the American and Canadian shores. Is it, then, reasonable or true, that within the extremities of that mile a rule of law prevails, the converse of the uniform rule governing at those extremities? Does the reason of the rule of the Common and Civil Laws lose its force, and reasons for an opposite rule arise because the same injury happens on water instead of on land? The District Judge in this case says in his opinion: "Were this an original question, then I should feel compelled to hold that this libel could not be maintained. . . . I am at a loss to understand why a rule of liability differing from that of the Common Law should obtain in these Courts."

It is a well recognized legal maxim that the common law affords a remedy for a violation of every legal right. The jurisdiction of the Common Law Courts is much more general and extensive, over both torts and contracts, than that of the Admiralty. They possess concurrent jurisdiction in all cases of tort or contract which may be entertained in the Admiralty Court. It is so in England.

2 Browne's Civil and Admr. Law, 116.
Browne vs. Benn, 2 Lord Raymond, 1247.

This is also the ruling in this country.

It cannot be said that a party has any greater right of action under the maritime law than he would have at the common law. The mode of enforcing the right may differ, but the right itself is the same. The maritime law, the common law, and the equity law are parts of one system.

When it is said that a person has a right of action by the general maritime law, nothing more is meant than that under *the general law of the land* he has a right, which, in the particular instance, may be enforced by an Admiralty Court if the party sees fit to resort to that tribunal.

In *Loyd vs. Guibert, Law Rep. 1, Q. B. 123*, it was claimed that the case was governed by the "general maritime law;" but the Court said, "We can understand this term in the sense of the general maritime law as administered in the English Courts, that being in truth *nothing more* than English law, although dealt out in somewhat different measure, in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty."

In *The New Jersey Steam Navigation Company vs. The Merchants' Bank, 6 How. 390*, it was said that "the Common Law Courts exercise a concurrent jurisdiction in nearly all the cases of Admiralty cognizance, whether of tort or contract;" and, referring to the clause in the Act of 1789 which saves to suitors the right of common law remedy where the common law is competent to give it, the Court said: "*This leaves the concurrent power where it stood at common law.*"

In *Plummer vs. Webb, 4 Mason 384*, Judge Story said that in respect to maritime torts, with the exception of cases of prize, Courts of Common Law have constantly claimed a right of concurrent jurisdiction.

See also the cases of Schoonmaker vs. Gilmore and of Brown vs. Davidson decided by this Court at the October Term, 11 Cent. Law Journal 438.

Leon vs. Galceran, 11 Wall. 191.
Steamboat Company vs. Chase, 16 Wall. 522.
The Belfast, 7 Wall. 644.
The Eagle, 8 Wall. 25.
Ex parte McNiel, 13 Wall. 243.
Edwards vs. Elliott, 21 Wall. 557.
De Lovio vs. Boit, 2 Gall 413.

The only difference between a suit in the Admiralty and one at common law, so far as the maintenance of the action is concerned, is in the mode of procedure.

If the Courts of Common Law have a concurrent—that is, an equal jurisdiction in all cases of maritime torts, the

right of action exists as well at common law as in Admiralty. The same right of action *must* exist whether the suit is commenced in one forum or in the other. A change of forum, from one Court to another Court of concurrent jurisdiction, works no change of rights. If no right of action exists at common law, it follows that no such right exists in Admiralty.

Ex parte McNeil, 13 Wall. 243.

To hold otherwise would be to establish a distinction between torts occurring upon the sea and torts occurring upon the land. Why should a right of action exist in the one case and not in the other? Why should the same Court sustain an action for damages resulting from death when brought in the Admiralty, and deny the right to maintain it when it is brought at common law?

From the earliest history of the Admiralty down to the present time, no case can be found in which it has been held that a maritime lien arises on account of the death of a human being. In none of the cases in the District and Circuit Courts in which such actions have been sustained, has the question of lien been much discussed. The existence of such a lien is absolutely essential to the maintenance of a proceeding *in rem.*

If there is such a lien in the maritime law, in whose favor does it exist? If liens exist independent of any statutory enactment, in favor of the parties injured, then *each person* who suffers from the death, including not only the next of kin, but all others, may have a separate lien and bring separate suits *in rem* to enforce the same.

Among the cases relied upon by the libelants is *Cutting vs. Seabury, 1 Sprague 522*, in which it was said that it cannot be considered as settled law that no action can be maintained for damages occurring from the death of a human being. This was an opposite ruling to that by the same judge in *Crapo vs. Allen*, 1 *Sprague 184*, and was mere dictum, applying as well to the common law as to Admiralty, and was clearly overruled by the decision in *Insurance Company vs. Brame*, above cited.

In *The Sea Gull, Chase's Decisions, 145*, it was held that a libel *in rem* might be maintained by a husband for injuries

to the wife, terminating in her death. This decision of Judge Chase is based upon the decision of *The Maverick, 1 Sprague*, which was a suit to recover damages suffered by libellant himself upon navigable waters, and the principle decided in that case was only that a suit in Admiralty will lie to recover damages from personal injuries arising from a maritime tort.

In *The Highland Light, Chase's Decisions, 151*, which was a libel *in rem* by the widow and son of an employe on a vessel, it was held that the libel could not be maintained, but that, on account of the Act of Congress, the remedy must be *in personam* against the owners. It was held that the jurisdiction of the Admiralty in a suit *in personam* might be sustained by reason of the Maryland Statute, which, we believe, is similar to Lord Campbell's Act. A review of these two decisions by Judge Chase will, however, show that the question here involved received from him but very slight consideration, either upon principle or authority.

In *Rusk vs. The Charles Morgan, 18 Am. Law Reg. 624*, a libel *in rem* was filed by the widow of a passenger, for damages resulting from his death on account of the negligence of the master and officers of the steamboat. The libel was excepted to, and the exceptions overruled, apparently for the purpose of allowing a trial upon the merits, so that the whole case might go to the Supreme Court. We insist that these decisions are entitled to but little weight compared with the general current of authority that the rule of the general maritime law is the same as that of the common and civil law.

III.

Does the statute of Michigan create a right which may be enforced in Admiralty by proceedings *in rem?*

This statute does not in terms declare that a lien shall be created upon the thing causing the death, nor does it, confer jurisdiction upon any Court to enforce the claim by proceedings of the nature of the suits in rem of the Admiralty Courts.

The act is as follows:

SECTION 1.—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

SECTION 2.—Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person.

2 Compiled Laws of Michigan of 1871, p. 1882.

1. Does this statute create a maritime lien? It does not authorize an attachment of any kind. It clearly provides for an action at common law *in personam*. It declares that the *person who, or corporation which*, would have been liable if death had not ensued, shall be liable to an action for damages. This is apt language to create a right of action *in personam* in the Common Law Courts, but to say that it creates a *maritime lien* or a right of action *in rem* in the Admiralty Courts of the United States, would be to violate both its letter and its spirit, and in direct conflict with the language and the meaning of this Court in *The Yankee Blade, 19 How. 89*, "That maritime liens are *stricti juris*, and cannot be extended by construction, analogy, or inference."

Lord Campbell's Act has been held, by the English Courts, to confer no jurisdiction upon the Admiralty.

In *The Guldfaxe, Law Rep. 2 Ad. and Ecc. 324*, Sir Robert Phillimore, after quoting from that Act, said: "This statute, though it effected the material alteration in the common law which I have mentioned, *conferred no jurisdiction upon the Admiralty Court.*" And the cases in which the English Admiralty have sustained the action, place their rulings entirely upon the provisions of more subsequent statutes—the Merchants' Shipping Act of 1854 and the Admiralty Jurisdiction Act of 1861.

In *The Franconia Law Rep. 2 P. D. 163*, and in the case of *The Explorer, 3 Law Rep. Ad. and Ecc. 289*, the action was sustained, but upon the express authority of this later statute. The case of the *Franconia* was carried to the Court of Appeal, where the judges were equally divided in opinion. Bramble, L. J., and Brett, L. J., were for reversing the decision upon the ground that the Admiralty had no jurisdiction whatever. Baggallay, L. J., and James, L. J., were for affirmance. It was said by the judges who were for affirmance: "It is admitted that if the Court of Admiralty had any such jurisdiction, it was conferred by the Admiralty Jurisdiction Act of 1861 (24 Vict. c. 10), section 7 of which enacts that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." This decision is, therefore, directly in support of our position, as there is no statute in this country, either State or National, similar to the English Admiralty Jurisdiction Act referred to in the *Franconia.* It may well be doubted whether even the British Admiralty Jurisdiction Act is sufficient to confer the requisite jurisdiction, inasmuch as the Court of Queen's Bench in *Smith vs. Brown, Law Rep. 6 Q. B. 728*, held that it was not sufficient, and that the writ of prohibition would lie to the Admiralty Court to restrain it from proceeding in such an action.

See also Harris vs. Owners of Franconia, 20 English Rep. 446.

As the right given by the Michigan statute is identical with that given by Lord Campbell's Act, then, unless the decisions in the cases of the *Guldfaxe*, the *Franconia* and the *Explorer* are wrong in principle, it follows that the Michigan

statute furnishes no jurisdiction for the District Court in this case.

We do not contend that an action may not be maintained by the administrator in the Admiralty Court in personam. In *Holmes vs. the O. and C. Railway Company, 5 Federal Report 75*, it was held by the District Judge of Oregon that the Section of the Oregon Civil Code which gives to an administrator a right to recover damages on account of the death of his intestate, could be enforced by a proceeding in the Admiralty *in personam*. Judge Choate, S. D. N. Y., in a more recent case *in personam*. 5 Fed. Rep. 608, to recover damages on account of death, says: "I see no valid reason why the right of a person to whom, under the municipal law, the title to a chose in action survives, or a new right to sue is given for damages resulting from a tort, the Admiralty Courts in the exercise of their jurisdiction *in personam* over marine torts should not recognize and enforce the right so given.

The District Judge in the case now under consideration has followed the Oregon case, holding that the right given by the Michigan statute might be so enforced, but has gone further, and decided that there exists under the statute a lien which may be enforced by proceedings *in rem*.

The attempt here is to create by implication *a lien*, and to enforce it by a *proceeding in rem*. If the general maritime law does not recognize the existence of a right of action for the tort, and if the local statute has created the right, and simply provided for its enforcement by a suit at common law, what authority would the Court have for saying that the injured party has, therefore, a lien or privilege on the vessel for the damages arising from the tort. This would be to extend the lien by analogy or construction.

In the case of *The Yankee Blade, 19 How. 82*, a lien was sought to be maintained on account of the breach of a contract respecting the employment of a certain vessel. The Court, in denying the existence of the lien, said: "We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject matter is a ship employed in navigating the

ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument that if this contract was in the nature of a charter party, or had some features of a charter party, the Court would extend the maritime lien by analogy or inference, for the sake of giving the libelant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction."

The argument to sustain the jurisdiction of the Court seems to be that the State statute having created the right of action, such right of action may be enforced in the federal tribunals. (The General Smith, 4 Wheat., 430; Railway Company vs. Whitton, 13 Wall., 270; Ex parte McNeil, 13 Wall., 236), and that the tort being maritime the action is cognizable by the District Court in Admiralty. So far we find no fault with the argument, but it is further claimed that being a maritime tort a lien necessarily arises against the thing which caused death, and the damages may be recovered by a proceeding in rem. But as was said by the late Judge Emmons in The Avon, Browns Ad. Reps., p. 176, "This proceeding in rem is not process. In no sense is it remedy only, or a part of the lex fori. It is the enforcement of a *proprietary* interest, and can no more be resorted to when *that* by the law of the place of the contract or of the act does not exist, than a suit for possession can be maintained without a title to support it. * * * * Unless a *lien*, by virtue of some law applicable to the act was created by this collision, when and where it occurred, there is no standing here by the libelant." (See also The Rock Island Bridge, 6 Wall., 215).

The principle contended for by the libelant is essentially this: that the maritime law recognizes a lien whenever, when by any system of law, a right of action is created, and the act is done on navigable waters; and it is presumed the same assumption would apply to contracts as well as to torts; but it is obvious there is no such principle of law. and none such has been recognized by any decided case. If there is any such principle, then many of the observations of judges as to liens being a proprietary interest and stricti juris, and that the

process in rem can only be used to enforce such a proprietary interest created by some law, have been useless. If it be true that as a general proposition the maritime law gives the process whenever the right of action is recognized, then it is mere circumlocution to first say the maritime law recognizes a lien, and therefore the remedy may be by proceeding in rem. A much simpler statement of the principle would be that the Admiralty Court will enforce by proceeding in rem whether a lien is declared by the law creating the right of action or not if the act for which the action is brought is done in navigable waters, or in other words that the "proceeding is process," and not the enforcement of a proprietary interest existing by the law of the place of contract, or of the act done.

The cases of *The Railway Company vs. Whitton, 13 Wall. 270*, and *Ex parte McNiel, 13 Wall. 236*, are relied on to sustain the jurisdiction of the District Court in this cause. In the former case, an action at common law was brought to recover damages for the death of a person, upon a statute of Wisconsin which, among other things, provides that such action shall be brought in some Court established by the Constitution and laws of that State. It was, nevertheless, held by this Court that the action might be brought in the Federal Court. To have held otherwise would have been to deny the right guaranteed by the Federal Constitution to litigate the case in the Federal Court, although the requisites existed respecting citizenship. We do not see how this case has any application to the one now under consideration.

Ex parte McNiel, which referred to a suit *in personam* and in Admiralty, involved the question of jurisdiction on the part of the District Court to enforce a claim for half pilotage under the laws of New York regulating the subject of pilotage. It was held that the State statute amounted to a regulation of commerce ; but that Congress having by numerous Acts recognized and adopted them, they were to be considered as valid ; that the service of the pilot was a maritime service ; that the tender of such services under the statute, constituted a contract maratime in its nature, upon which the law raised an implied promise to pay the amount specified in the statute;

that it was a contract maritime in its nature over which Courts of Admiralty had undoubted jurisdiction, and that the right created, on account of its maritime character, was such that it might be enforced in Admiralty. This case does not decide that a *proceeding in rem* would be sustained in the absence of a provision in such statute making the claim of the pilot a lien upon the vessel. The same may be said of the cases which recognized the validity of liens for supplies and materials furnished to a vessel in her home port. Though by the general maritime law there is no lien, yet the contract being maritime in its nature, and one over which the Court of Admiralty has jurisdiction, if the local law gives a lien, that lien will be enforced in the Admiralty. But it should be remembered that these statutes in *express terms give a lien upon the vessel*, and that parties contracting under them, may be fairly held as assenting to a lien upon the property, the *lex loci contractus* governing the construction of the contract. There is certainly no analogy whatever between such statutes and the one now under consideration giving an action *in personam* for damages on account of the death of a person. These local statutes, giving liens upon vessels for supplies in the home port, are regulations of commerce, intended as such, which are recognized as valid on the ground that Congress, while it possesses the power, has not legislated upon the subject, and therefore the States may create valid liens, which will be enforced when they arise out of contracts maritime in their nature.

Whether the libelant in this case could maintain a suit in Admiralty *against the owners* of the Garland, we are not called upon to discuss, but conceding that he might do so, we deny that from that it follows that he may set up a valid claim to a lien upon thier vessel and enforce that lien by a proceedings *in rem*, as he is attempting to do in this case.

It has been held in several cases, that the Admiralty Courts have no jurisdiction to enforce a claim arising under the State statute, unless that statute gives a lien in express terms. Thus in *Peyroux vs. Howard, 7 Pet. 341*, it was said, repeating the language of Judge Story in the case of The Gen'l Smith, 4 Wheat. 443: "The case is governed altogether

by the local law of the State, and no lien is implied unless it is recognized by that law; but if the local law gives a lien it may be enforced in the Admiralty." The decisions of the Lottawanna, 21 Wall. 579, and of many cases since the Gen'l Smith, follow this principle.

By a statute of Massachusetts, a right of action was created in behalf of a pilot who should tender his services, whether they were accepted by the vessel or not; but as the statute did not in terms give a lien, it was held in the *Robert J. Mercer, 1 Sprague 284*, that the District Court had no jurisdiction to enforce the claim by a proceeding *in rem.*

Under the decisions last above referred to, it seems clear that the District Court has no jurisdiction to enforce the libelant's demand as administrator under the statute by proceedings *in rem*, inasmuch as the statute itself gives no lien.

In conclusion, then, it follows:

1. That the District Court has no jurisdiction to entertain this cause under the general maritime law.

2. That the statute of Michigan creates no lien, as is claimed, and does not therefore confer jurisdiction upon the Admiralty to enforce the claim for damages specified by a proceeding *in rem.*

3. That the writ of prohibition, as prayed for, should issue.

H. C. WISNER,

Attorney for Petitioner.

F. H. CANFIELD, *Counsel.*

Jno Harlan

SUPREME COURT

—OF THE—

UNITED STATES.

Ex Parte THE DETROIT RIVER FERRY COMPANY.

Brief on Petition for Writ of Prohibition.

H. C. WISNER,
Attorney for Petitioner.

DETROIT:
GULLEY PRINTING HOUSE, 12, 14, 16 EAST LARNED ST.
1881.

SUPREME COURT

OF

The United States,

IN ADMIRALTY.

IN THE MATTER OF THE PETITION OF THE DETROIT RIVER FERRY COMPANY, OWNERS OF THE STEAMER "GARLAND," FOR A WRIT OF PROHIBITION.

BRIEF FOR PETITIONER.

This is an application for a writ of prohibition to the District Court of the United States for the Eastern District of Michigan. It appears from the petition that the original libel was filed by James H. Cuddy as the father of David and William H. Cuddy, to recover damages on account of their death, which, it is alleged, was caused by a collision between the steamer "Garland" and the steam yacht "Mamie" on the Detroit River on the 22nd day of July, 1880.

Exceptions to the jurisdiction of the Court under this libel were filed by the claimant of the "Garland," who is the petitioner in this case. Subsequently, by leave of the Court the libelant filed what is called a supplemental libel, seeking to recover damages for the death of his sons, the said David and William H. Cuddy, as *administrator by virtue of the statute of the State of Michigan*, entitled "An Act Requiring Compensation for Causing Death by Wrongful Act, Neglect, or Default." Exceptions for want of jurisdiction were also filed to this so-called supplemental libel. The exceptions to the original and supplemental libel were both overruled by the District Court, which is now about to proceed to the hearing of the cause. It appears from the petition, that eleven intervening libels were filed of the same nature as the original libel above mentioned, and that the causes thereon are now pending in the District Court. The writ of pro-

hibition is asked for upon the ground, that the District Court has no jurisdiction either under the maritime law or under the statute of Michigan to entertain such causes.

In support of the application we submit:

I.

It is well settled that at the common law no right of action is recognized for the death of a human being, caused by the negligence or wrongful act of another, and no civil action can be maintained by any person, to recover damages resulting to him in consequence of such death.

Baker vs. Bolton, 1 Camp., 493.
Hyatt vs. Adams, 16 Mich., 180.
Whitford vs. Railroad Company, 23 N, Y., 465.
Kearney vs. Railroad Corporation, 9 Cush., 109.
Kramer vs. Railroad Company, 25 Cal., 434.
Cooley on Torts, 15, 16, 262.
Conn. Mutual Life Insurance Co. vs. Railroad Company, 25 Conn., 265.

The same rule has been recognized, we believe, in all of the States of this Union, as well as by the Courts of England.

In *Osborn vs. Gillett, Law Rep. 8 Exch. 88*, Kelley, C. B., said: "No decision is to be found in the books from the earliest times, by which an action for this cause has been sustained. No dictum is to be found by any judge, or upon any competent authority that such an action is maintainable. All the authority that exists, is against it."

It has also been expressly so ruled by the Supreme Court of the United States. In the case of *Insurance Company vs. Brame, 95 U. S., 754*, it is said "the authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question."

In *Hyatt vs. Adams*, above cited, the Court says: "It is admitted on all hands, and cannot be denied that, at the common law, no civil action could be maintained for the death of a human being, caused by the wrongful act or negligence of another, or for any damages suffered by any person in consequence of such death."

Neither did the civil law recognize any such right of action This was expressly so ruled in *Hubgh vs. New Orleans and Carrollton Railroad Company, 6 La. Ann., 495*, and in *Hermann vs. the New Orleans and Carrollton Railroad Company, 11 La. Ann. 5.* And inasmuch as the case of the *Insurance Company vs. Brame*, above cited, arose in the State of Louisiana, where the civil law prevails, we are justified in saying that this Court by the term "common law," as used in its opinion in that case, meant the prevailing unwritten law, as distinguished from statutory law, and that it virtually decided that no civil action lies for an injury resulting in death, unless the action is authorized by statutory enactment. But even if it were true that by the civil law the right of action exists, it by no means follows that the right exists in, or should be recognized by the Courts of the United States. The civil law has not been generally recognized or adopted as the law of this county, either State or National.

Not only have the Courts of England, and of this country, almost universally sustained our proposition, but the adoption of Lord Campbell's act by Parliament, was a legislative declaration of the fact, that no such right of action was known anywhere to the jurisprudence of England. The preamble of that statute being as follows: "Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such cases shall be answerable in damages for the injury so caused by him," etc.

Osborn vs. Gillett, 2 Law Rep. 8 Exch. 88,

Lord Campbell's Act having been adopted, substantially, in most, if not all, of the States of this Union, we may consider such State legislation as a repetition of the declaration, that no right of action exists on account of the death of a human being, outside of the statutes. In other words, that the legislation on this subject, which has been adopted in England and in this country, *created a new right of action—a right previously unknown to our jurisprudence.*

It was not a mere want of a remedy, or of want of power, on the part of the Common Law Courts to enforce an existing right. There was an entire absence of the right itself.

In *Cooley on Torts, p. 15*, it is said: "This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous. When, therefore, it was concluded that public policy demanded the giving of the right of action in these cases, *a new law* was obviously essential." And at p. 28 Judge Cooley also says "that Lord Campbell's Act, which gave an action for the benefit of a surviving husband or wife, parent or child of the person whose death should be occasioned by the wrongful act, neglect or default of another, and allowed the value of the life to be assessed by way of compensation, was an Act which gave *new and important rights*. It gave to husband, wife, parent and child, in addition to the rights recognized by the common law, a *new* and important interest in each other's life."

II.

No such right of action is recognized in Admiralty; and the District Court sitting in Admiralty has no jurisdiction to enforce such a claim.

2 Parsons. S. and A. 350.
Benedicts Ad. 35.

1. No such right is known, and the Admiralty Court has no such jurisdiction under the maritime law. Aside from certain decisions in the District and Circuit Courts no cases are to be found, either in England or in this country upon this question. And the case is now presented for the first time for adjudication in this Court.

2. The jurisdiction of the High Court of Admiralty of England, over all torts on the high seas was as extensive and as complete as the jurisdiction of the Admiralty Courts of this country.

Benedict's Ad. 60.
Abbott on Shipping, p. 131, note.

And the fact that no reported case is to be found, in which such an action was sustained or sought to be sustained, is strong evidence that no such right of action is recognized. And as accidents must have frequently occurred on the high seas, resulting in loss of life on account of the negligence of

the owners or masters of vessels, it is altogether probable—nay, morally certain—that actions would have been brought in the English Admiralty if the existence of any such right of action was ever recognized.

In *Le Caux vs. Eden, 2 Doug. 601*, which was an action for trespass for taking a vessel at sea as a prize, upon the question being made whether such an action could be maintained, it was held that "inasmuch as there never had been an action brought in such a case, a case that must have frequently occurred if such an action would lie, that circumstance went strongly to show the general opinion of the profession that no such action would lie."

In *Duke of Newcastle vs. Clark, 8 Taunton 620*, which was an action of trespass brought by the Commissioners of Sewers, Dallas, C.J., said that "there have been no instances referred to, either since the time of Henry VIII., or before that time, which made it appear that any action of this description has ever been brought, though the occasion for bringing such an action must very often have occurred. The argument of negative usage, as applicable to this case, is not decisive, is extremely strong."

In *Costigan vs. Railroad Company, 2 Denio 609*, it was held that the novelty of the peculiar action or defense, where the facts on which it is founded are of common occurrence, is a strong argument that it cannot be upheld.

Campbell vs. Rogers, 2 Handy 111.

To ascertain what the jurisdiction of the Admiralty Court in this case under the maritime law is, we must look to the reports of adjudged cases and to the commentaries of recognized authors, and as we find no decision or commentator who asserts it, we are forced to the conclusion that the Admiralty has no jurisdiction of such a case under the general maritime law.

The Lottawanna, 21 Wall 576.

It would be difficult to show why a right of action, in such a case as this, should be recognized in Admiralty and not by the Courts of Common Law. It was a well recognized legal maxim that the common law afforded a remedy for

every legal right. The jurisdiction of the Common Law Courts is much more general and extensive, over both torts and contracts, than that of the Admiralty. They possess concurrent jurisdiction in all cases of tort or contract which may be entertained in the Admiralty Court. It is so in England.

2 Browne's Civil and Admr. Law, 116.
Brown vs. Benn, 2 Lord Raymond, 1247.

This is also the ruling in this country.

It cannot be said that a party has any greater right of action under the maritime law, than he would have at the common law. The mode of enforcing the right may differ, but the right itself is the same. The maritime law, the common law, and the equity law are parts of one system.

When it is said that a person has a right of action by the general maritime law, nothing more is meant than that under the general law of the land he has a right, which, in the particular instance, may be enforced by an Admiralty Court if the party sees fit to resort to that tribunal.

In *Loyd vs. Guibert, Law Rep. 1, Q. B. 123*, it was claimed that the case was governed by the "general maritime law;" but the Court said, "We can understand this term in the sense of the general maritime law as administered in the English Courts, that being in truth *nothing more* than English law, although dealt out in somewhat different measure, in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty."

In *The New Jersey Steam Navigation Company vs. The Merchants' Bank, 6 How 390*, it was said that "the Common Law Courts exercise a concurrent jurisdiction in nearly all the cases of Admiralty cognizance, whether of tort or contract;" and, referring to the clause in the Act of 1789 which saves to suitors the right of common law remedy where the common law is competent to give it, the Court said: "*This leaves the concurrent power where it stood at common law.*"

In *Plummer vs. Webb, 4 Mason 384*, Judge Story said that in respect to maritime torts, with the exception of cases

of prize, Courts of Common Law have constantly claimed a right of concurrent jurisdiction.

See also the cases of Schoonmaker vs. Gilmore and of Brown vs. Davidson, decided by this Court at the October Term, 11 Cent. Law Journal 438.

Leon vs. Galceran, 11 Wall. 191.
Steamboat Company vs. Chase, 16 Wall. 522.
The Belfast, 7 Wall. 644.
The Eagle, 8 Wall. 25.
Ex parte NcNiel, 13 Wall. 243.
Edwards vs. Elliott, 21 Wall. 557.
De Lovio vs. Boit, 2 Gall 413,

The only difference between a suit in the Admiralty, and one at common law, so far as the maintenance of the action is concerned, is in the mode of procedure.

If the Courts of Common Law have a concurrent—that is, an equal jurisdiction in all cases of maritime torts, the right of action exists as well at common law as in Admiralty. The same right of action *must* exist whether the suit is commenced in one forum or in the other. A change of forum, from one court to another court of concurrent jurisdiction, works no change of rights. If no right of action exists at common law, it follows that no such right exists in Admiralty.

Ex parte McNeil, 13 Wall. 243.

To hold otherwise would be to establish a distinction between torts occurring upon the sea, and torts occurring upon the land. Why should a right of action exist in the one case and not in the other? Why should the same Court sustain an action for damages resulting from death when brought in the Admiralty, and deny the right to maintain it when it is brought at common law?

Again, under his original libel Cuddy seeks to recover damages resulting to him as the *father* of the deceased. He sues in this own individual capacity, asserting his rights under the *general maritime law*. Should he recover, the decree would be no bar to another suit brought against the owners of the "Garland" by him under the statute as administrator.

Leggott Admr. vs. Railroad Company, 17 Eng. R, 238, Law Reports 1 Q. B. 599.

And this affords a strong argument why the District Court in Admiralty should not sustain his original libel.

From the earliest history of the Admiralty down to the present time, no case can be found in which it has been held that a maritime lien arises on account of the death of a human being. In none of the cases in the District and Circuit Courts in which such actions have been sustained, has the question of lien been much discussed. The existence of such a lien is absolutely essential to the maintenance of a proceeding *in rem*.

If there is such a lien in the maritime law, in whose favor does it exist? If liens exist independent of any statutory enactment, in favor of the parties injured, then *each person* who suffers from the death, including not only the next of kin, but all others, may have a separate lien and bring separate suits *in rem* to enforce the same.

We submit, that for a Court at the present time to declare that a lien exists under such circumstances would, in view of the previous history of the law, be mere legislation, and that the Court has no power by any rule or decision to create such a lien. To hold otherwise would be to depart from the rule so frequently recognized by this Court, that maritime liens are *strictí juris*, and cannot be extended by construction, analogy or inference.

The Yankee Blade, 19 How. 89.

Among the cases relied upon by the libelants is *Cutting vs. Seabury*, *1 Sprague 522*, in which it was said, that it cannot be considered as settled law that no action can be maintained for damages occurring from the death of a human being. This was mere dictum, and applies as well to the common law as to admiralty, and may well be considered as overruled by the decision of the Supreme Court in *Insurance Company vs. Brame*, above cited.

In *The Sea Gull*, *Chase's Decisions*, *145*, it was held that a libel *in rem* might be maintained by a husband for injuries to the wife, terminating in her death; but the question of lien was not discussed, or apparently considered, in the decision.

In *The Highland Light*, *Chase's Decisions*, *151*, which was a libel *in rem* by the widow and son of an employe on a vessel, it was held that the libel could not be maintained, but that, on account of the Act of Congress, the remedy must be *in personam* against the owners. It was held that the

jurisdiction of the Admiralty might be sustained by reason of the Maryland Statute, which, we believe is similar to Lord Campbell's Act. This case is really an affirmance of the proposition, that neither under the maritime law, nor under such a statute as exists in Michigan, can a suit *in rem*, such as attempted in this case, be sustained. A review of these two decisions by Judge Chase will, however, show that the question here involved, received from him but very slight consideration either upon principle or authority.

In *Rusk vs. The Charles Morgan, 18 Am. Law Reg. 624*, a libel *in rem* was filed by the widow of a passenger, for damages resulting from his death on account of the negligence of the master and officers of the steamboat. The libel was excepted to, and the exceptions overruled, apparently for the purpose of allowing a trial upon the merits, so that the whole case might go to the Supreme Court. We insist that these decisions are entitled to but little weight compared with the general current of authority to the contrary, as shown by the cases, some of which are cited by us ,and that the District Court has no jurisdiction of the original libel filed by Cuddy as father of the deceased.

III.

The local statute of Michigan, giving an action for injuries on account of the death of a person, does not confer jurisdiction upon the District Court in Admiralty to enforce such a claim by a proceeding *in rem* against a vessel.

2 Compiled Laws of Michigan of 1871, p. 1882.

This act is as follows:

SECTION 1.—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

SECTION 2.—Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person.

1. It was not the intention of this statute to create a maritime lien. It does not authorize an attachment of any kind. It clearly provides for an action at common law *in personam*. It declares that the *person who, or corporation which*, would have been liable if death had not ensued, shall be liable to an action for damages. This is apt language, to create a right of action *in personam* in the Common Law Courts, but to say that it creates a *maritime lien* or a right of action i*n rem* in the Admiralty Courts of the United States, would be to violate both its letter and its spirit. This more clearly appears when we read the statute in connection with the preamble of Lord Campbell's Act, section 1 above quoted being identical with that Act.

Hyatt vs. Adams, 16 Mich. 195.

Lord Campbell's Act has been held, by the English Courts, to confer no jurisdiction upon the Admiralty.

In *The Guldfaxe, Law Rep. 2 Ad. and Ecc. 324*, Sir Robert Phillimore, after quoting from that Act, said: "This statute, though it effected the material alteration in the common law which I have mentioned, *conferred no jurisdiction upon the Admiralty Court.*" And the cases in which the Admiralty have sustained the action, place their rulings entirely upon the provisions of more subsequent statutes—the Merchants' Shipping Act of 1854 and the Admiralty Jurisdiction Act of 1861.

In *The Franconia, 21 Eng. Rep. 581*, and in the case of *The Explorer, 3 Law Rep. Ad. and Ec. 289*, the action was

sustained, but upon the express authority of this later statute. The case of the *Franconia* was carried to the Court of Appeal, where the judges were equally divided in opinion. Bramble, L. J., and Brett, L. J., were for reversing the decision upon the ground that the Admiralty had no jurisdiction whatever. Baggallay, L. J., and James, L. J., were for affirmance. It was said by the judges who were for affirmance: "It is admitted that if the Court of Admiralty had any such jurisdiction, it was conferred by the Admiralty Jurisdiction Act of 1861 (24 Vict. c. 10), section 7 of which enacts that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." This decision is, therefore, directly in support of our proposition, and as there is no statute in this county, either State or National, similar to the English Admiralty Jurisdiction Act referred to in the *Franconia*, we submit that the District Court has no statutory jurisdiction to maintain this action. It may well be doubted whether even the British Admiralty Jurisdiction Act is sufficient to confer the requisite jurisdiction, inasmuch as the Court of Queen's Bench in *Smith vs. Brown, Law Rep. 6 Q. B. 728*, held that it was not sufficient, and that the writ of prohibition would lie to the Admiralty Court to restrain it from proceeding in such an action.

See also Harris vs. Owners of Franconia, 20 English Rep. 446.

As the right given by the Michigan statute is identical with that given by Lord Campbell's Act, then, unless the decisions in the cases of the *Guldfaxe*, the *Franconia* and the *Explorer* are all wrong, it follows that the Michigan statute furnishes no jurisdiction for the District Court in this case.

In *Holmes vs. the O. and C. Railway Company, 5 Federal Report 75*, it was held by the District Judge of Oregon, that the Section of the Oregon Civil Code which gives to an administrator a right to recover damages, on account of the death of his intestate, could be enforced by a proceeding *in rem* in the Admiralty. The District Judge in the case now under consideration, seems to have adopted the same view, holding that the right given by the Michigan statute might be so enforced; but neither judge seems to have had his atten-

tion called to the rulings of the English Court in the cases of the *Guldfaxe* and the *Franconia* above cited.

The argument to sustain the jurisdiction of the Court, seems to be, that as the tort complained of occurred upon navigable water, it is a maritime tort, and therefore the jurisdiction exists. But if the general maritime law does not recognize the existence of a right of action for the tort, and if the local statute has created the right, and simply provided for its enforcement by a suit at common law, what authority would the Court have for saying that the injured party has, therefore, a lien or privilege on the vessel for the damages arising from the tort. This would be to extend the lien by analogy or construction.

In the case of *The Yankee Blade, 19 How. 82*, a lien was sought to be maintained on account of the breach of a contract respecting the employment of a certain vessel. The Court in denying the existence of the lien said: "We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument that if this contract was in the nature of a charter party, or had some features of a charter party, the Court would extend the maritime lien by analogy or inference, for the sake of giving the libelant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction."

The cases of *The Railway Company vs. Whitton, 13 Wall. 270*, and *Ex parte McNiel, 13 Wall. 236*, are relied on to sustain the jurisdiction of the District Court in this cause. In the former case, an action at common law was brought to recover damages for the death of a person, upon a statute of Wisconsin which, among other things, provides that such action shall be brought in some Court established by the Constitution and laws of that State. It was, nevertheless, held by this Court that the action might be brought in the Federal Court. To have held otherwise would have been to

deny the right guaranteed by the Federal Constitution to litigate the case in the Federal Court, although the requisites existed respecting citizenship. We do not see how this case has any application to the one now under consideration.

Ex parte McNiel, involved the question of jurisdiction on the part of the District Court to enforce a claim for half pilotage under the laws of New York regulating the subject of pilotage. It was held that the State statute amounted to a regulation of commerce; but that Congress having by numerous Acts recognized and adopted them, they were to be considered as valid; that the service of the pilot was a maritime service; that the tender of such services under the statute, constituted a contract maritime in its nature, upon which the law raised an implied promise to pay the amount specified in the statute; that it was a contract maritime in its nature over which Courts of Admiralty had undoubted jurisdiction, and that the right created, on account of its maritime character, was such that it might be enforced in Admiralty. The same may be said of the cases which recognized the validity of liens for supplies and materials furnished to a vessel in her home port. Though by the general maritime law there is no lien, yet the contract being maritime in its nature, and one over which the Court of Admiralty has jurisdiction, if the local law gives a lien, that lien will be enforced in the Admiralty. But it should be remembered that these statutes in *express terms give a lien upon the vessel*, and that parties contracting under them, may be fairly held as assenting to a lien upon the property, the *lex loci contractus* governing the construction of the contract. There is certainly no analogy whatever between such statutes and the one now under consideration giving an action *in personam* for damages on account of the death of a person. These local statutes, giving liens upon vessels for supplies in the home port, are regulations of commerce, intended as such, which are recognized as valid on the ground that Congress, while it possesses the power, has not legislated upon the subject, and therefore the States may create valid liens, which will be enforced when they arise out of contracts maritime in their nature.

It has been held in several cases, that the Admiralty

Courts have no jurisdiction to enforce a claim arising under the State statute, unless that statute gives a lien in express terms. Thus, in *Peyroux vs. Howard, 7 Pet. 341*, it was said: "The case is governed altogether by the local law of the State, and no lien is implied unless it is recognized by that law; but if the local law gives a lien it may be enforced in the Admiralty."

By a statute of Massachusetts, a right of action was created in behalf of a pilot who should tender his services, whether they were accepted by the vessel or not; but as the statute did not in terms give a lien, it was held in the *Robert J. Mercer, 1 Sprague, 284*, that the District Court had no jurisdiction to enforce the claim by a proceeding *in rem.*

Under the decisions last above referred to, it seems clear that the District Court has no jurisdiction to enforce the libelant's demand as administrator under the statute, inasmuch as the statute itself gives no lien.

It is well settled that statutes like the statute now under consideration, have no extra-territorial effect whatever; that the right of action and the remedy which they provide are wholly local, and that the action can only be brought "in the State whose statute gives it, and where the killing took place."

Cooley on Torts, 266.
Whitford vs. Railroad Company, 23 N. Y. 465.
Mahler vs. Transportation Company, 35 N. Y. 352.
Campbell vs. Rodgers, 2 Handy, 111.
Woodward vs. Railroad Company, 10 Ohio St. 121.
Needham vs. Railroad Company, 38 Vt. 294.

Now, can a lien be held to exist under any principle known to the Admiralty law, which can only be enforced in a District Court sitting in the particular State which has adopted a statute creating a right of action?

If the Michigan statute in question gives a *maritime lien* for the tort, the rule of construction laid down in the authorities above cited, must be reversed, as the lien is a proprietary interest in the *res* which follows wherever the *res* may go, and the Admiralty Courts of every State or nation would have the right, and it would be their duty, to enforce the lien, and with it the statute, if the *res* should be found within the reach of their process.

In conclusion we submit:

1. That the District Court has no jurisdiction to entertain this cause under the general maritime law.

2. That the statute of Michigan creates no such lien, and was not intended to create or give any such jurisdiction.

3. That even if the statute is to be construed otherwise, still the Court has no jurisdiction under the supplemental libel; that the right of Cuddy, as administrator, under his supplemental libel, is as distinct and independent from his rights as father of the deceased, under the original libel as if he was a different person; that if the Court has jurisdiction by virtue of the Michigan statute to entertain the claim of Cuddy as administrator, it could only do so by a new and original libel, and therefore the petitioners are entitled to the writ of prohibition asked for in this cause.

WISNER & SPEED,
F. H. CANFIELD
Counsel for Petitioner.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM. 1881.

Ex parte THE DETROIT RIVER FERRY CO.

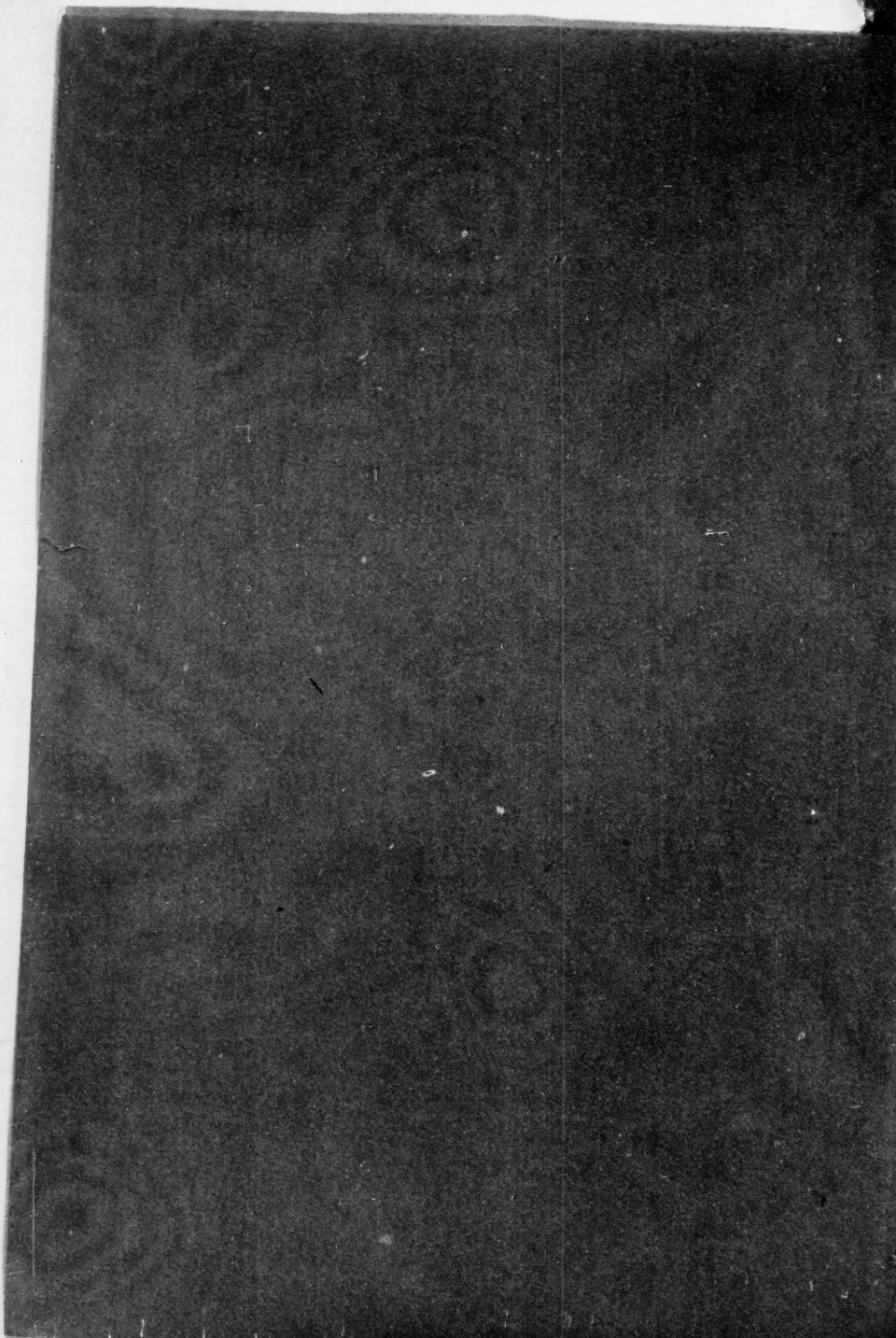
PETITION FOR PROHIBITION TO THE DIST. COURT, E. D. MICH.

BRIEF AGAINST THE ALLOWANCE OF THE WRIT.

ALFRED RUSSELL,

Counsel for Respondent.

DETROIT:
EMIL SCHOBER, PRINTER AND BINDER.
1881.



The Supreme Court of the United States.

OCTOBER TERM, 1881.

Ex Parte THE DETROIT RIVER FERRY CO.

Petition for Prohibition.

BRIEF FOR RESPONDENT.

On the 22nd of July 1880, a collision took place upon the Detroit River, between the Steamer Garland, owned by petitioner, and the little Steam Yacht Mamie, in which collision a large number of persons, mostly children, were lost. Libels were filed against the Garland, by parents of the children, (claiming by virtue of the relation of parent and child,) to recover damages, and subsequently, James H. Cuddy, having been appointed administrator of each of the children who were lost, filed additional libels, (claiming under the Michigan statute creating an action.) All were original libels, except the one which was filed by Cuddy, as administrator of his own children, which was filed as a supplemental libel to the one brought by him originally, as father of the lost boys.

The petitioner prays that the proceedings may be prohibited as beyond the jurisdiction of the Court

I.

In a court of admiralty, recovery can be had for causing the death of a human being; causing the death of the intestates was a marine tort, and the locality is the only test of jurisdiction.

The argument against the liability is founded upon the rules of the common law. But, in considering the question, it must be borne in mind that the general admiralty law is drawn very largely from the civil law, and has always inclined towards its equitable and philosophical principles rather than to the mere technical rules of the common law. Indeed, as this court has declared in "*The Moses Taylor*," 4 Wall., 431, near the end of the opinion, a proceeding *in rem* in admiralty, "*is a proceeding under the civil law*," not known to the common law. It may also fairly be said that, not only is the common law rule opposed to natural reason and justice, but also that it stands alone in the jurisprudence of nations from the earliest ages, in refusing compensation to the family and relatives of a deceased person. And so general has the conviction of the justice of the rule allowing compensation now become, that the defect in the common law has been remedied by statutes both in England and throughout the United States

In almost all ages and among almost all nations, compensation in some form to the family of a person killed, is found.

Justinian fixes the compensation, in the case of a free man who is killed, at fifty *aurei*.

Dig. Lib. IX., Tit. III.

Domat says: "If that which has been thrown out, causes the death of any person, or wounds him, the person who did it will be tried for it in a criminal prosecution, and he shall be punished according to the nature of the act and will be liable to make good the damage that is done."

Domat, civ. L. (Strahan).
Pt. I., Bk. II., Tit. VIII., Sec. I., Art. IV.

The rule as laid down by Grotius is identical with that created by Lord Campbell's Act, and the various statutes

of the United States, and is as follows: "*Homicida injustus tenetur solvere impensas, si quae factæ sunt in medicos, et iis quos occisus alere ex officio solebat, puta parentibus, uxoribus, liberis dare tantum quantum illa spes alimentorum, rationi habita ætatis occisi, volebat.*"

Grot. Lib. II., Cap. XVII. § XIII.
Rutherford's Institutes, 206.

Among the Franks and Saxons, compensation was made to the family of a person who had been killed, by the person causing the death, which was called *weregild*, the amount being graduated according to the rank and position of the person killed.

1 Hallam Mid. Ages 150 – 1
2 id. 262

Blackstone says, *weregild* was a private pecuniary satisfaction paid to the party injured and his relatives, to expiate enormous offenses, and was common to all northern nations, the custom being derived from the ancient Germans.

He refers to a similar costum among the Irish: "Under the Irish brehon law, in cases of murder, the brehon or judge was used to compromise between the murderer and the friends of the deceased who prosecuted him, by causing the malefactor to give to them or to the child or wife of him who was slain a recompense which they called an *erioch.*

4 Blk. Comm. 312.

The Scotch law, which is largely derived from the civil law, recognizes the right, under the name of *assythment.* "The law takes cognizance of the loss and suffering of the family of the person killed and gives assythment, both as indemnification and solatium."

"And the right of action is wtih the wife and family of the deceased; the division being like that of the goods in communion."

Bell's Principles of the Law of Scotland, p. 749, sec. 2029.
Erskines Inst., B. 4, Tit. 4, § 105.

The Court of Cassation, of France, held the same liability existed under the Code Napoleon.

Hubgh vs. R. R., 6 La Ann, 502.
Herman vs. Saline 11 id. 5.

The general impression among the profession has been that the liability existed under the civil law.

See brief of Sir F. Thesiger, in Blake vs. Railway Co.
18 Adol. & E. 98., and
Judge Deady's opinion, in Holmes vs. R., R. 5 Fed. R., 79,
1 Cush., 475.

Judge Brown, however, in "The Garland" inclined to the view that the right did not exist, basing his opinion upon the Louisiana cases above cited. But while the first case did say that the civil law provided no remedy, in the second, after an elaborate argument by plaintiff's counsel the court say that they will follow the decisions of their predecessors, but will not undertake to say how they would have decided the question, had it been *res nova*.

Even at the common law, the relatives and family of a deceased person were not entirely without remedy against a person causing the death. The *appeal* was a private prosecution for the punishment of crime, the prosecutor having the right to compound with the offender, and, probably, was originally given, says Blackstone, as a process for the recovery of the weregild, and this process continued a part of the system of common law until it was abolished by 59 Geo. III., C. 46 Though probably for some time prior to its abolition, the appeal existed simply as a private process in order to secure the punishment of the offender, without allowing any pecuniary compensation for the offense.

4 Blk. 313–314.
1 Austin's Lec. on Jur. 397.
Rex vs. Burroughs, 3. P. Wms 453.

At common law it has generally been regarded as settled, that no civil action, (except the appeal, above mentioned which was a *quasi* civil action), will lie to recover damages caused by the death of a human being. The rule is without foundation either in reason or justice, and in modern times, whenever it has been enforced, its application has been accompanied by a condemnation of it because of its injustice. And in some instances the courts have broken down the rule and allowed a recovery.

Sullivan vs. N. P. Ry. Co., 3 Dill., 341.
Ford vs. Monroe, 20 Wend., 210
James vs. Christie, 18 Mo., 162.
Shields vs. Younge, 15 Ga., 349.

II.

But what has the rule at common law to do with the rule in admiralty? The historical conflict between the systems is well known, and we need not go over it.

De Lovio vs. Boit, 2 Gall., 398.

Anciently in England the admiralty may have entertained such cases, as is admitted in "The Guldfaxe," L. R., 2 Ad. & Ec., 325, although *now* the jurisdiction in England is drawn from the statute.

The "Franconia," L. R , 2 P. D., 163,

and the discussions there are consequently not useful.

In admiralty, the weight of authority in this country is in favor of the action

The earliest case upon the subject in admiralty is *Plummer* vs *Webb*, (1 Ware, 75,) (Ware, D. J.,) where a libel was sustained by a father for damages caused by the death of his son from ill-treatment upon shipboard. Judge Ware was a great master of admiralty law.

In *Cutting* vs. *Seabury*, (1 Sprague, 522,) Judge Sprague says that he does not regard it as settled that no action can be maintained for the death of a human being.

In *The Sea Gull*, (Chase's Dec., 145,) which was a libel *in rem* by a husband to recover damages for the death of his wife, caused by collision between the "Sea Gull" and the "Leary," and *The Highland Light*, (id., 150.), (widow and son jointly filing libel for causing death of husband and father,) Chief Justice Chase held that the common law had no application in courts of admiralty, and that a recovery could be had.

In *The Towanda*, (23 Int., Rev. Rec., 384,) (McKennan, Cir. J , aff'g D J.,) the foregoing cases were followed and in *The Charles Morgan*, (27 Law Reg., 624,) (Swing, D. J.,) the cases are all reviewed and the same conclusion reached . And the learned editor of the Law Register concludes an elaborate note to the last case in the following language: "We should rather hope, that when the question comes before the Supreme Court of the United States, that distinguished tribunal will find it more consonant with the principles of natural equity and justice to allow the action, than to follow the unreasoned decision of Lord Ellenborough in *Baker vs. Bolton*." The first of these cases was an action by the wife of the chief mate of a schooner, which was run down by a steamer, causing the death of the husband, and it was held that an action *in rem* in admiralty would lie — The latter case was also *in rem* to recover for the death of a passenger, who was killed by falling through a hatchway very negligently left open.

Judge Deady, in *Holmes vs. O. & C. Ry Co.*, (5 Fed R., 75,) in an able opinion, concurs in the rule after a careful review of the cases and a full discussion of the principles involved. He is also authority for saying that the civil law permitted the action, p. 79. — This was a suit in admiralty to recover for the death of a passenger on a ferry boat, the death having been caused by the negligence of those managing the boat. Followed in *The Clatsop Chief*, 8 Fed. Rep., 163.

Judge Brown has embodied the entire discussion of this subject in the learned and well considered opinion delivered in this case and leaves very little to be said in addition to the considerations there found.

The Garland, 5 Fed. R., 924.

The opinion that the admiralty Court has jurisdiction of cases of the nature presented in this case is so strongly impressed upon the profession generally, that in two cases, where actions were brought under the statute, in a common law court, for deaths caused by the collision of steam vessels, it was strenuously contended and with much show of reason, that admiralty courts had exclusive jurisdiction.

Chase vs. Steamboat Co., 9 R. I., 419.
S. C., 16 Wall., 522.
Sherlock vs. Alling, 93 U. S., S. C., 44 Ind., 189.
Dougan, adm'x. vs. C. T. Co., 56 N. Y., 1.

In the latter case, (1874.) the defendant company was sued under the N. Y. statute for causing the death of the intestate by negligence, while a passenger on its boat on L. Champlain. It was claimed that the injury was a maritime tort, and therefore solely within the admiralty jurisdiction of the U. S. courts. The N. Y. Court of Appeals, conceding that redress for the injury complained of might have been obtained in admiralty, held jurisdiction under the reservation, in sec. 9 Jud. Act., 1789, 1 Stat., 73, reproduced in Sec. 563, R. S., U. S. See 16 Wall, pp. 530 to 534.

III.

The supplemental libel proceeds upon the additional ground that a remedy for causing death having been provivided by the state statute, a court of admiralty, in cases perfectly within its jurisdiction, will enforce the right thus created. The tort occurred upon navigable waters, and the action is brought upon the general principle that if a state

statute gives a right of action, the federal court will administer the remedy, when the case is properly within its jurisdiction.

The general rule has been asserted many times. Thus, in cases of supplies furnished vessels in a home port, where a lien is provided by locol law.

The Planter, 7 Pet., 324.
The Gen. Smith, 4 Wh., 438.
The Lottawanna, 21 Wall., 579.

In cases where the state law has regulated the matter of pilotage and pilots.

The Wright, 1 Deady, 597.
The California, 1 Saw., 467.
Steamship Co. vs. Joliffe, 2 Wall., 457.
Ex parte McNeil, 13 id., 236.

In the latter case, Judge Swayne says: "It is urged further that a state law can not give jurisdiction to the District Court. That is true. A state can not give jurisdiction to any federal court, but that is not the question in this case. A state law may give a substantial right of such a character that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, *of admiralty* or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence."

The same principle has been declared in cases where a state statute has provided for quieting titles in equity.

Clark vs. Smith, 13 Pet., 195, 13.

And for proceeding by judgment creditor's bill.

Lorman vs. Clark, 2 McLean, 569.

And for a iien under paving assessments.

Fitch vs. Creighton, 24 How., 160.

And where a right was created by a state statute it was held by this court that a proviso, in the act creating it, that suits to enforce it should be brought in the state court, did not prevent the federal court from entertaining jurisdiction in a case otherwise properly within its jurisidiction.

Railway Co. vs Whitton, 13. Wall., 270.

In 16 Wall., and 56 N Y., above, we have seen that a statutory remedy is regarded as simply amendatory of the common law, and as included within the reservation in sec. 9 of the Jud. Act, of a common law remedy.

Now, in P. W & B. R Co. vs. P. & H S. Co , 23 How., 216, a marine tort is said to include wrongs through the negligence of others, where the remedy at common law is by an action on the case.

In other words, an action in admiralty exists where there is an action at law touching such a cause of action.

The statutory action at law is maintainable against both colliding vessels, where the intestate was a passenger on one.

Cooper vs. E. T. Co,, 75 N. Y., 116. (1878.)
Cuddy vs. Horn, S. C. Mich , Oct. T., 1881.

And so in admiralty.

The Wash. & Gregory, 9 Wall., 513.
The Alabama & Gamecock, 92 U. S., 695.
The Atlas, 93 U. S., 302.
The New Phil., 1 Black., 62.
Sturgis vs. Boyer, 24 How., 124.

Recoveries at law and in admiralty are not a bar to each other.

The Ann & Mary, 2 W. Rob., 190.
The John & Mary, Swabey, 471.
Knox vs. The Minetta, Crabbe, 534.
Granger vs. W. C. Judge, 27 Mich , 412.
G. S. N. Co. vs. Tomkin, 4 Moore, 321.

The intestates were conveyed on the little yacht, "Mamie," against whose owners their administrators

bronght suits in the state court, which were sought to be enjoined in the District Court in admiralty, by a petition in a cause of limitation of liability ; an appeal in which to this court is the subject of a motion to dismiss at the present term. Libels were also filed in assertion of liens on the other colliding vessel, the "Garland," which are now sought to be prohibited.

IV.

The supplemental libel, under the peculiar circumstances of this case, is entirely proper, for, although the ground of recovery is different, and the father, as administrator, is technically a different person from the father in his natural capacity, yet in substance the two are identical Under the statutes of Michigan the father is the next of kin of his son, who dies without issue, 2. Comp. Laws. §§ 4309, 4377. And the proceeds when recovered by the adminisrator also go to the next of kin ; so that in both instances the father is the person who is beneficially interested, as well as being the libellant of record. Twelve other cases are now pending brought by parents of persons who were lost in the same collision, and Cuddy, having been appointed administrator of each person, has filed independent libels in every case, but this one.

V.

Liability on the part of the owner having been established, the only remaining question is whether the libellant is entitled to proceed *in rem.*

In all cases of marine torts the general admiralty law authorizes a suit *in rem.* In a case of tort Dr. Lushington says : "The liability of the ship and the responsibility of the owners are convertible terms ; the ship is not liable if the owners are not responsible ; and *vice versâ* no responsibil-

ity can attach upon the owners if the ship is exempt and not liable to be proceeded against.

The R. I. Bridge, 6 Wall., 215.
Ins. Co. vs. Sherwood, 14 How., 363.
The Feronia L. R., 2 Ad & Ec., 72.
The Bold Buccleugh, 2. E. L. & Eq., 536.
The Williams, Brown Ad., 224.
The Sch. Freeman, 18 How., 189.
The Druid, 1 W. Rob., 399.
The Bark Edwin, 1 Cliff., 330.

The numerous cases of collision are prosecuted *in rem*, upon this principle. When death is caused by collision on navigable waters, it is as truly a marine tort as when any other wrongful act is done within admiralty jurisdiction.

A suit *in rem* is permitted to recover damages caused to property by a collision, and there is no reason why a different rule should be applied when the damage is to the person in the same collision.

Taylor vs. Dewar, 5 Best & Smith, 61.

The right of action created by the statute stands on the same footing as any tort under the general admiralty law, where the wrongful act is committed upon navigable waters and within the admiralty jurisdiction And the methods of procedure of the admiralty courts are all applicable, including process *in rem* against the offending vessel.

The Richard Busteed. 1 Spr., 442.

This rule was applied without question in *The Sea Gull*, *The Towanda*, and *The Charles Morgan*, cited above.

The petition should be dismissed and the writ denied.

ALFRED RUSSELL,
Counsel for Respondent.

(over)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

EX PARTE THE DETROIT RIVER FERRY CO.

Reply Brief for Respondent.

Mr. Wisner, for the petitioner, objects that the Michigan Statute does not in terms declare a lien upon a vessel causing death.

Neither did the New York Pilot Law passed upon in *Ex-parte McNeil*, nor the Oregon Pilot Law in the cases cited below, and the decisions upon the Massachusetts Pilot Law are not put upon that ground.

Mr. Wisner is mistaken in the fact when he asserts that the statute passed upon in *Ex-parte McNeil* in express terms gives a lien (p. 15, Mr. W.'s brief). There is no clause in the original New York Statute of April 15, 1847, or in any of the amending Acts of March 12, 1860, March 14, 1865, April 16, 1868, and April 5, 1871, creating a lien.

Section 7, of the original Act, provides that the pilot who shall first tender his services *may demand and receive* from the master, owner, or consignee of any vessel, in case of tender and refusal of his services, one-half pilotage fees.

In the Massachusetts pilot case, the brig *America*, 1 Lowell Decisions, 176, it is said that "A lien is implied or results from a valid contract for pilotage, unless, as in the case before Judge Sprague, the law expressly or by implication denies it;" and it was held that a lien existed "taken either way." Commenting on the case before Judge Lowell, it is said in the pilotage case of the *California*, 1 Sawyer, C. C. 463, that Judge Lowell does not rest the right to sue the ship on the fact that the statute gave a lien, but upon the maritime law, independent of the State lien, because the maritime law gives the pilot a lien for services whether actually rendered or not. On p. 469 it is said that when the State law creates a demand for pilotage offered and refused, and an implied assumpsit, the demand then becomes a lien on the ship by virtue of the maritime law. The Oregon Pilot Law gave no lien on the vessel.

The *George S. Wright*, Deady, 597.

The law is quoted in the late case of the *Glenearne*, 7 Fed., Rep. 606, in which a lien was sustained.

So under the Delaware and Pennsylvania laws quoted in the very late case of the *Clymene*, 9 Fed., Rep. 164, where a proceeding *in rem* was sustained for pilotage, no lien being given by statute.

The Massachusetts Statute did give a lien.

Mr. Wisner cites against me the *Robert J. Mercer*, 1 Sprague, 284. This is the case referred to by Judge Lowell in Lowell's Decisions, *supra*, wherein the State law, as then existing, denied a lien.

But I submit that a State law cannot abridge or affect the judicial power of the District Courts in admiralty to enforce the lien which is incidental to the liability according to the principles of maritime law.

Circuit Judge Emmons distinguishes the case of the *Robert J. Mercer* upon the ground that in that case there was no actual maritime service, and no contract therefor. The lien results from the contract of pilotage and not

from any enactment. In the case before Judge Emmons, a tug was hired by the master of the schooner at $200 per day to go to the assistance of a vessel in distress. The vessel obtained relief before the tug reached her. A libel against the vessel to recover the compensation was sustained, although no actual service was rendered, on the ground that a maritime contract imports a lien.

The same is unquestionably true of a maritime tort.

The *Williams*, Brown Ad. R., 224.

Mr. Wisner cites the *Yankee Blade* (Vandewater v. Mills, 19 How., 89). That was not a case of maritime contract at all, but of common partnership, like the case of Ward v. Thompson, 22 How., 330. It is not "extending" a maritime lien by "construction, analogy or inference" to uphold a maritime lien in favor of everyone injured in any way in a purely maritime case like a collision case.

If the Michigan Statute did declare a lien, the argument for respondent would not be advanced, in view of the positive declaration of this Court in its latest decision on the subject, that, "State legislatures have no authority to create a maritime lien."

Norton, Assignee, v. Switzer, 93 U. S., 356.

In view of the above citations, I will now briefly re-state the argument for the libellants, thus:

1. This case is a collision case and nothing else.

2. In all collision cases the general maritime law recognized by Rule 15, impresses a maritime lien on the wrongdoing vessel.

The *China*, 7 Wall., 68.

3. The State of Michigan has lawfully regulated the subject matter of damages by collision, and has created a liability therefor against the owners of the vessel to pay

damages to the class of persons to which the libellants belong.

Sherlock v. Alling Adm'r, 93 U. S., 99.

4. Whether this liability gives rise to a maritime lien is a purely judicial question to be necessarily settled in the affimative, because the suit is for a maritime tort, to wit, a collision.

The pilotage cases above.

Mr. Wisner has correctly stated the principle which I contend for, at the bottom of p. 13 of his brief. Namely, that "The maritime law recognizes a lien wherever, by any system of law, the right of action is created and the act is done in navigable waters; and it is presumed the same assumption would apply to (maritime) contracts as well as to (maritime) torts." Mr. Wisner, however, then adds: "But it is obvious there is no such principle of law, and none such has been recognized by any decided case." I reply that this principle of the maritime law is fundamental and is fully recognized by all the decided cases referred to above, and the list might be very largely extended. When Mr. Wisner, on p. 12 of his brief, admits that the libellants may maintain a libel *in personam*, he admits away his case.

I will put the argument in the form of a syllogism. In all collision cases a maritime lien exists. The statutory liability of the owner for the maritime tort, resulting in the death of the intestates, is a collision case. Therefore, a lien exists, attached to that liability.

There is no flaw in this reasoning. The analogy of the pilotage cases above discussed is perfect.

My general proposition is, that all causes of action, maritime in their nature, whether contracts or torts, and whether existing without State statutes or created by them, give rise, by the principles of Admiralty jurisprudence, to maritime liens enforceable *in rem*.

I come now to consider the petitioner's argument in favor of the prohibition, aside from the State Statute. It reduces itself to this. That it does not appear that persons, in like case with the libellants, have always, *historically*, had the benefit of a maritime lien. I reply that when *damnum* and *injuria* are shown, on principle, the lien is extended to all persons injured, and there is no precedent *contra*, because the case has not arisen, as was said by Chief Justice Taney in the *Genesee Chief* case, pp. 457, 458, although very numerous cases have arisen of an extension of the lien to cases of personal injuries not resulting in death, which do not differ in principle, at all, from the case before us. This Court says, that "The lien is clear and undeniable in cases of personal injuries," in Steamboat Co. v. Chase, in which case, as is said by the Court of Appeals of New York, near the bottom of p. 248, of 57 N. Y., Baird v. Daly, this Court "discussed the question * * * on the theory that the Court of Admiralty had, without reference to the State Statute, jurisdiction over the cause," viz.: a suit for death by collision.

On principle, a master may recover for the death of his servant, the father for that of his minor child, the wife for that of her husband, the child for that of a parent.

There can be no question of survivorship in cases like the present by a master, because the cause of action could never have vested in the servant, and, therefore, could not be lost by his death. True, a personal action dies with the person; but whose personal action? The personal action of the person dying, not the personal action of any survivor injured by his death. In Ins. Co. v. Brame, this Court held simply that the Company could not recover against the murderer of the insured, and stated that an heir or executor has no action, because the action of the decedent himself abates by his death and does not survive to his representatives. This is the whole extent of that case cited by Mr. Wisner. He cites another case, Osborn v. Gillett,

recently determined in the English Exchequer, which was an action by father and master for injuries causing the immediate death of his daughter and servant, and the expenses of her burial. Mr. Baron Bramwell, in a dissenting opinion, which seems to be unanswerable, sustains the action. He says if the servant had been disabled, and not killed, a recovery could be had, citing Hodsall v. Stultebass, 11 A. & E., 301, an action for permanently disabling. He then cites Broon's Maxims, 5th edition, 904, to the point that *actio personalis*, etc., does not apply, and declares that Lord's Campbell's Act, Sec. 2, affirms this view in the words "such as would, if death had not ensued, have entitled the *party injured* to maintain the action." All the English and American cases are then fully reviewed, and he asserts that there is no "clear and binding authority," and no "semblance of authority" against the action on that side of the Atlantic, except a short note of Baker v. Bolton, an action by a husband for the death of his wife from the overturning of a coach, and that the English cases rest on that and some vague notion of a merger in a felony. He sustains also a recovery for the expenses of burial, citing the English and American cases, and closes by saying that Smith, in his excellent work on Master and Servant, 3d edition, 139, assumes, as certain, that this action would lie, and he declares the plaintiff entitled to a judgment. A shipper, whose merchandise is sent to the bottom by a collision, has his action *in rem*, and, on the same principle, a master, whose servant, a passenger, is killed by the same collision, has his action *in rem*, because, as is said by Mr. Justice Field, 4 Wall, 427, top, "*There is no distinction in principle touching the contract of transportation in the two cases.*" As shown by Mr. Justice Bradley, in Ins. Co. v. Dunham, the jurisdiction depends on principle, not precedent. There was no precedent for the exercise of Admiralty jurisdiction over the western waters, and, indeed, for twenty-six years, from 1825 to 1851, the precedents are all

the other way. But this Court, in the *Genesee Chief*, a decision which may be termed *feliciter audax*, asserted the jurisdiction even in the face of the legislative declaration to the contrary by the Act of 1845. Even after that case, this Court applied the limitation of the legislative power over inter-state commerce granted to Congress as a restriction of the judicial power over maritime cases granted to the courts, and in a case which I argued in 1858, refused jurisdiction of affreightment between two ports in the same State, Allen v. Newberry, in which case, I may here observe, the question of jurisdiction was not discussed by counsel nor referred to by any member of the Court at the argument, and as late as 7 Wall., 641 (1868), this restriction was supposed to exist (and in Lord v. S. S. Co., 102 U. S., 545, the restriction is referred to), but principle again finally triumphed over precedent in the *Gray Eagle*, 8 Wall., as also on a third subject in Ins. Co. v. Dunham, 11 Wall., already referred to.

A fourth instance of the ultimate prevalence of a correct doctrine against precedent is found in the declaration of Mr. Justice Bradley on p. 579 of 21 Wall., that a lien is a right of property and not a mere matter of procedure, although the Court had unanimously held it to be a mode of procedure in the steamer *St. Lawrence*, 1 Black, 522, and reaffirmed it in the *Potomac*, 2 Black., 583. And Mr. Justice Woodbury in 6 How., 436, and Chief Justice Marshall, in 4 Cranch, 24, had apparently regarded the allowance of a proceeding *in rem* as discretionary with the Court.

Rule 15 gives, or, more properly, recognizes process *in rem* in all suits for damages by collision. In the *Franconia* the English Court construed the word "damage" in the Admiralty Court Act of 1861, conferring jurisdiction over "any claim for damage done by any ship" to include damage to the family of the deceased in respect of his death from a collision.

Now, if we construe the word "damages" in the same

way in the rule, and regard the rule as declaratory of existing law, the libellants have a right to a proceeding *in rem*.

I will now restate the argument aside from the Statute of Michigan.

The parents bringing the first set of libels were injured.

Injury implies loss and a right of redress.

The injury and loss were inflicted by a maritime tort, and hence:

Jurisdiction in Admiralty, *in rem* arises, because "*there can be no reason*" for an admiralty lien in a collision case for injury to property and person "*which does not apply with equal force*" to injury by loss of life. Taney, C. J., cited by Bradley, J., 11 Wall., 26 Middle.

Mr. Wisner argues that a new burden on commerce is to be imposed. I reply, that granting the writ would, on the contrary, be to relax a highly beneficial rule for the security of life in water transportation, which is of more importance.

In 6 How., 427, speaking of the loss of life on the *Lexington*, Mr. Justice Woodbury says: "In view of all this, to relax the legal obligations and duties of those who are amply paid for them, or to encourage careless breaches of trusts the most sacred, or to favor technical niceties likely to exonerate the authors of such a calamity, would be of most evil example over our whole sea-board, and hundreds of navigable rivers and vast lakes, where the safety of such immense property and life depends chiefly on the due attention of the owners and agents of steamboats, and is unfortunately so often sacrificed by the want of it."

The writ should be refused.

ALFRED RUSSELL,
For Resp.

In the Supreme Court of the United States of America.

In the matter of the suggestion of Walter F. Hagar, for a writ of Prohibition to the District Court of the United States for the District of Delaware, sitting as a Court of Admiralty.

SUGGESTION AND EXHIBITS FILED.

H. G. WARD,
R. C. M'MURTRIE,
For the Relator.

In the Supreme Court of the United States of America.

TO THE HONORABLE, THE JUDGES OF THE SAID COURT.

The suggestion of Walter F Hagar, agent for Stilson R. Hilton, master, part owner and claimant of the British ship "William Law," against the District Court of the United States, for the District of Delaware, respectfully alleges:

That the said Stilson R. Hilton, master of the British ship "William Law," while on a voyage, in ballast, from the port of Antwerp, Belgium, to the Delaware Breakwater, for orders, refused the services of one Peter Chambers, a pilot licensed by the State of Delaware, who offered to conduct the said vessel to the Delaware Breakwater. That the said vessel having come to an anchor without employing any pilot, was subsequently ordered to Philadelphia. That the said Peter Chambers filed a libel *in rem* against the said vessel to recover the penalty imposed by an Act of the State of Delaware, passed on the fifth day of April, A. D, 1881, on all vessels calling at the Delaware Breakwater for orders which refuse to accept the services of a pilot licensed by the State of Delaware, which was duly allowed by the District Court of the United States for the District of Delaware, and a claim and stipulation were entered to release the said vessel, which proceeding is now pending in the said Court. A copy of the libel filed is appended hereto, marked "Exhibit A," and also a copy of the 5th and 18th sections of the said Act marked "Exhibit B."

That the amount claimed in the libel filed in the said proceeding being under the sum of fifty dollars, the decree therein will be final and not subject to an appeal, and will affect all shipping calling at the Delaware Breakwater for orders, because

the penalty that can be claimed under the said Act of Delaware 5 April, 1881, for refusing a pilot will never exceed fifty dollars for any one vessel.

That the State of Delaware has no title whatever to, or jurisdiction over, the said Breakwater or the harbor created thereby, having ceded the same before the erection thereof to the United States by an Act of Assembly, passed the 26th day of January, A. D., 1827, reserving only the right to execute civil and criminal process therein, a copy of which Act is appended hereto marked "Exhibit C," and that the sole and exclusive power of legislation therein is vested by Section 8, of Article 1, of the Constitution of the United States in Congress, for which reasons the Act of the State of Delaware of 5 April, 1881, which creates the cause of action upon which the libel is founded, is invalid and unconstitutional, and cannot be enforced by the District Court of the United States for the District of Delaware.

That the said Breakwater was erected by the United States with the public moneys, for the equal benefit of all the States, and that the Act of the State of Delaware, 5 April, 1881, as far as it subjects vessels calling thereat to a penalty for refusing the services of a pilot is unconstitutional and void as a tax upon commerce, and cannot be enforced by the District Court of the United States for the District of Delaware.

That, furthermore, the said District Court of the United States for the District of Delaware has no jurisdiction over the said proceeding there pending, because the same is *in rem*, whereas no lien is conferred against the vessel by the said Act of the State of Delaware of 5 April, 1881, for the penalty for refusing to accept the services of a pilot to the Delaware Breakwater, but the same is made by section 5 of the said Act, collectible from the master, owner or consignee in personam: nor is the claim for which the libel is filed a lien on the vessel by any law which the Court of Admiralty can enforce.

Wherefore, the said Walter F. Hagar, agent for the said Stilson R. Hilton, respectfully requests that a writ of prohibition may be issued out of this Honorable Court, to the Judge of the District Court of the United States, for the District of

Delaware; prohibiting him from holding the plea aforesaid, concerning the premises aforesaid any wise further before him.

Walter F. Hagar being duly sworn according to law, deposes and says that the facts set forth in the foregoing suggestion are true, to the best of his knowledge, information and belief.

(signed) Walter F. Hagar

Sworn and subscribed before me, this 13th day of October 1881.

(signed) Franklin Nicholson
Notary Public

"A"

TO THE HONORABLE EDWARD G. BRADFORD,
JUDGE OF THE DISTRICT COURT OF THE U. S.,
FOR THE DISTRICT OF DELAWARE.

The libel of Peter Chambers, of the city of Philadelphia and State of Pennsylvania, Pilot, filed against the British Ship "William Law," whereof, Stilson R. Hilton now is or lately was, master and part owner her tackle, apparel and furniture, and also against all persons lawfully intervening for their interest therein, in a cause of pilotage civil and maritime alleges as follow:

First: That on the sixteenth day of June, A. D., one thousand eight hundred and eighty one, the libellant having become duly qualified, therefor was duly licensed to act as a pilot of the first-class, in the Bay and River Delaware, by the Board of Pilot Commissioners, existing by virtue of and duly organized under an Act of the General Assembly of the State of Delaware, passed at Dover on the fifth day of April, in the year aforesaid, and entitled an Act regulating Pilots and Pilotages of and on the Bay and River Delaware, and he hath ever since he was licensed as aforesaid, continued to be and now is, such first-class Pilot.

Second: That on the twenty-sixth day of June, in the year aforesaid, the said British Ship "William Law," being then bound from a foreign port to wit, the port of Antwerp, in Belgium to the Delaware Breakwater, for orders, and being in

ballast and not solely coal laden, the libellant offered his services as Pilot, as aforesaid, to the master of said ship, to conduct said ship to the Delaware Breakwater, the said ship at the time of said offer being at the distance of between six and seven miles from the Cape Henlopen Light-house, in the District aforesaid, and bearing East, North-East from said Light-house, and being outside of said Light-house bearing South-West; but the master of said ship then and there refused to take the libellant as Pilot to conduct said ship to the Delaware Breakwater, although said ship then had no Pilot on board or in charge of her, and the libellant was the first to offer himself as Pilot to said ship.

Third: That immediately after the refusal by the master of said ship to take the libellant as Pilot as aforesaid, the said ship proceeded without any Pilot, to the Delaware Breakwater, and there waited for and received orders before proceeding further up the Delaware Bay.

Fourth: That at the time the libellant offered his services as Pilot as aforesaid, he was ready, willing, and able to render said services, and the master of said ship knew or had good cause to know, that the libellant was a Pilot on the Bay and River Delaware, and did not require the libellant to exhibit to him his license as Pilot.

Fifth: That the said ship on the day and year last aforesaid, drew over twelve and not more than fifteen feet of water, to wit, thirteen feet of water, whereby the libellant under said Act of the General Assembly of the State of Delaware, and on account of the refusal, aforesaid was entitled to demand from said ship, pilotage, at the rate of two dollars and eight cents for each foot of water drawn by said ship, aggregating the sum of twenty-seven dollars and four cents, the same being half pilotage, as mentioned in the eighteenth section of said Act.

Sixth: That after the arrival of the said ship at the Delaware Breakwater, as aforesaid, and while said ship remained there, to wit, on the day and year last aforesaid, the libellant demanded of the master of said ship payment of said half pilot-

age; but said master then and there refused to pay the same or any part thereof; and the libellant has since the day and year last aforesaid caused similar demand to be made in the said City of Philadelphia; but said master again refused to pay said half pilotage nor any part thereof has ever been paid to the libellant or to any person or persons in his behalf, and the same continues wholly unpaid.

Seventh: That by settled usage no vessels as large as said ship, bound from foreign ports to the Delaware Breakwater for orders, proceed within or behind said Breakwater, but anchor in Cape Henlopen Roads a short distance outside said Breakwater, and said ship did not upon the voyage aforesaid proceed within or behind said Breakwater but waited outside the same in said Roads for orders.

Eighth: That the said ship is now in the River Delaware, and within the jurisdiction of this Honorable Court.

Ninth: That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Wherefore the libellant prays that process in due form of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction may issue against the said British Ship "William Law," her tackle, apparel and furniture, and that all persons claiming any right, title or interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of said half pilotage with costs, and that the said vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

PETER CHAMBERS.

Sworn to and subscribed before me, this 6th. day of August, A. D., 1881.

L.S.

S. RODMOND SMITH, Clerk
U. S. District Court,
District of Delaware.

EDWARD G. BRADFORD, JR., *Proctor for Libellant.*

District of Delaware *ss.*

Issue process of attachment and monition general, against the within named British Ship "William Law," her tackle, apparel and furniture, returnable on the 9th. (ninth) day of September, A. D., 1881, at 11 o'clock, A. M.

E. G. BRADFORD

U. S. District Judge, August, 6, 1881.

"B"

SEC. 5. *And be it further enacted:* That every ship or vessel propelled by steam or sails, arriving from, or bound to, any foreign port or place, except such as are solely coal-laden, passing in or out of the Delaware Bay, by the way of Cape Henlopen, shall be obliged to receive a Pilot. That every such ship or vessel bound to the Delaware Breakwater for orders, and not proceeding further up the Delaware Bay, shall be obliged to receive a Pilot, provided she is spoken or a Pilot offers his services outside of the Cape Henlopen Light-house, bearing south-west; and if the master of any of the said ships or vessels, after she is spoken or a Pilot offered, shall refuse or neglect to take a Pilot, the master, owner or consignee of such vessel shall forfeit and pay to any such Pilot, suing for the same, a sum equal to the pilotage of such ship or vessel, to be recovered by a suit in our State Courts, or before a Justice of the Peace, or such Pilot may pursue his remedy therefor, by a libel in admiralty, in any United States District Court, as such Pilot may see fit and proper to do.

SEC. 18. The fees for pilotage are hereby established as follows: For every merchant vessel propelled by steam or sails, inward or outward bound, and not exempted from pilotage by virtue of these regulations, drawing not more than twelve feet, three-seventy-four one hundredth dollars per foot; for every vessel drawing over twelve feet, and not more than fifteen feet, four sixteen one hundredth dollars per foot; for every vessel drawing over fifteen feet, and not more than eighteen, four fifty-one hundreth dollars, per foot; for every vessel draw-

ing over eighteen feet, and not more than twenty feet, five dollars per foot; for every vessel drawing over twenty feet, five fifty-one hundreth dollars per foot; and they shall also receive, over and above the said sums for conducting ships or vessels to or from any port on the Bay or River Delaware, between the first day of November and the first day of April, inclusive, in any year, the additional sum of ten dollars. That every ship or vessel bound to the Breakwater for orders shall pay pilotage fees as follows: A sum equal to half pilotage to the port of Philadelphia; the same pilotage fees when outward bound; and if such ship or vessel proceeds to Philadelphia, or any other port on the Bay or River Delaware, the full pilotage fees as fixed by this section in addition.

"C"

An Act ceding to the United States of America, the jurisdiction which this State now has over certain parts of the shore bed and waters of the Delaware Bay with a reservation therein named.

SEC. 1. Be it enacted, by the Senate and House of Representatives of the State of Delaware, in General Assembly met, That all the jurisdiction and title of the State of Delaware over and to so much of the shore bed and waters of the Delaware Bay as are necessary for the erection of a Breakwater or other harbour, and for the construction of such defences as may be thought proper at or near the mouth of said Bay, be and the same is hereby ceded to the United States of America, for the purpose of erecting and keeping up such breakwater or other harbour or such defences and for no other uses or purposes whatosever: Upon condition nevertheless that such harbour and defences as may be there erected shall be constructed and kept up at the sole expense of the United States of America and upon the further condition that all process both civil and criminal under the authority of this State may be executed and served within the place or places the jurisdiction of which is hereby ceded, in the same manner as if no such cession had been made: Provided nevertheless and it is hereby expressly understood and enacted, That if the erection

of such breakwater or other harbour shall not have been commenced at or before the expiration of ten years from the passage of this act, all the jurisdiction, right and powers hereby ceded to or vested in the United States of America shall revert to, and remain in the State of Delaware to as full an extent as if this act had not been passed.

Passed at Dover, }
Jan. 26th, 1827. }

IN THE

Supreme Court of the United States.

EX PARTE HAGAR.

No. 9, ORIGINAL, OCTOBER, 1881.

Return of the U. S. District Judge to Rule.

Globe Printing Office, 339 and 341 Penna. Avenue.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE SUGGESTION OF WALTER F. HAGAR FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, SITTING AS A COURT OF ADMIRALTY.	*No. 9 Original, October Term*, 1881.

The undersigned, judge of the District Court of the United States for the District of Delaware, admits service by copy served upon him of the following rule of the Supreme Court of the United States:

SUPREME COURT OF THE UNITED STATES,

No. 9 ORIGINAL, OCTOBER TERM, 1881.

Ex Parte: IN THE MATTER OF WALTER F. HAGAR, *Petitioner.*	Petition for a Writ of Prohibition.

On consideration of the petition of Walter F. Hagar it is hereby ordered that cause be shown by the judge of the District Court of the United States for the District of Delaware before this Court, at Washington, in the District of Columbia, on the second Monday of December next, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of prohibition should not issue restraining and prohibiting him from proceeding further and from en-

tering any decree except to dismiss the libel in the case of Peter Chambers, libellant, *vs.* the British ship *William Law*, &c., Stilson R. Hilton, master and part owner.

31*st October*, 1881.

In pursuance of said rule and in response thereto, the undersigned makes known to this honorable Court, touching the matters therein referred to, as follows:

That a libel was filed in the said District Court on the sixth day of August, 1881, in the words following, to wit:

To the honorable Edward G. Bradford, judge of the District Court of the United States for the District of Delaware.

The libel of Peter Chambers, of the city of Philadelphia and State of Pennsylvania, pilot, against the British ship *William Law*, whereof Stilson R. Hilton now is, or lately was, master and part owner, her tackle, apparel, and furniture, and also against all persons lawfully intervening for their interest therein, in a cause of pilotage, civil and maritime, alleges as follows:

First. That on the sixteenth day of June, A. D. one thousand eight hundred and eighty-one, the libellant having become duly qualified therefor, was duly licensed to act as a pilot of the first class, in the bay and river Delaware, by the Board of Pilot Commissioners, existing by virtue of, and duly organized under, an act of the General Assembly of the State of Delaware, passed at Dover, on the fifth day of April, in the year aforesaid, and entitled an act regulating pilots and pilotages of and on the bay and river Delaware, and he hath, ever since he was licensed as aforesaid, continued to be, and now is such first-class pilot.

Second. That on the twenty-sixth day of June, in the year aforesaid, the said British ship *William Law* being then bound from a foreign port, to wit, the port of Antwerp, in Belgium, to the Delaware Breakwater for orders, and being in ballast and not solely coal laden, the libellant offered

his services as pilot as aforesaid to the master of said ship to conduct said ship to the Delaware Breakwater, the said ship, at the time of said offer, being at the distance of between six and seven miles from the Cape Henlopen lighthouse, in the district aforesaid, and bearing east northeast from said lighthouse, and being outside of said lighthouse, bearing southwest; but the master of said ship then and there refused to take the libellant as pilot to conduct said ship to the Delaware Breakwater, although said ship then had no pilot on board or in charge of her, and the libellant was the first to offer himself as pilot to said ship.

Third. That immediately after the refusal by the master of said ship to take the libellant as pilot as aforesaid, the said ship proceeded without any pilot to the Delaware Breakwater, and there waited for and received orders before proceeding further up the Delaware bay.

Fourth. That at the time the libellant offered his services as pilot as aforesaid he was ready, willing, and able to render said services, and the master of said ship knew, or had good cause to know, that the libellant was a pilot on the bay and river Delaware, and did not require the libellant to exhibit to him his license as pilot.

Fifth. That the said ship, on the day and year last aforesaid, drew over twelve and not more than fifteen feet of water, which the libellant, under said act of the General Assembly of the State of Delaware, and on account of the refusal aforesaid, was entitled to demand from said ship pilotage at the rate of two dollars and eight cents for each foot of water drawn by said ship, aggregating the sum of twenty-seven dollars and four cents, the same being half pilotage as mentioned in the eighteenth section of said act.

Sixth. That after the arrival of the said ship at the Delaware Breakwater as aforesaid, and while said ship remained there, to wit, on the day and year last aforesaid, the libellant demanded of the master of said ship payment of said half of pilotage, but said master then and there refused to pay the

same or any part thereof, and the libellant has since the day and year last aforesaid caused similar demand to be made in the said city of Philadelphia, but said master again refused to pay said half pilotage or any part thereof, and neither said half pilotage or any part thereof has ever been paid to the libellant or to any person or persons in his behalf, and the same continues wholly unpaid.

Seventh. That by settled usage no vessel, as large as said ship, bound from foreign ports to the Delaware Breakwater for orders, proceed within or behind said breakwater, but anchor in Cape Henlopen Roads, a short distance outside said breakwater, and said ship did not upon the voyage aforesaid proceed within or behind said breakwater, but waited outside the same in said roads for orders.

Eighth. That the said ship is now in the river Delaware and within the jurisdiction of this honorable Court.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable Court.

Wherefore the libellant prays that process in due form of law, according to the course of this honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said British Ship, *William Law*, her tackle, apparel and furniture, and that all persons claiming any right, title or interest therein, may be cited to appear and answer all and singular the matters aforesaid, and that this honorable Court would be pleased to decree the payment of said half pilotage with costs, and that the said vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

PETER CHAMBERS.

Sworn to and subscribed before me this 6th day of August, A. D., 1881.

[L. S.] S. RODMOND SMITH,
Clerk U. S. District Court, District of Delaware.

EDWARD G. BRADFORD, JR.,
Proctor for Libellant.

That process *in rem* as prayed in said libel was therefore issued, and on the same day, to wit, the sixth day of August A. D. 1881, a claim was duly filed on behalf of the owners of said ship, and the usual stipulations were duly given.

That an answer to the said libel was on the twenty-third day of September, A. D., 1881, filed in the words following, to wit:

"*In the District Court of the United States for the District of Delaware.*

"To the Honorable Edward G. Bradford, Judge of the said Court."

The exception and answer of Stilson R. Hilton, master and claimant of the British Ship William Law, to the libel of Peter Chambers against the said ship, her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein in a cause of pilotage civil and maritime respectfully represents:

First. The respondent excepts to the jurisdiction of this honorable Court over the cause of action set forth in the libel, and prays that the same may be dismissed because the proceeding is *in rem* against the vessel, whereas a penalty for refusing the services of a pilot is purely statutory and no lien is conferred therefore against the vessel by the law of the State of Delaware, of 5th April 1881, referred to in the libel, but the same is made collectable from the master, owner or consignee in person and,

Second. The respondent has no other knowledge of the facts set forth in the first article of the libel except as derived therefrom, but believes the same to be true.

Third. The facts set forth in the second, third, and fourth articles of the libel are true.

Fourth. The respondent denying the right claimed by the libellant in the fifth article of the libel, admits the facts stated therein and also in the sixth article to be true.

Fifth. The respondent without admitting the usage mentioned in the seventh article of the libel admits the other facts therein stated to be true.

Sixth. The respondent is advised and so avers that the State of Delaware has no title whatever to or jurisdiction over the Delaware Breakwater or the harbor created thereby, having ceded the same to the United States by an act of Assembly passed the 26th day of January, A. D. 1827, reserving only the right to execute civil and maritime process therein and therefore the act of the State of Delaware of 5th April 1881, referred to in the libel, so far as it applies thereto is invalid and unconstitutional.

Seventh. The respondent is further advised and so avers that the sole and exclusive power of legislation over the said Breakwater and harbor thereby created is vested by the Constitution of the United States in Congress, and that therefore, the act of the State of Delaware of 5th April, 1881, referred to in the libel is invalid and unconstitutional.

Eighth. The Delaware Breakwater is a great public work constructed and owned by the Federal Government for the benefit of commerce generally, and the respondent is advised and so avers that the act of the State of Delaware of 5th April, 1881, so far as it makes pilotage compulsory upon shipping calling at the Delaware Breakwater is a tax upon commerce and therefore invalid and unconstitutional.

Ninth. The respondent avers that the said ship *William Law*, was not bound to any port or place within the jurisdiction of the State of Delaware, and he is advised that the State of Delaware has no power to impose any liability upon such a vessel to take a pilot or any penalty for refusing the services of a pilot.

Tenth. And the respondent avers that even if the said ship *William Law* did not come to anchor in the Breakwater Harbor, but in Cape Henlopen Roads, as in the libel alleged, still she would not be liable to pay compulsory pilotage under a law of the State of Delaware, because the said waters are public navigable waters of the United States.

Wherefore the respondent prays that the libel may be dismissed with costs.

STILSON R. HILTON.
By his Agent, Walter F. Hagar.

WALTER CUMMINS,
Proctor and of Counsel for Respondent.

Walter F. Hagar being duly sworn, according to law, deposes and says that the respondent, Stilson R. Hilton, is now on the high seas and unable to verify the said answer, and that the deponent is his agent in the premises and that the facts therein set forth are true to the best of his knowledge, information, and belief.

WALTER F. HAGAR.

Sworn to and subscribed before me this twenty-first day of September A. D., 1881.

[L. S.] FRANKLIN NICHOLSON,
Notary Public.

That no decree has been made in the said cause, nor has any hearing been had therein.

That the said libel is based upon a statute of Delaware passed April 5, 1881, as follows:

AN ACT regulating pilots and pilotage of and in the Bay and River Delaware. Title.

SECTION 1. *Be it enacted by the Senate and House of Representatives, of the State of Delaware, in General Assembly met:* That immediately after the passage of this act there shall be established a board of pilot commissioners for the State of Delaware, to consist of five persons, citizens of this State, acquainted with the navigation of the bay and river Delaware, to be appointed by the Governor of the State, one for the term of two years, two for the term of four years, and two for the term of five years. Upon the expiration of these respective terms the new appointments shall be made for the term of five years. Any vacancies in the said board by Pilot commissioners. Terms. Vacancies.

death, resignation or otherwise shall be filled by the Governor for the residue of any such terms. The board of pilot commissioners shall meet in the city of Wilmington on the first Mondays of May and November in each and every year and at the call of the president for the time being of the board whensoever occasion may require. That each member of the said board who shall be appointed by virtue of this act shall, before he takes upon himself the existence of the duties herein required, take an oath or affirmation before some one authorized by the laws of this State to administer oaths that he shall well and faithfully, to the best of his skill, understanding and judgment do execute and discharge the office and duties of a member of the said board of pilot commissioners without favor or partiality according to the laws of this State. And the said board of pilot commissioners, three of whom shall be a quorum, when met, shall have full power and authority under the limitations hereinafter prescribed to grant license to persons to act as pilots in the Bay and River Delaware, and to make rules for their government while employed in that service, to decide all differences which may arise between masters, owners and consignees of ships or vessels and pilots except in cases hereinafter excepted: *Provided* that if any person whomsoever shall conceive himself aggrieved by any decision or penalty made, given and imposed by the said board, such persons, may, except in cases hereinafter excepted, within six days appeal therefrom to the Superior Court of either of the counties of this State, and on such appeal the like security shall be entered and the like proceedings had as in the case of an appeal from the judgment of a Justice of the Peace for a debt or demand not exceeding one hundred dollars.

Place and time of meeting.

Oaths of office.

Quorum. Powers.

Appeal.

Security.

SECTION 2. *And be it further enacted by the authority aforesaid*, That any person exercising the profession of a pilot in the bay and river Delaware shall within three months after the passage of this act apply in person to the board of pilot commissioners for a license to entitle him to follow that occupation, and that it shall be the duty of at least three of the said board to examine every person so applying as to his fitness in all respects to perform the duties of a pilot and to grant licenses to all such as they shall deem qualified according to their respective abilities. Those of the first class to persons capable of piloting ships or vessels of any practical

Licenses.

Qualification of application.

Grades.

draught of water. Those of the second class to persons capable of piloting ships or vessels drawing twelve feet of water or under, which licenses shall be in force for one year from the date thereof and until pilots respectively shall next after the expiration of the year, arrive with any ship or vessel at any port on the bay or river Delaware and no longer, but every pilot delivering up his license shall be entitled to receive a new one in lieu thereof, giving like security, as hereinafter directed, unless it shall appear to said board that the person applying is disqualified from exercising the duties of a pilot, and if any person shall after the time herein prescribed for taking out license exercise the profession of pilot in the bay and river Delaware without such license or at any time after his license shall have expired, he shall forfeit for every vessel which he shall undertake to pilot to or from any port on the bay and river Delaware, the sum of thirty dollars, together with the pilotage to which he would be otherwise entitled, one-half to the use of the person who shall sue for the same, and the other half for the use of the pilot commissioners. Each applicant under this section shall pay to the board of pilot commissioners the sum of ten dollars.

Continuance of license.

Penalty for not taking out license.

Fine.

How apportioned.

SECTION 3. *And be it further enacted by the authority aforesaid*, That no license of the first class shall be granted to any person who at the time of passing this act shall not be or within three months previous thereto hath been a licensed pilot by virtue of the laws of the Commonwealth of Pennsylvania or the State of New Jersey, or who shall not have served a regular apprenticeship of at least six years to a licensed pilot on board of a Delaware Bay and River pilot boat, nor any license of the second class except to persons already licensed as aforesaid or such as shall have served an apprenticeship of at least six years in manner aforesaid, nor shall any license be granted until the person applying shall have given bond with sufficient surety to the Governor of this State in any sum not exceeding five hundred dollars conditioned for the true and faithful performance of the duties and services required by this act, and that they will not be aiding or assisting in defrauding the revenue of the United States, and that they will deliver up the license to them granted when required by the board in pursuance of the provisions of this act. *Provided*, that no person shall be entitled to a license as pilot for any branch without first having

Qualifications of licenses of first class.

Bond.

Condition.

Proviso.

under the immediate inspection of his master or a pilot of the first branch, conducted a square rigged vessel (at least brig rigged) twenty times up and twenty times down the river and bay.

License. How forfeited.

SECTION 4. *And be it further enacted by the authority aforesaid*, That if any person having license as a pilot shall for the space of two weeks refuse or wilfully neglect to execute the duties of a pilot, every such pilot upon due proof thereof shall forfeit his license; and if any pilot shall enter into any combination with a view of preventing any other person from executing such duties, every such pilot being thereof duly convicted, shall for the first offence forfeit his license as a pilot for the Bay or River Delaware for the space of three months; for the second offence for the space of one year; and for the third offence absolutely.

What vessels obliged to receive pilots.

SECTION 5. *And be it further enacted*, That every ship or vessel propelled by steam or sails arriving from or bound to any foreign port or place, except such as are solely coal laden, passing in or out of the Delaware Bay by the way of Cape Henlopen shall be obliged to receive a pilot. That every such ship or vessel bound to the Delaware Breakwaters for orders and not proceeding further up the Delaware Bay shall be obliged to receive a pilot; *provided* she is spoken or a pilot offers his service outside of the Cape Henlopen Light-house, bearing southwest, and if the master of any of the said ships or vessels after she is spoken or a pilot offered, shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel to be recovered by a suit in our State courts or before a justice of the peace, or such pilot may pursue his remedy therefor by a libel in admiralty in any United States District Courts as such pilot may see fit and proper to do.

Proviso.

Penalty for refusal of master to receive pilot.

How recovered.

Pilotage of inward bound vessels.

SECTION 6. *And be it further enacted*, That the pilot who shall first offer himself to any inward-bound ships or vessels shall be entitled to take charge thereof; *provided* his license shall authorize him to pilot ships or vessels of such draught of water, and it shall be the duty of such pilot, if required, to exhibit his license to the master or commander of such ship or vessel, and in case the draught of water of such ships or

vessels shall be greater than such pilot shall be licensed to carry, he may, nevertheless, with the consent of the master, take charge of such ship or vessel until a pilot duly qualified shall offer, and if such qualified pilot shall offer before such ship or vessel shall have passed Brandywine Shoals, bearing east, he shall be received and the former pilot entitled to pilotage according to the distance he may have conducted such ship or vessel, and the latter to the residue of the pilotage which shall be ascertained by the president of the board of pilot commissioners for the time being. No vessel employed in and licensed for the coasting trade shall be obliged to receive a pilot or be subjected to the payment of pilotage in case of refusal to receive such pilot, except ships or vessels under register bound to the States or Territories of the United States on the Pacific Ocean, but a coastwise vessel voluntarily taking a pilot, shall pay him the same fees for pilotage as prescribed in the case of a vessel bound to or from a foreign port.

Apportionment and payment of pilotage.

Coasting vessels exempt from pilotage. Exception.

SECTION 7. *And be it further enacted*, That it shall be the duty of every master or commander of a ship or vessel, outward bound, and he is hereby required to remain six hours after his arrival at the capes, to give to the pilot on board such ship or vessel, an opportunity to be taken out, and if the master or commander of such ship or vessel refuses so to do, and if the same can be done without endangering the vessel aforesaid, the master, owner, or consignee of such ship or vessel, shall forfeit and pay to such pilot, his executors or administrators, any sum not exceeding eight hundred dollars, to be recovered in any court of record in which the same may be sued for by action of debt or otherwise.

Outward bound vessels to remain in port six hours for certain purposes.

Penalty.

SECTION 8. *And be it further enacted*, That if it shall so happen that any first-rate pilot having a boat attending him, shall be carried to sea in any ship or vessel contrary to his inclination by stress of weather or other unavoidable accident, the master, owner, or consignee of such ship or vessel shall pay to such pilot, his executors or administrators the same wages as the master of said vessel receives until the return of said pilot to the said capes.

Pilot boats carried to sea.

Master or vessel responsible for.

SECTION 9. *And be it further enacted*, That when any inward bound ship or vessel having a pilot on board, shall be prevented by the ice, or by any other cause, from proceeding

Pilots carried beyond ports on the bay or river Delaware.

How paid.

to any port on the bay or river Delaware, and shall be compelled to proceed to some other port or place not in the bay and river Delaware, the pilot shall be entitled to receive and recover from the owner or consignee of such ship or vessel full pilotage, as if he had conducted such ship or vessel to such ports, and shall also receive the sum of eight cents for each and every mile he shall travel to his usual place of abode.

Pilot fees.

SECTION 10. *And be it further enacted*, That from and after the passage of this act, there shall be paid by every pilot obtaining a license or branch to authorize him to act as pilot for the bay and river Delaware, the sum of fifty cents; to be applied for the support of the board's office.

Compensation of pilots for certain duties.

SECTION 11. *And be it further enacted*, That the compensation to be paid to pilots for conducting to or from any port on the bay or river Delaware, all dismasted or otherwise crippled vessel or vessels, which shall have been in anywise injured so as to occasion to the said pilots any extraordinary care or trouble, shall not exceed double the amount which they otherwise would have been entitled to, of which the board of pilot commissioners shall judge.

When master may discharge pilot.

SECTION 12. *And be it further enacted*, That when any inward bound ship or vessel, having a pilot on board, shall be detained by ice and conducted by him to a place of safety, it shall and may be lawful for the master of any such ship or vessel, after being so detained for forty-eight hours, to discharge his pilot, and in such case the pilot shall be entitled to receive and recover full pilotage as if he had conducted ship or vessel to her port of destination, and in case such pilot shall be detained more than forty-eight hours, his compensation for such detention shall be three dollars per day for every day he shall be so detained.

Damage accruing from negligence of pilot.

How ascertained.

SECTION 13. *And be it further enacted*, That if any pilot shall misbehave in the execution of his duty, so that damage shall accrue by reason of his negligence or incapacity, it shall and may be lawful for the person or persons so injured or aggrieved to complain to the board, who shall thereupon appoint a time and place of hearing, of which due notice shall be given to such pilot, and upon due proof being made therof

to the board, it shall be lawful for them to fine such pilot in any sum not exceeding the amount of the pilotage of the ship or vessel to which such damage shall have happened, for the use of the pilot commissioners, or to suspend such pilot for any time which the board may think proper, and in every case of suspension the pilot shall deliver up his license to the board to be by them kept till the time for which he may have been suspended shall have expired. Fine. Suspension of pilot.

SECTION 14. *And be it further enacted*, That it shall not be lawful for any licensed pilot to demand, ask or receive, for the pilotage of any vessel, or for any other services for which compensation is fixed by law, a greater sum than is authorized by this act; and it shall be the duty of the board of pilot commissioners, whenever it shall have been satisfactorily proven to them that any licensed pilot had demanded, asked or received for the pilotage of any vessel or his services on board of any vessel, a greater sum than is authorized by this act to deprive such pilot of his license for the term of one year from the time when proof thereof shall have been made to them. Unlawful for pilot to receive more than legal fees. Penalty.

SECTION 15. *And be it further enacted*, That if any person, from and after the passage of this act, shall undertake to pilot any vessel, over one hundred tons register, in the bay and river Delaware, or shall in any manner exercise or attempt to exercise the profession of a pilot in said bay and river without a license duly granted by the board of pilot commissioners established under this act, or duly licensed as a pilot under the laws of the States of Pennsylvania or New Jersey, or after such license from the States of Pennsylvania, New Jersey or this State, shall have expired, every person so offending, shall, upon conviction thereof be fined any sum not exceeding one hundred dollars at the discretion of the court where suit is brought. Penalty for piloting vessels without proper license.

SECTION 16. *And be it further enacted*, The board of pilot commissioners established by this act, shall be a body politic and corporate, and may appoint a register, who shall enter in a book to be provided for that purpose, all applications to and all other proceedings of the said board, and shall countersign all warrants for pilots granted by the board, and said board shall have power to enforce all remedies and collect all money penalties under this act by suits in the courts of this State. Commissioners a corporation. Duties.

Fund for payment of salaries of commissioners. How raised.

SECTION 17. To provide a fund for the payment of the salaries of pilot commissioners, each pilot licensed by the said board of pilot commissioners, shall, upon every renewal of his license, pay to the said board the sum of five dollars.

Fees for pilotage.

SECTION 18. The fees for pilotage are hereby established as follows: For every merchant vessel propelled by steam or sails, inward or outward bound, and not exempted from pilotage by virtue of these regulations, drawing not more than twelve feet, three $\frac{74}{100}$ dollars per foot. For every vessel drawing over twelve feet and not more than fifteen feet, four $\frac{18}{100}$ dollars per foot. For every vessel drawing over fifteen feet and not more than eighteen feet, four $\frac{50}{100}$ dollars per foot. For every vessel drawing over eighteen feet and not more than twenty-five feet, five dollars per foot. For every vessel drawing over twenty feet, five $\frac{50}{100}$ dollars per foot. And they shall all receive, over and above the said sums for conducting ships or vessels to or from any port on the bay or river Delaware, between the first day of November and the first day of April inclusive, in any year, the additional sum of ten dollars. That every ship or vessel bound to the Breakwater for orders, shall pay pilotage fees as follows: A sum equal to half pilotage to the port of Philadelphia, the same pilotage fees when outward bound, and if such ship or vessel proceeds to Philadelphia or any other port on the bay or river Delaware, the full pilotage fees as fixed by this section, in addition.

Public act.

SECTION 19. *And be it further enacted*, That this act shall be deemed and taken to be a public act.

Passed at Dover, April 5, 1881.

That the undersigned submits himself to such order or decree as this Honorable Court shall deem it proper to make in the premises.

EDWARD G. BRADFORD,
U. S. District Judge for the District of Delaware.

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In the Supreme Court of the United States.

In the matter of the Suggestion of Walter F. Hagar for a Writ of Prohibition to the District Court of the United States for the District of Delaware, sitting as a Court of Admiralty.

ARGUMENT IN SUPPORT OF THE SUGGESTION.

H. G. WARD,
R. C. McMURTRIE,
For the Relator.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

IN THE MATTER OF THE SUGGESTION OF WALTER F. HAGAR FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, SITTING AS A COURT OF ADMIRALTY.

ARGUMENT IN SUPPORT OF THE SUGGESTION.

This is an application to the court under its power "to issue writs of prohibition to the district courts when proceeding as Courts of Admiralty and Maritime Jurisdiction," Rev. Stat., sec. 688, for a writ of prohibition to the District Court of the United States for the District of Delaware, from proceeding further in a cause of pilotage, civil and maritime, there pending, which arose as follows:

This British ship William Law, while on a voyage from Antwerp to the Delaware Breakwater, for orders, was spoken by one Peter Chambers, who tendered his services as a pilot, which having been refused, the vessel entered the Capes without a pilot, and came to anchor in Delaware Bay, outside of the Breakwater harbor. The vessel was subsequently ordered to load at the port of Philadelphia, and upon her outward voyage from Philadelphia she was arrested by process issued out of the District Court of the United States for the District of Delaware at the suit of Chambers. [See libel, "Exhibit A" of suggestion.]

The present application is made in conformity with the cases of the United States *vs.* Peters, 3 Dall. 121, and *Ex parte* Easton, 5 Otto, 68, in neither of which the court below had passed upon the question of jurisdiction. The objection in the first case to the jurisdiction was that the vessel attached belonged to another sovereign, and in the second case that the cause of action, though within the Admiralty, should have been *in personam*, and not *in rem*.

With reference to the party making the suggestion, attention is called to the case of Worthington *vs.* Jeffries, 10 L. R., C. P. 379, in which the prohibition was moved for by one Wood, as a stranger to the suit, on the instructions of the defendant's attorney. The court held that a superior court is bound to grant a writ of prohibition on the application either of a party or of a stranger, without regard to the size of the claim, if it be clearly of the opinion both with reference to the law and the facts that an inferior court is exceeding its jurisdiction.

This application for a writ of prohibition to the District Court of Delaware rests on the want of jurisdiction of that court over the claim for which the libel is filed.

The grounds of that claim are found in the libel (page 4 of the suggestion), viz.: The libellant, a licensed pilot of Delaware, offered his services as pilot to a foreign vessel on the high seas bound to the Breakwater for orders. The vessel refused to employ the pilot, and for this pilotage is claimed. It is rested by the libel on the statute of Delaware printed, page 6 of the suggestion. There are two grounds against the jurisdiction:

First.—The statute gives no lien or claim against the vessel, but only a claim *in personam* against the master, owner, or consignee (see sec. 5).

Second.—The statute of Delaware can not impose a pilot on a vessel not bound to or ultimately going to or coming from a port of that State.

As to the first. This was decided in the case of the "Robert J. Mercer," 1 Sprague, 284, following the reasoning in the case of the "General Smith," 4 Wheat., 441. Peyroux *vs.* Howard, 7 Peters, 341, where it was held that if no lien or claim against the ship is given by a State law, admiralty courts can not enforce the claim. The libel here is *in rem*, and not against any person made liable by the statute.

The other ground is of much greater consequence, as the act materially affects the commerce of Philadelphia. 1. In imposing pilotage and half pilotage on all vessels going to Philadelphia, if they stop at the Breakwater for orders or otherwise. 2. In depriving Pennsylvania bound vessels of the benefit of a recent reduction in the rates of pilotage between Philadelphia and the ocean.

The vessel in question did proceed to Philadelphia, not having been even within the harbor created by the Breakwater, at which there is no port (page 4 of suggestion); and there is a plain implication that she was ordered to Philadelphia, and proceeded there (Libel, p. 5 of suggestion). The effect, therefore, of affirming the legality of the Delaware act is to impose on vessels bound for Pennsylvania ports a liability for pilotage as regulated by Delaware, because they are thus compelled to pass through waters bounded by Delaware, or certainly if they see fit to stop at the national harbor called the Breakwater. And this liability is much more onerous than is imposed by the laws of Pennsylvania, beside compelling the employment of a pilot licensed by Pennsylvania.

This latter objection of course ceases if Delaware is authorized to license pilots who may take a vessel into ports of Pennsylvania of which there can be none on

waters bounding the two States, as there are no such waters.

And this depends on the effect of the act of Congress of 1837, presently to be examined.

But for that act there can be no question that the capacity of Delaware to compel the employment of pilots for vessels coming to the vicinity of the Breakwater, but not bound to a port of Delaware, depends on the act of 1789, conferring on the States the power to regulate pilotage.

It is immaterial for this question whether the fact asserted as to the difference in the rates imposed by Pennsylvania and Delaware is true; it is enough that it might be or might become true. The real question is one of power, not whether it is fairly or judiciously exercised.

It is plain, if Delaware can impose any duty as to pilotage on vessels not bound for her own ports, that State is the sole judge of the proper measure of that burden—for to it must, on that hypothesis, have been delegated the power by the act of 1789.

But before considering the act of 1789 it is proper to call attention to two things:—

1. The reasons for thus conferring the power of legislation on the States, over what is confessedly a subject of the national jurisdiction.

2. The dangers that result from the existence of legislative powers over subjects not in any way represented in the legislature and powerless to be heard against the injustice of the measures.

As to the first:—

These are so admirably pointed out by Mr. Justice Curtis, in Cooley *vs.* The Board of Wardens, 12 Howard, 299, that it seems difficult to add anything on that score. The following are some of the passages:—

"We do not perceive anything in the nature or extent of this particular discrimination in favor of vessels engaged in the coal trade, which would enable us to declare it to

be other than a fair exercise of legislative discretion, acting upon the subject of the regulation of the pilotage of this port of Philadelphia, with a view to operate upon the masters of those vessels who, as a general rule, ought to take a pilot, and with a further view of relieving from the charge of half pilotage such vessels, as from their size or the nature of their employment, should be exempted from contributing to the support of pilots, except so far as they actually receive their services."

"The purpose of the law being to cause masters of such vessels as generally need a pilot, to employ one and to secure to the pilots a fair remuneration for cruising in search of vessels, or waiting for employment in port, there is an obvious propriety in having reference to the number, size, and nature of employment of vessels frequenting the port; and it will be found by an examination of the different systems of these regulations, which have from time to time been made in this and other countries, that the legislative discretion has been constantly exercised in making discriminations founded on differences, both in the character of the trade and the tonnage of vessels engaged therein."

* * * * * *

"Imposts and duties on imports, exports and tonnage were then known to the commerce of the civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforce their pilot laws, as they were from wharfage or towage, or any other local port charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports and tonnage would be to confound things essentially different, and which must have been known to be different by those who used this language."

"Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the

consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the Constitution; for it can not be supposed uniformity was required, when it must have been known to be impracticable."

* * * * * *

"But, as already stated, pilotage fees are not duties within the meaning of the Constitution, and certainly Pennsylvania does not give a preference to the port of Philadelphia by requiring the masters, owners, or consignees of vessels sailing to or from that port to pay the charges imposed by the twenty-ninth section of the Act of 1803. It is an objection to, and not a ground of preference of a port, that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce, from time to time, renders consistent with the general policy of the pilot laws. This State, by its act of the 24th of March, 1851, has essentially modified the law of 1803, and further exempted many vessels from the charges now in question. Similar changes may be observed in the laws of New York, Massachusetts, and other commercial States, and they undoubtedly spring from the conviction that burdens of this kind, instead of operating to give a preference to a port, tend to check its commerce, and that sound policy requires them to be lessened and removed as early as the necessities of the system will allow.

* * * * * *

"Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly varied subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port, and some like the subject now in question, as imperatively demand-

ing that diversity which alone can meet the local necessities of navigation."

* * * * * *

"The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local, and not national; that it is likely to be the best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."

* * * * * *

"This would be to affirm that the nature of a power is in any case something different from the nature of the subject to which, in such case, the power extends; and that the nature of the power necessarily demands in all cases exclusive legislation by Congress, while the nature of one of the subjects of that power not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits."

* * * * * *

"It is the opinion of a majority of the court, that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that, although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States."

We ask attention to the fact that every ground on which the legislation is justified is that it is essentially a local matter, dependent on the position of the *ports of destination* or departure, and the necessity of adapting the regulations from time to time to the exigence of *the ports*

where the trade exists, and of guarding that trade from undue or unnecessary burdens of this kind.

And the same principle is asserted in The Annapolis, Lushington, 295, to justify legislation affecting foreign vessels when on the high seas, viz.:—*that their port of destination* is the ground on which alone such legislation as to foreign vessels can be maintained. "Admitting the pilot station off Port Lynas to be out of British jurisdiction for some purposes, I think it was competent to the British legislature to make this enactment without any violation of international law. In revenue, quarantine, and pilotage matters the necessity of the case seems to require a more extended jurisdiction than the three-mile limit. This enactment is not to be taken simply by itself as prescribing something to be done out of British waters, but must be construed in conjunction with the circumstances of the ship's entry into the port of Liverpool." And this same ground of decision was adopted by Judge Sprague in "The Schooner Thebes," 12 Hunt's Merch. Mag., 82, where he held that a vessel merely traversing the waters of Boston harbor was not liable to pilot regulations for Boston harbor.

That this was the view on which the act of 1789 was passed, is really declared in the act of 1837, the single exceptional legislation by Congress. For if each State bordering on the waters constituting a port could legislate on the subject of pilots for that port, as they certainly could for the waters of the port, which are common to both States, the legislation was absolutely uncalled for.

As to the only other category, viz., that when more than one State borders on navigable waters, each might compel the employment of their own pilots while passing through their own waters, the act of 1837 has made no provision; for it has confined the remedy to a license to take a pilot from either to the special case of the vessel being bound to or coming from a port situate on waters which are the

boundary between the State granting the license and the State within which is the port of destination or departure.

As to the dangers that are incident to the permission for Delaware thus to legislate for Pennsylvania commerce, it is hardly necessary to do more than advert to the subject. It is precisely that on which the Revolution was justified, and the only ground originally assigned for that act—government by laws made by those having no interest or an adverse interest to the governed; and as matter of fact, it is well known that this legislation was procured from Delaware by pilots because of a lightening of the burdens on vessels by the Pennsylvania Legislature.

The Act of 1789, the foundation of all the jurisdiction, reads thus:—

"Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively *wherein such pilots may be*, or with such laws as the States may respectively enact for the purpose." (4235 Rev. Stat., copied from Act 1789, c. 9, s. 4.)

The reasons for this legislation show the proper interpretation of the words; for,

1. If construed literally, the claim can not be mantained as the act done by the parties was not within the jurisdiction of any State, but on the high seas, if by place is meant the locality at the time of tendering the service or the employment.

2. The locality of the person of the pilot was certainly not intended, for that would be to require the legislation to vary with the place of employment, *e. g.* his residence, and there might be no legislation in that State.

3. The place of the services done or where they should be used no doubt is meant.

And that depends on the port of destination or departure; for, as to them, all the waters between these places and the ocean are as much their waters as waters of any other State.

4. If this be not so, it is an inevitable construction that Congress intended that in passing up a river bounded by twenty or more States, as the vessel alternately passed the *filum aquæ*, she might be subjected to as many regulations as there might be States where the services were rendered, which is absurd.

5. As the employment or refusal in case of inward-bound vessels is always on the high seas, and frequently if not generally more than three miles from the shore, there is not, and there never can be any legislation existing for want of legislative capacity in the States as the subject is extra-territorial.

And the only possible ground for sustaining legislation as to inward-bound vessels when not within a county is that stated in the case of The Annapolis, Lushington, 295—viz., the intention to enter a port of the country that has made the regulation, which intent is subsequently executed.

For example. Should a ship approach the Capes of Delaware and refuse a pilot, and then change her destination to New York or Europe, it can not be pretended she was subject to Delaware legislation on any subject whatever under that statute, or by common law or the law of nations.

It may be said by the claimant—

(*First.*) The waters in question were waters of Delaware.

But until the capes were passed the waters on which the ship floated were not waters of Delaware for any purpose whatever.

(*Second.*) If the voyage had continued direct and without intermission to Philadelphia, Delaware had no jurisdiction for any purpose, unless it is proposed to assert that there is a sovereignty in each State over vessels bound to the port of one State while passing through the public waters of the United States because they are a boundary of the State claiming such possession.

(*Third.*) The absolute right to the waters of Delaware Bay were secured to Penn by the colonial charter. The charter of 1681 of Charles II. to William Penn for the province of Pennsylvania, after describing the territory granted, continues:—

"We doe also give and grant unto the said William Penn, his heirs and assigns, the free and undisturbed use and continuance in and passage into and out of all and singular ports, harbors, bayes, waters, rivers, isles, and inlets belonging unto or leading to and from the countrey or islands aforesaid."—*1 Vol. Colonial Records, IX.*

The reason for this, at the time, is evident enough. Robber barons, and not less robber governments, were in the habit of exacting tolls and imposing restrictions under the pretense of territorial sovereignty over the passers through their countries or along their rivers. And it was evident that ownership of the shores of the river below the Pennsylvania lines *might be* a pretense for subjecting the foreign commerce of the colony to claims by the present or future sovereign of those shores. And, indeed, there was such a claim made by the subsequent patentee of Delaware.

The charter for the three lower counties Newcastle, Kent, and Sussex, which now comprise the State of Delaware,

was granted to William Penn by the Duke of York almost a year later, giving him the Delaware river in the twelve-mile circle at New Castle, subject to the public right of navigation. *Pea Patch Case*, App. 2 Wall., Jr., cxxiii. and cxlviii.

In 1707 the authorities of the three lower counties, whose eastern boundary at New Castle was low-water mark on the Jersey side, required all vessels navigating the bay and river Delaware to pay a tax, and erected a fort at that point to enforce the law. This led the representatives of the freemen of the province of Pennsylvania to measure their rights by a comparison of the two charters, and among other things in their protest they reached the following conclusion:—

"In the meantime we shall insist that the liberty of the free use and passage to and out of the ports of this province granted by the above-recited royal charter, is well warranted by the laws of England. And that no imposition can by any act or ordinance made at New Castle be lay'd upon any vessel bound to or from any port in this province which does not unlade at some key or place within the said lower counties. And we conceive that upon a strict examination of their said act of assembly, it will most evidently appear that the vessels not bound to or out of some port or place there cannot legally be obliged to comply with the impositions of the said act." *2 Vol. Colonial Records, 395.*

When the colonies declared their independence July 4th, 1776, they succeeded respectively to the rights of the crown within their charter limits, and the navigable streams and waters continued to be held for their common use as they had been theretofore. *Martin* vs. *Waddell*, 16 Pet., 367.

It can not be that Pennsylvania as a member of the Union is worse off in respect to her commerce than she was as a province, which will certainly be the case if, under the Union, Delaware can impose pilotage on Pennsylvania commerce without the consent of that State,—indeed, repeal her laws on the subject.

These rights are now secured by the Federal Constitution. Gibbons *vs.* Ogden, 9 Wheaton, 1.

(*Fourth.*) The act of 1837 presupposes this state of the law, *i. e.*, that each State has the exclusive right to regulate pilotage for her own commerce, as already stated.

It may also be said the Breakwater is a port of Delaware.

Passing the facts that the ship did not enter that harbor, and that there is there no port, it is sufficient to say, that harbor, place, or port, and the territory on which it stands, is national and not State property.

It was ceded to the United States. See act of Delaware (p. 7 of suggestion).

The effect of that is to deprive Delaware of all possible sovereignty except that of serving process.

The Breakwater was constructed by the United States in the bed and waters of Delaware Bay, with the consent of the Legislature of Delaware, evidenced by the act of January 26th, 1827. Laws of Delaware, Vol. 7, p. 31. [See "Exhibit C" of suggestion.] Over such a place Congress has, by section 8 of article 1 of the Constitution, the power "to exercise exclusive legislation in all cases whatsoever * * * over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The mere consent of the legislature, without more, confers this exclusive power, as was held by Judge Story in U. S. *vs.* Cornell, 3 Mason, 60, where the defendant was indicted for a murder committed in Fort Adams, a place which had been purchased with the consent of the State, but with no cession of jurisdiction. He said, *inter alia:* "The Constitution of the United States declares that Congress shall have power to exercise 'exclusive legislation' in all cases whatsoever over all places purchased by

the *consent* of the *legislature* of the *State* in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When, therefore, a purchase of land for any of these purposes is made by the National Government, and the State legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, *ipso facto* falls within the exclusive jurisdiction of Congress, and the State jurisdiction is completely ousted. This is the necessary result for exclusive jurisdiction, is the attendant upon exclusive legislation, and the consent of the State legislature is, by the very terms of the Constitution by which all the States are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place."

The Breakwater and its harbor fall within the words of the Constitution, which must be construed to carry out the evident intent of Congress to cover public works and improvements constructed at the public expense. For instance, in Commonwealth *vs.* Clary, 8 Mass., 72, the defendant was indicted for selling spirituous liquors contrary to the form of the statute. The sale took place on a tract of land which the United States had purchased with the consent of the State, reserving the right to serve civil and criminal process, for the *sole* purpose of erecting forts, magazines, arsenals, and other needful buildings. In point of fact the land was used for buildings for the manufacture of small arms. No attention at all was paid by the court to the argument that this was not a building within the clause. It was held that the jurisdiction of the United States was so exclusive over the tract that the laws of the State did not apply to it at all, and that the State courts could take no cognizance of the offense charged in the indictment, and that the defendant must be discharged.

But even if there were doubt whether the Breakwater is such a construction as to fall within the clause of the

constitution in question, the result would be the same, because the Legislature of Delaware did not merely give its consent, but went on and expressly ceded its jurisdiction to the United States. There can be no doubt about the extent of the grant, because but one right has been reserved, namely: the right of the State to execute and serve civil and criminal process within the place over which she has ceded her jurisdiction to the United States. The purpose and effect of this reservation has been frequently determined. Chancellor Kent says of it at page *429 of Volume 1 of his Commentaries: "What then is the true intent and effect of the saving clause annexed to the cessions? It does not imply the reservation of any concurrent jurisdiction or legislation, or that the State retained a right to punish for acts done within the ceded lands. The whole apparent object of the proviso was to prevent the ceded lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State, and such permission to execute process is not incompatible with exclusive sovereignty and jurisdiction. The acceptance of a cession with this reservation amounts to an agreement of the new sovereign to permit the free exercise of such process as being *quoad hoc* his own process."

See also Comm. *vs.* Clary, *supra*; Opinions of the Attorney-Generals, Volume 8, pp. 387 and 389; U. S. *vs.* Ames, 1 W. and M., 76.

Such a cession is made a prerequisite by law.

U. S. Revised Statutes, sections 355, 1838, 4661, and 4662.

A very analogous case to the present one arose in Massachusetts, Mitchell *vs.* Tibbetts, 17 Pick., 300, which was a *qui tam* action to recover the penalty provided by a Massachusetts statute for the neglect of any vessel carrying stone, gravel, and sand in that State to be marked and weighed. The defendant was master of a vessel which carried a load of stone to the United States navy yard,

which was on a tract of land in Charlestown, which had been ceded to the United States by consent of the legislature, reserving right to execute civil and criminal process. The court held the act did not extend to and operate within that territory.

In all places so ceded the jurisdiction of the United States for all purposes, both general and local, is exclusive of that of the States. Hence obviously the attempt of Delaware to regulate the pilotage of vessels either going to or coming from the Delaware Breakwater is invalid, and can not be enforced.

Granting that it was intended to give to the States jurisdiction to legislate as to national ports if locally within the limits of the State prior to the cession, and that all these decisions do not apply, then we insist that for the reasons above stated, *place* where the pilots are, to subject the vessel to the jurisdiction of a State, means the place to which or from which the vessel is going, for the purpose of her voyage. And that a temporary stoppage to await directions as to the port of entry can not subject that vessel to local regulations, and free her from those of the port to which she is destined. For it can not be supposed that it was intended to authorize the imposition of a double pilotage because of the mere fact of anchoring or lying to for orders, or to wait for mails or passengers at a point in the river connecting the port and ocean, because that point lay next the Delaware shore.

The result would be to enable every state thus to tax vessels as they use the national waters for transit, while they certainly must be taxed by the laws of the port of destination, if there be one in the United States.

This becomes absurd (looking to the reasons for the law assigned by Curtis, J.) if *place* be here taken literally. For then a direction to a vessel to wait within the bight of the Capes for orders from Philadelphia, makes the anchorage ground the *place* for determining what pilotage regu-

lations govern her, instead of those of the port to which she may be directed to proceed; and thus, as she may chance to anchor on the New Jersey or Delaware side of the *filum aquæ*, determine the law she is under for pilotage to Philadelphia.

Thus the law stood until the act of 1837, section 4236 Rev. Statutes, as stated by Mr. Justice Curtis in Cooley *vs.* The Board of Port Wardens. Each State could regulate pilotage for its own commerce, *i. e.*, as respects all vessels bound to or leaving its ports.

This right extended to all pilotage ground on national waters, whether ocean or inland.

There then arose a case for interference by the United States.

The port of New York is bounded by New York on the one side and New Jersey on the other. The waters were common and the landings from the port in the two States were from these common waters. The monopoly by the New York pilots had led to carelessness, which caused great loss of life and property, and a rival set were necessary to create competition. New Jersey was willing to license such persons, and undoubtedly these could carry the vessel into the waters constituting the port of New York, because they were as much waters of New Jersey as of New York. But if the vessels moored at New York wharves they were liable to a penalty for not employing a person licensed by New York. To sanction the employment of this proposed set of pilots the act was passed. It reads thus—

"That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situated upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage or custom to the contrary notwithstanding."

The words import no more than is expressed, *i. e., a license to employ a pilot licensed by another State*—other than what?—other than the State to whose port the ship is bound or from which it sails. In what case may such pilot be employed? When the port is on waters which are *the boundary* between the State that licenses from the one to whose port the vessel is going. It is impossible to suppose that any authority was needed to sanction the employment to bring the vessel to the *waters* constituting the port, because *ex concessis* these were common waters of the two states. Both had the same jurisdiction over their respective sides of the *filum aquæ*. It was because the place of lading, the place of clearance, determined up to that time the exclusive right to license.

The capacity to pilot to the waters of a port situate on waters common to two States, that is, forming a boundary between them, necessarily involved the capacity to the port of either State formed by those waters.

The justification for the act and its reasonableness is thus shown, and the state of the law prior thereto also.

It is possible that absurd and iniquitous legislation, compelling the employment of a pilot from both States, might have been anticipated—but if it was, there is no legislation to prevent it, for the act is silent as to that. It is more probable that Congress was well aware of the rule that each State could regulate pilotage for its own commerce on all places on navigable waters between its own ports and the ocean.

If it were intended that any State bordering on navigable waters might license the employment over those navigable waters, in any other case than that of vessels bound to her own ports (which was already an existing power), why is there the limitation in the grant to vessels bound to a port of the kind mentioned only—and why not give the right as to any port situate on that river or bay, &c.

The reason seems obvious. The result would have been to grant a power to legislate on matters in which the State

had no interest. Vermont and New Hampshire could have legislated for the Connecticut; Ohio, Kentucky, Illinois, Missouri, &c., for the sea-going vessels of New Orleans.

The rule or canon that requires exceptional grants to be strictly followed accords with the common presumption if we look at the evils to be remedied and the result of enlarging the operation of the clause. And there is no more ground for assuming an intention to confer a power to license beyond the particular case mentioned than to imply an intention to allow all the States, or any one State, to legislate, irrespective of the ports of destination or locality of the waters altogether.

This act, the history of which was well known to all familiar with the events in New York commerce in 1834-7, led Mr. Justice Curtis to call this *the single* exceptional legislation. 12 Howard, 320.

Chief Justice Taney had already said of it in the License Cases, 5 Howard, 580, "There is but one law of Congress making any specific regulation upon this subject" (*Pilotage*), "and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York law, leaving the residue of its provisions entirely untouched."

A reference to the debates in the Senate on the bill introduced to repeal the act of 1837 will show precisely the emergency which led to its passage. Vol. 18 Congressional Globe, 620–625 and 884.

Delaware, therefore, draws no authority from this act unless there be a port opposite her shores on the Delaware, in New Jersey, and the vessels are bound to it, or come from it. The justification under the statute must bring the case within the words of the statute.

It is plain, therefore, that

(*a.*) Delaware has absolute jurisdiction, because vessels pass through waters on which she is bounded, irrespective of the place to which they are bound, or from which they come; or

(*b.*) She has exclusive jurisdiction, or concurrent with New Jersey *alone*, or as to vessels bound to the Breakwater, because that is her port, or a port on waters forming a boundary between her and New Jersey; or,

(*c.*) She has no jurisdiction if the ship is not bound to or from a port in State or to one in another State on waters dividing that State from Delaware.

As to the first, it has never been contended that Congress intended to put the control of such matters on the point of a supposed sovereignty over the national waters and the commerce using those waters. This is expressly contradicted by Cooley *vs.* The Port Wardens.

As to the second, this would be a most extravagant recognition of State sovereignty over national waters and commerce, and renders the reasoning of this court in Cooley *vs.* The Port Wardens absurd. For what sort of argument is it that Congress has left matters entrusted to it to State regulation, because the subject is essentially local to the *particular ports* to which or from which the vessel is going, if the ground is territorial sovereignty of the States over the waters used to approach or leave the port, irrespective of the locality of that port.

The libel, therefore, shows no jurisdiction, because of the *absence of that averment, which alone confers the jurisdiction* that the ship was bound to or from, and actually went to or came from a port over which the State whose licensed pilot makes the claim was, either by the act of 1789 or the act of 1837, authorized to grant a license to exercise the calling, and *therefore* had jurisdiction to impose the duty of employing, or paying if employment was refused, which is the ground of the claim set up in this libel.

H. G. WARD,
R. C. McMURTRIE,
For the Relator.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the matter of the Petition of WALTER F. HAGAR, for a Writ of Prohibition to the District Court of the United States, for the District of Delaware, sitting as a Court of Admiralty.

No. 9, Original. Oct. Term, 1881.

Supplemental Brief on behalf of the Relator.

H. G. WARD,
R. C. M'MURTRIE,
Proctors for Relator.

U. S. S. C.

In re HAGAR.

No. 9, Original Oct. Term, 1881.

Additional brief on behalf of the relator as to the legislation of the States on the subject of pilotage, before the passage of the Act of Congress of March 2d, 1837.

To measure the present power of the States, to regulate commerce in respect to pilotage, one must know what were the powers of the States at the time they entered the Union, and how they were affected by the two acts passed by Congress, the first in 1789, in the following words :—

"That all pilots in the bays, inlets, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws, respectively, wherever such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provisions shall be made by Congress." *U. S. Rev. Stat., 4235.*

And the second in 1837, in the following words :—

"That it shall and may be lawful for the Master or commander of any vessel coming into or going out of any port situated upon waters which are the boundary between two

States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding." *U. S. Rev. Stat., 4236.*

Or the question may be simplified by omitting the act of 1789, which is understood by all to express the intention of Congress to leave the subject of pilotage in the States respectively. Whatever powers they had when they entered the Union they were to continue to exercise until Congress should avail itself of the power to regulate commerce, conferred upon it by the Constitution. Of course Congress did not mean to delegate its whole power to each State, but simply not to use its power at all, and in the meantime to leave the States to exercise their own powers respectively. The effect of this is to make every State statute passed within the scope of its powers an Act of Congress. This leaves for investigation only the powers of the States when they entered the Union, and the extent to which they were affected by the Act of 1837.

In the case of the *Clymene*, lately decided in the District Court of the United States for the Eastern District of Pennsylvania, *9 Fed. Rep.*, 164, Judge Butler was of the opinion that each State, by virtue of the act of 1789, had power to license pilots, and regulate their employment, in common, however, with its neighbors. This he looked on as the natural result of the equal right each State has in public navigable waters of the United States. But that right is of navigation, and for a State to compel vessels not sailing to or from its ports to take pilots can in no sense be called an exercise of its right of free navigation. If it be so, then every State, without regard to its situation, has an equal right to regulate pilotage. Kentucky and Kansas, as well as Delaware, may supply pilots to vessels bound to and from Philadelphia, because they have an equal right for the purposes of navigation in the waters of the Delaware river and bay. If, on the other

hand, the right be confined, as Judge Butler appears to intend, to the States bordering upon the same waters, then it can only be rested on the principle that the vessel, during her navigation, passes through navigable waters of the United States within the territorial limits of those particular States, which is utterly inconsistent with the free use of those waters for navigation, and is the extremest possible extension of the doctrine of States rights.

This power, Judge Butler thought, having led to conflicting legislation, Congress passed the Act of 1837 to restrain the States from legislation excluding each other. "It might readily have been foreseen that the States, thus left to separate independent action, would soon come into conflict. Two or more bounding on the same water, each intent upon its individual interests, would be impelled to conflicting hostile legislation. Such a result did follow, and to provide for it Congress in March, 1837, enacted, &c. (the act of 1837)." He relied upon *Flanigen* vs. *The Ins. Co.*, 6 Barr., 306, and proviso of the Act of Congress of 1867 (called in the opinion the act of 1847), in confirmation of this view.

Now, these two conclusions are founded on mistakes of fact. The States never intended or attempted to legislate within each others' territories, and the act of 1837 was not passed to prevent conflicts. No conflicts existed, and it was neither a declaratory nor a restraining act, but was emphatically an enabling one.

Before examining the legislation of the States it ought first to be remarked that an act is not extra-territorial because it requires something to be done, as a pilot to be taken on the high seas, or on waters without the territory of the State enacting the law. That is simply the condition upon which, and upon which only, the State will allow the vessel to enter

its ports. The law only becomes effectual when the vessel does enter. When on the high seas the law is of no force. She may do as she pleases, refuse the pilot, and go elsewhere; but if she refuses, and then enters, she will subject herself to the law by so doing. This was well explained by Dr. Lushington in *The Annapolis*, Lush., 295 :—

"Admitting the pilot station off Port Lynas to be out of British jurisdiction for some purposes, I think it was competent to the British Legislature to make this enactment without any violation of international law. In revenue, quarantine, and pilotage matters the necessity of the case seems to require a more extended jurisdiction than the three-mile limit. This enactment is not to be taken simply by itself, as prescribing something to be done out of British waters, but must be construed in conjunction with the circumstance of the ship's entry into the port of Liverpool."

And also in *Cisco* vs. *Roberts*, 36 N. Y., 292; *The Bark Nevada*, 7 Bew., 386.

The States which now compose the Union never attempted, either as Colonies, as Members of the Confederation, or as Members of the Federal Union, down to the year 1837, to do more than to regulate the pilotage of vessels bound to and from *their own ports* respectively. Wherever any Legislation existed as to pilotage through passes or over bars or shoals without exclusive reference to the destination of the vessel, like the Act of Massachusetts of February 24, 1820, Laws of Massachusetts, 1818-1822 v. 412, entitled "an Act for establishing the compensation for piloting vessels through the Vineyard Sound over Nantucket Shoals in certain cases," the employment of a pilot was made voluntary and not compulsory.

An examination of the Statute Laws of the various States will bear this statement out, and it would not be practica-

ble to incorporate in an argument like this such a mass of legislation. It would be easy for the other side to point out instances of legislation inconsistent with it if they can be found. Of course, if they do exist it must be in the legislation of adjacent States lying on common waters, because it could not be pretended, even on the theory of the equal right of every State in the public navigable waters of the United States, that States distant from each other, like Florida and New York, could pass laws affecting each other's ports.

The States so situated are *Maine* and *New Hampshire*, with reference to the Piscataqua River:

New York and *New Jersey*, with reference to New York Bay:

Delaware, *New Jersey* and *Pennsylvania*, with reference to Delaware Bay and River:

Maryland and *Virginia*, with reference to the Chesapeake Bay and Potomac River:

South Carolina and *Georgia*, with reference to the Savannah River:

Georgia and *Florida*, with reference to the St. Mary's River:

Texas and *Louisiana*, with reference to the Sabine River:

Washington and *Oregon*, with reference to the Columbia River:

And then inland along the Mississippi River: *Louisiana*, *Mississippi*, *Arkansas*, *Tennessee*, *Missouri*, *Kentucky*, *Illinois*, *Iowa*, *Wisconsin:*

Along the Ohio: *Kentucky*, *Illinois*, *Indiana*, *Ohio*, *West Virginia.*

It is proposed to show from their legislation that all these States, up to the year 1837, confined themselves to regulating shipping bound to and from *their own ports.* Resort has been had for this purpose to the Law Library at Philadelphia, whose collection not being complete, much may have been missed.

But it is thought that enough positive confirmation of what has been said has been found.

The first law of Maine is that of February 24, 1821 (*Laws of Maine*, Vol. I., 613), entitled, "An act for regulating pilotage in the several *ports of this State*." There is no legislation of this State as to Piscataqua river or the port of Portsmouth.

The first law of New Hampshire is 22 June, 1785, (Vol. I., 282), entitled, "An act for regulating pilotage in the *port of Piscataqua*." There is no legislation for any other place.

The first law of New York is 14 April, 1784 (*1 Laws of New York*, 86), entitled, "An act for the regulation of pilots and pilotage for the *port of New York*, and for other purposes therein mentioned," the preamble of which is: "Whereas, the safety of the navigation to and from *the port of New York* will be much promoted by the establishment of proper regulations for the pilots and of their rates of pilotage," be it enacted, &c. No port but that of New York is mentioned in its legislation.

The first law of New Jersey is 8 Feb., 1837 (*Laws of New Jersey, 1836, 1837*, p. 110,) entitled, "An act to establish and regulate pilots for the *ports of Jersey City, Newark*, and *Perth Amboy*, by the way of Sandy Hook," the preamble being, "Whereas, the *Commerce of New Jersey* requires every facility and aid usually extended to maritime States; and whereas, at this time there are no licensed pilots for the safe conduct of *our increasing commerce*, rendering us wholly dependent on a neighboring State, therefore be it enacted," &c.

Section XVIII. is in the following words:—

"That if the Master of any vessel (except schooners and sloops employed in the coasting trade, licensed for that purpose, and not making the usual signal for a pilot), coming into the ports of Jersey City, Newark, or Perth Amboy, or into any of the waters of New Jersey, shall refuse to receive

on board and employ a pilot who shall have offered to go on board and take charge of the pilotage of such vessel, the Master, owner, or consignee of such vessel shall pay to the pilot half pilotage from the place at which such pilot shall have offered himself to the port of destination; but no half-pilotage shall be collected from any vessel in charge of a New York pilot; *Provided*, Vessels in charge of a New Jersey pilot be permitted to enter and traverse the waters of New York without being compelled to pay half pilotage."

The first Law of Delaware is 5 February, 1819, (5 Laws of Delaware, 395) entitled "An Act for the relief of distressed and decayed pilots, their widows and children." It provided that every ship or vessel, with certain exceptions, "sailing from or bound to *any port in the State of Delaware*," shall be obliged to receive a pilot, *i. e.*, Pennsylvania pilot, there being no others licensed. Half pilotage was to be paid to the Pennsylvania Society.

The first Law of Pennsylvania is 26 February, 1773, (Hall and Sellers Laws of Pennsylvania, p. 464) entitled "An Act appointing Wardens *for the port of Philadelphia* and for other purposes therein mentioned." It was subsequently amended down to the year 1803, when it was repealed by the Law of 29 February, 1803, (4 Smith's Laws, 67) entitled "An Act to establish a Board of Wardens for the *port of Philadelphia*, and for the regulation of pilots and pilotages, and for other purposes therein mentioned," which is the one, with subsequent amendments, now in force. All these Acts applied solely to vessels bound to and from the port of Philadelphia.

The first Law of Maryland is Chapter XXVI of 1787, (Laws of Maryland, Vol. 2) entitled "an Act to establish pilots and regulate their fees." The preamble being in the following words: "Whereas, it is necessary for the safety and preservation of vessels bound *from this State* to sea, or

coming into Chesapeake Bay, and bound *up any river of this State* and to some *port thereof*, that able and experienced pilots should be established to conduct and pilot such vessels for reasonable fees to their several moorings, and that ignorant and unskilful persons should be prevented from undertaking such pilotage." Be it enacted, etc.

And Section 20 being :

" And be it enacted that no person licensed in virtue of this Act shall undertake to conduct or pilot any vessel from sea and bound to any port in the State of Virginia, unless such vessel is below the Horse-shoe, and no pilot appointed by Law of that State shall be below the Horse-shoe and shall offer to pilot such vessel, and in such case the pilot from this State shall deliver up such vessel to the Virginia pilot and shall demand no reward, and it is expected that the Legislature of Virginia will make a similar regulation as to vessels from sea and bound to some port in this state."

The first Law of Virginia is Chapter XI of 1755, (6 Hening's Stat at Large, 490) entitled " an Act for establishing pilots and regulating their fees." The preamble being : " Whereas, it is necessary for the safety and preservation of ships and vessels coming into the bay of Chesapeake, bound *up the rivers of this dominion*, that able and experienced pilots should be established to conduct such vessels for reasonable fees to their several moorings, and to prevent ignorant and unqualified persons from undertaking such pilotage." Be it therefore, etc.

Then follow rates of pilotage to various ports on the rivers of Virginia. No ports but those of Virginia are mentioned.

The first Law of South Carolina is 25 March, 1691, (3 Stat at Large, of South Carolina, p. 50) entitled, " An Act for the settling of pilotage," applying only to vessels on the Ashley River.

Subsequently an Act was passed 28 March, 1778, (4 Stat at Large of South Carolina, 431) entitled, " An Act for the better regulating of pilots for the *ports and harbors of Charlestown, Beaufort, Georgetown* and *Stone*, and for other purposes therein mentioned."

The preamble being the following words :

" Whereas, it will tend greatly to the advantage of merchants and others trading to the *several ports and harbors of this State*, if the pilots and pilotage thereof are laid under proper regulations and restrictions, and as the pilot boats belonging to the port and harbor of Charlestown are, by law, now under the care of the Commissioner of the Navy of this State, it is expedient that the pilots should be likewise subject to their orders. Be it, etc."

No Legislation was ever attempted for the Savannah River.

The first law of Georgia, we find, although there evidently were earlier ones regulating pilots and pilotage, is an Act passed 24 December, 1836, (*Laws of Georgia, 1836, p. 176*) entitled, " An Act to regulate the fees of pilots for the *several ports of this State*."

The first section being in the following words :—

" 1. That from and after the passage of this act the pilots for the *several ports and harbors of this State* shall receive as full and ample satisfaction unto the pilot bringing in or carrying out every ship or vessel inward to or outward from any of the *ports or harbors afosesaid* a sum equal to twenty per cent. on the rates and prices now established by the Board of Commissioners for the regulation of pilots' rates, and all matters relating to the pilotage for the *several ports of this State*."

Florida passed many different laws, but all relating solely to her own ports.

Feb. 2, 1831, for St. John and Nassau Rivers.
Feb. 13, 1831, for Appalachicola.
Laws of Fla., 1831, pp. 14 and 32.

The first law of Louisiana is 31 March, 1805 (*Orleans Laws*. p. 122), entitled, "An act relative to the Harbour Master and Master and Wardens and Pilots of the *port of New Orleans*."

All her legislation was directed to vessels coming to and from her own ports.

Texas was not annexed to the United States until the year 1845.

Mississippi, Arkansas, Tennessee, Kentucky, Missouri, Illinois, Iowa, Wisconsin, Ohio, and Indiana had no laws on the subject prior to 1837.

It will thus be seen that before the year 1837 none of the States ever attempted to do more than regulate the vessels coming to and going from *their own ports*, and that in several instances they expressly recognized their lack of authority to do more; *e. g.*, in the eighteenth section of the Act of New Jersey of 8 Feb., 1837, the twentieth section of the Act of Maryland, chapter XXVI. of 1787, and in the act of Delaware of Feb. 5, 1819, which had to be passed in order that the Pennsylvania legislation under which the only pilots on the bay or river Delaware acted should extend to the ports of Delaware.

It is true that the State of Maryland had regulated pilotage of vessels coming to and from Georgetown and Virginia had done the same for Alexandria, which were included in the territory they subsequently ceded to the United States to form the District of Columbia in 1790, but Congress, by the act of 1789, passed before the cession, adopted that with all other existing legislation of the States until she should herself interfere.

It must be seen, from what has been said, that there was no conflicting legislation between the States, that, on the contrary, the greatest harmony existed between them, founded on the fact that from their earliest history to 1837 they had attempted to regulate nothing but shipping bound *to and from their own ports.* More particularly that there was no contest between New Jersey and New York as to the right of the former to supply pilots to shipping bound to the latter, because her pilot system did not come into existence before February, 1837, and when it did, did not pretend to apply anywhere but to her own ports—Jersey City, Newark and Perth Amboy. On the contrary, in the Eighteenth Section there was a proposal of an exchange of courtesies between the States as to vessels bound to each other's ports.

The origin of the Act of 2 March, 1837, was as follows:

The greatest port of the United States is, and always has been, New York, and up to 1837, all its commerce had been regulated on admitted principles by the State of New York. The result was, that for want of competition, the pilots became negligent, and two most distressing wrecks occurred, namely, those of the packets "Bristol" and "Mexico," by which many lives were lost under the most apalling circumstances. The attention of the New York merchants and underwriters was thus awakened, and the result was the passage of the Act of Congress of 2 March, 1837.

The sole object of this Act was to enable the State of New Jersey to do what without it she could not, viz.: supply pilots to vessels bound to and from New York. It was not to settle conflicting legislation between the States, because, as has been seen, no conflict whatever existed, and it was not to affirm a disputed right, for no State had claimed it. It was an enabling act to create a new right. But as soon as the Act was passed conflicts began to arise. New York felt her sovereignty infringed. Maryland and Virginia were not quite sure whether they had a right to supply pilots for each other's

shipping or not. Persistent efforts were made to repeal the disturbing Act, and the Legislatures of the States most affected by it, adopted resolutions instructing their Senators and Representatives in Congress upon the subject. These resolutions are here given in full as being conclusive evidence that the Act, instead of being passed to solve existing difficulties, was itself the cause of the difficulties. During the contest, feeling ran so high in New York that she repealed her Pilot Laws altogether by an Act 1 April, 1845, (*Laws of New York, 1845, p. 30*).

RELATIVE TO THE PILOT SYSTEM.

Be it resolved by the Senate and General Assembly of the State of New Jersey, That the Act of Congress of March second, eighteen hundred and thirty-seven, entitled, "An Act concerning pilots, authorizing the commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters to pilot said vessel to and from said ports has, in the opinion of the Legislature, been a useful and salutary law, and that the operation of the same has materially diminished the perils to which ships and cargoes, and the lives of those, both passengers and crew, who navigate the ocean, are exposed.

Resolved, That the act in question, by *producing competition*, has stimulated exertion, secured to the most active and enterprising the fair rewards of their labour, and aroused from their lethargy those who are content to gain an easy living without effort and without exposure, while enjoying the

monopoly allowed them by the *regulations existing before the passage of that act*, and of the New Jersey pilot laws.

Resolved, That, in the opinion of this legislature, the said act is within the range of the constitutional power of Congress to regulate commerce among the several States, and that its constitutionality may be considered as settled by the decision pronounced by the highest judicial tribunal of the Union in the well-known steamboat controversy; and, while we would regret and oppose any encroachment by the general government upon the powers of the States, we call on that government to maintain in its full vigour a power legitimately belonging to it, and the operation of which, as exercised by the Act of Congress before referred to, has been useful and salutary, beneficial to commerce, and injurious to none but those who enjoyed the profits of a *monopoly*.

Resolved, That our Senators, and Representatives in Congress be earnestly requested to use their best efforts to prevent the repeal of the said act.

Resolved, That the Secretary of State be directed to transmit a certified copy of these resolutions to each of the Senators and Representatives to Congress from this State.

Approved, January 27, 1846.

Laws of New Jersey, 1843–1846, p. 233.

RELATIVE TO THE PILOT LAWS OF THE UNITED STATES.

1. *Be it resolved by the Senate and General Assembly of the State of New Jersey*, That the passage of the Act of March

second, eighteen hundred and thirty-seven, by Congress, by which the business of pilotage in the bays and harbours adjoining this State and the State of New York was *thrown open to citizens of this State*, appointed as pilots under our laws, was an act of justice to the State of New Jersey, and loudly called for by the appalling disasters upon our coasts, which before that time continued to occur in quick succession.

2. *And be it resolved*, That the results of the experience of the last ten years, the greatly diminished number of wrecks of vessels approaching our shores, the superior vigilance and care of the New Jersey pilots, the danger of a renewal of the melancholy scenes and loss of life which attended the wrecks of the Mexico and Bristol, the impolicy and injustice of again erecting a *monopoly*, encouraging criminal remissness on the part of the pilots, all combine to furnish an unanswerable argument against the repeal of the present law.

3. *And be it resolved*, That the recent establishment of a line of ocean steamships from Great Britain, whose terminus is at the port of Jersey City, furnishes an additional argument against the repeal of that Act.

4. *And be it resolved*, That the Governor of this State be requested to forward a copy of the foregoing resolutions to our Senators and Representatives in Congress.

Approved February 11, 1848.

Acts of New Jersey, 1848, page 256.

STATE OF NEW YORK.

In Assembly, March 10, 1846.

Resolved, (if the Senate concur,) That it be recommended to the Senators and Representatives of the State of New York,

in the Congress of the United States, to use their best efforts to procure the passage of a Law, during the present session of Congress, that will regulate and establish the pilot system of the United States upon equitable and proper principles, securing to the citizens of *each State their just rights*, and also proper competition in the business of piloting, and establishing in each State a Board for the examination of all pilots before they shall be permitted to enter upon the duties of so important an office, requiring similar qualifications in all pilots.

Resolved, (if the Senate concur,) That in case so desirable an object cannot be effected, that they endeavor to procure the passage of a Law giving to *each State the power to pass laws* for the appointment and regulation *of the pilots for themselves.*

Resolved, (if the Senate concur,) That the Governor be requested to transmit a copy of the above resolutions to each of the Senators and Representatives in Congress from this State.

By order of the Assembly,

WILLIAM C. CRAIN, *Speaker.*

WILLIAM W. DEAN, *Clerk.*

STATE OF NEW YORK,

In Senate, April 22, 1846.

Resolved, That the Senate do concur with the Assembly in the foregoing resolutions.

By order of the Senate,

A. GARDINER, *President.*

ISAAC R. ELWOOD, *Clerk.*

Laws of New York, 1846, page 484.

STATE OF NEW YORK.

In Assembly, March 4, 1848.

Resolved, (if the Senate concur,) That our Senators in Congress be instructed, and our Representatives be requested, to oppose any change in the "Act concerning pilots," as would destroy or diminish the competition now existing.

Resolved, That the Governor be requested to forward copies of this resolution to our Senators and Representatives in Congress.

By order of the Assembly,

P. B. PRINDLE, *Clerk*.

STATE OF NEW YORK.

In Senate, March 6, 1848.

Resolved, That the Senate do concur in the foregoing resotions.

By order of the Senate,

A. H. CALHOUN, *Clerk*.

Laws of New York, 1848, page 582.

PREAMBLE AND RESOLUTION IN RELATION TO PILOTS.

WHEREAS, On the fourth of March, eighteen hundred and thirty-seven, Congress passed an act entitled, "An act concerning Pilots," in the following words:—"*Be it enacted*, That it shall and may be lawful for the Master and commander of

any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot any vessel to or from said port, any law, usage, or custom to the contrary notwithstanding ;"

AND WHEREAS, Said act is exceedingly imperfect, and is unaccompanied by all detail or provision for its own proper execution, but permits the conflicting jurisdiction of adjacent States to disturb and derange the best systems of pilotage which either may adopt, therefore,

Be it resolved by the General Assembly of Maryland, That our Senators and Representatives in Congress be requested to use their best efforts to have said law amended or repealed.

Passed March 10, 1846.

Laws of Maryland, 1845, 1846, 1847.

Observe that in the first joint resolution of New Jersey, the act is approved of as having *produced* competition, not as having regulated existing competition, as Judge Butler supposed, but as having brought competition into existence. In its second resolution the act was commended as one "by which the business of pilotage in the bays and harbors adjoining this State and the State of New York was *thrown open* to citizens of this State appointed as pilots under our laws," and as "an act of justice to the State of New Jersey." The wrecks of the "Bristol" and the "Mexico" are expressly referred to, as well as the negligence of the New York pilots while they enjoyed a monopoly. The first joint resolution of New York instructed its representatives to advocate an act of Congress regulating the whole subject of pilotage, and securing

to the citizens *of each State their just rights*, viz., as appears from the next paragraph, "the power to pass laws for the appointment and regulation of the pilots *for themselves*." Maryland directed her representatives to advocate a repeal of the act, because "it permits the conflicting jurisdiction of adjacent States to disturb and derange the best systems of pilotage which either may adopt." What more conclusive contemporaneous evidence, from witnesses having opposite interests, could there be that Congress, for the purpose of exciting competition, passed the act of 1837, creating a new right, which caused, as might have been expected, conflicts between adjacent States?

And an examination of the debates in the Senate of the United States, which the Court will look at, not for the purpose of construing the words of the Act, but to see out of what public emergency or necessity it arose, will show that it was aimed at the port of New York to produce competition in the pilot service. The Act was originally passed on motion of Mr. Wall, the Senator from New Jersey. The *Congressional Globe* contains no evidence of any discussion, and Senator Dix, of New York, in his debate, June 30, 1848, upon the bill introduced to repeal the Act of 1837, said it was passed in a great hurry and without deliberation. (*Congressional Globe*, Vol. 18, p. 884.)

But the Bill to repeal the Act of 1837, which was originally introduced by Mr. Reverdy Johnson, the Senator from Maryland, in 1846, in accordance with the resolution of the Legislature of that State, and advocated at subsequent sessions of Congress by Senator Dix, of New York, was twice discussed in the Senate (Vol. 18, *Congressional Globe*, pp. 623, 625 and 884) by Senators Dix, Miller of New Jersey, and Davis of Massachusetts, all the speakers agreeing that it was passed, not to settle disputes arising between the States out of admitted powers, but to confer a new power upon States situated in a certain way relatively to each other, and most especially on

the State of New Jersey, in order to improve the pilot service of the harbor of New York, and to prevent further calamities, like the wrecks of the "Bristol" and "Mexico."

It seems therefore very clear that the Act of 1837 was not declaratory, but that it was, as declared by Judge Curtis, in *Cooley* vs. *The Wardens*, and by Chief Justice Taney, in the *License Cases*, exceptional legislation, intended to confer a new right, viz: the right of a State to affect by its legislation shipping bound to and from the ports of another State by suspending as to vessels so supplied the compulsory provisions of the Law of the State which possesses the port. And the fact that Congress had to interfere by an express enactment to accomplish this, is a positive recognition of the fact that before that Act the exclusive right to regulate the pilotage of shipping was in the State to or from whose ports it was bound.

It follows from what has been said that Delaware has not the power to legislate for shipping bound to and from Philadelphia, unless she gets it by the act of 1837, and the last inquiry accordingly is, does she fall within that act?

The real ground of *Flanigen* vs. *The Ins. Co.*, 7 Barr, 306, was that the provisions of the act of 29 Feb., 1803, as to compulsory pilotage did not create a statutory unseaworthiness, whereby any vessel lost without a pilot on board would be considered constructively unseaworthy. This disposed of the case.

But it was further said, and this was *obiter* that the plea was defective in averring only that the vessel sailed without having on board a pilot, in accordance with the act of Assembly, because as other than Pennsylvania pilots might have been employed by virtue of the Act of Congress of 1837, it ought also to have averred that the vessel had no such pilot. But this was a matter, to use the language of the Court, "simply relating to the form of the pleading."

Everything Judge Rogers said on this point would be satis-

fied by the fact that New Jersey, as is admitted on all hands, could have supplied a pilot under the Act of Congress. This would have been enough to make the plea defective. It is true he did say Delaware could do so also, but he was not construing the Act, and there was no occasion in the case before him to scrutinize the rights of Delaware under the Act, with reference to Pennsylvania shipping.

He does not seem to have been aware of the fact that neither Delaware or New Jersey had ever licensed a pilot for Delaware river or bay, and that for nearly a century no licenses but those of Pennsylvania had existed. It is to this fact, and not to a disposition to encroach upon her neighbors, that larger language has been used in some of her statutes, for example, that of 1846, than is proper. The words were made naturally to conform to the true state of affairs, to wit: that there were no pilots on the Dalaware river and bay except those licensed by Pennsylvania, in which state of affairs New Jersey and Delaware had acquiesced. Of course, any pretension that Pennsylvania has exclusive control over the navigation of Delaware river and bay "is founded on error," and the language of her acts, where too large, will be restrained by the courts to its proper limits. But so much of them as is legally enforceable must be enforced. For instance, the Act of 1846, the language of which applies to every one acting as a pilot in Delaware river and bay without a license from Pennsylvania will be held to extend to and cover only shipping bound to and from the ports of that State, and not to cover shipping bound to and from the ports of Delaware and New Jersey. Judge Rodgers was misinformed as to the origin of the Act of 1837, as may be seen from the following language:—

"It is understood that the Act of Congress grew out of a dispute between the States of New York and New Jersey as to the employment of pilots, the former asserting a right to

prescribe that none but pilots licensed by their Law should be employed in navigating vessels bound to their port," which probably led Judge Butler to give the explanation of the Act he did in the case of *The Clymene*.

It must be admitted that Judge Curtis fell into a similar error in *Cooley* vs. *The Wardens*, saying: "Conflicts between the Laws of neighboring States and discriminations favorable or adverse to commerce with particular foreign nations might be created by State Laws regulating pilotage, deeply affecting that equality of commercial rights and that freedom from State interference which those who formed the constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely, for in 1837 Congress actually interposed to relieve the commerce of the country from serious embarrassment arising from the Laws of different States situate upon waters which are the boundary between them. This was done by an enactment of the second of March, A. D. 1837, in the following words" He knew of the conflicts that had since occurred, and probably inferred that they had existed before, which was an immaterial error in the case before him, because the construction of the Act of 1837 was not involved.

It is singular that if Judge Butler's reading of the Act of 1837 be correct, this is the first attempt in the forty-four years of its existence that any State in the position of Delaware has made to avail of it. New Jersey has availed herself of it, with reference to New York Bay; Georgia, with reference to St. Mary's River; Washington Territory, with reference to the Columbia River; Indiana, with reference to the Ohio River; all being unmistakably within the Act. The following cases have arisen: *Hopkins* vs. *Wyckoff*, 1 Daly, 176; *Cribbs* vs. *The State*, 9 Fla., 420; *The Glencarne*, 7 Fed. Rep., 604; *Dryden* vs. *The Commonwealth*, 16 Ben. Monroe, 598. But Virginia has never attempted to supply pilots to Baltimore

shipping, nor the States along the Mississippi to shipping bound to New Orleans. This attempt of Delaware in 1881 stands alone.

The Court said in *Cribbs* vs. *The State*, 9 Fla., 420: "There is no doubt that the respective States are the most competent to regulate the pilotage *within their own ports*, and that it is for the general advantage that it should rest with them. With the exception of the said Act of 1837, regulating pilotage in ports situate upon waters which are the boundary between two States, it has been left to them. The question naturally suggests itself, Why did Congress make this exception? The answer is, to relieve the commerce of the country from any embarrassment arising from the Laws of different States situate upon waters which are the boundary between them. In some such States their Laws compelled Masters of vessels to take their pilots aboard. Each State, where there is a port situate upon waters which are the boundary between, without this regulation of Congress, might embarrass commerce by insisting that *their pilot* should be taken as pilot. It was also to remedy the strife between the two States, so embarrassing to the Masters, that this Act was passed. In fact, it was to meet just such a state of things as exist between the States of Georgia and Florida, at the ports of Fernandina and St. Mary's" and Taney, C. J., said of it in *The License Cases*, 5 Howard, 580: "There is but one Law of Congress making any specific regulation upon this subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York Law, leaving the residue of its provisions entirely untouched."

The explanation of the proviso in the Act of 1867, referred to by Judge Butler as the Act of 1847, is as follows:—Congress in 1852 passed an act regulating steam vessels, which contained among other things provisions establishing inspectors, from whom the Master of every American steam vessel was obliged to get a license as a pilot. The question at once

arose whether this was such legislation on the part of Congress as repealed the State laws upon the subject of pilotage, and was differently decided in various Federal courts. Finally, the Supreme Court, in *Steamship Co.* vs. *Joliffe*, 2 Wall, 450, by a divided Court, held that the Act of Congress in no way affected the State legislation, which decision was incorporated in this proviso, so that the doubt might be laid at rest forever. It is noticeable, however, that the compiler of the United States Revised Statutes changed the word of the proviso from "port" to "State," so that it reads:—"or if a State situate upon the waters of the same *State*," which would be more consistent with Judge Butler's views. But of course no change in the words of the proviso would alter the existing law, as it does not pretend to enact anything new, but simply to declare that the Act of 1867 should in no way interfere with the existing law.

The language of both these acts, however, shows as clearly as it is possible to do that Congress understood the right to regulate commerce upon the subject of pilotage to be in the State *to or from whose ports it is bound*, except so far as it is altered by Act of Congress. Before going into the construction of the act of 1837 the following language in Judge Butler's opinion, must be considered: "In this view of the case the respondent's contention that "pilotage is the subject of local regulation of the State in which the port lies," and therefore that Pennsylvania, in the absence of statutory prohibition, has exclusive jurisdiction of pilotage respecting the port of Philadelphia and its commerce, is unimportant. It is not improper, however, to say, as before intimated, that I could not adopt this position, even in the absence of the statute last referred to." This statute was the act of 1867, which, as we have seen, was nothing more than a recital, and, as printed in the Revised Statutes, a mis-recital of existing law. But the language just quoted can not be reconciled with the case of *Cooley* vs. *The Wardens*, an examination of which will show

that every reason given by the Court in support of the State legislation is founded upon the fact that pilotage is a subject of *local regulation*, and that the State which is best fitted and most interested to regulate it is the State *to or from whose ports* the shipping goes.

One is at a loss to conceive how such a proposition can be doubted, or how it can be supposed that any State *ex proprio vigore*, and without the assistance of Congress, can pass a law which shall be effective in the territory of another State. If Pennsylvania should think it better that compulsory pilotage should not exist at all, will it be contended that Delaware or any other State could require vessels coming to and departing from Philadelphia to take her pilots? And yet to this the argument must come. If other States than those that have the ports can regulate the pilotage of commerce, then the whole reasoning in *Cooley* vs. *The Wardens* becomes absurd.

Congress evidently did not intend by the act of 1837 to disturb the familiar principle that no sovereign can give his laws extra-territorial effect. See *The Appollon*, 9 Wheat., 368. The intention was, to use the words of Taney, C. J., "to alter only a single provision of the New York law," viz., to *suspend* the compulsory feature of the laws of the State to or from which the vessel was bound, provided she had on board a pilot licensed by another State in the statutory situation.

The act of 1837, recognizing that by existing law vessels were subject to the regulation of the State to and from whose port they were going, made an exception in favor of vessels bound to ports situated in a certain way whereby they might take a pilot from another State than the one to or from whose port they were bound, and yet be relieved from the compulsory features of the laws of the latter State. What ports are within the act? Those which are situated upon waters which are "the boundary between two States." From what other State than the one to or from which she is bound may she take a pilot? The State bounded upon the waters of the

port. The language of the acts can only be explained on the supposition that Congress recognized the fact that by existing laws the regulation of pilotage was in the State to or from whose ports the vessels were bound. If, as Judge Butler supposes, any State situated on the same waters had the right of regulating it, and the intention of Congress had been to reconcile the conflicting laws of such States by saying the pilot of any State shall be a defence to the vessel against the laws of the other States, it is impossible to see why the privilege was so laboriously confined to ports situate upon waters which are the boundary between *two States*, and to waters which are boundaries only. The rights of the States in navigable waters of the United States are the same whether they are boundaries or whether they lie entirely within particular States. So far as the rights of navigation are concerned, there is no difference between a vessel bound to a wharf at Philadelphia on the Schuylkill, and one bound to a wharf on the Delaware, nor, to take an illustration from the case of *The Glenarne*, *supra*, between a vessel bound to a port on the Columbia river, and one bound to a port on its tributary, the Wallamette. As the legislation is obviously exceptional, it should not be extended beyond its plain import, and to give it the construction adopted by Judge Butler is to make it very unreasonable. Instead of being in harmony with the free rights of navigation of all the States, it is impossible to conceive a more remarkable illustration of the doctrine of States' rights.

H. G. WARD,
R. C. M'MURTRIE,
Proctors for Relator.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

In the matter of the Petition of WALTER F. HAGAR, for a Writ of Prohibition to the District Court of the United States, for the District of Delaware, sitting as a Court of Admiralty.

No. 9, Original. Oct. Term, 1881.

Supplemental Brief on behalf of the Relator.

H. G. WARD,
R. C. M'MURTRIE,
Proctors for Relator.

U. S. S. C.

In re HAGAR.

No. 9, Original Oct. Term, 1881.

Additional brief on behalf of the relator as to the legislation of the States on the subject of pilotage, before the passage of the Act of Congress of March 2d, 1837.

To measure the present power of the States, to regulate commerce in respect to pilotage, one must know what were the powers of the States at the time they entered the Union, and how they were affected by the two acts passed by Congress, the first in 1789, in the following words :—

"That all pilots in the bays, inlets, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws, respectively, wherever such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provisions shall be made by Congress." *U. S. Rev. Stat., 4235.*

And the second in 1837, in the following words :—

"That it shall and may be lawful for the Master or commander of any vessel coming into or going out of any port situated upon waters which are the boundary between two

States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding." *U. S. Rev. Stat., 4236.*

Or the question may be simplified by omitting the act of 1789, which is understood by all to express the intention of Congress to leave the subject of pilotage in the States respectively. Whatever powers they had when they entered the Union they were to continue to exercise until Congress should avail itself of the power to regulate commerce, conferred upon it by the Constitution. Of course Congress did not mean to delegate its whole power to each State, but simply not to use its power at all, and in the meantime to leave the States to exercise their own powers respectively. The effect of this is to make every State statute passed within the scope of its powers an Act of Congress. This leaves for investigation only the powers of the States when they entered the Union, and the extent to which they were affected by the Act of 1837.

In the case of the *Clymene*, lately decided in the District Court of the United States for the Eastern District of Pennsylvania, *9 Fed. Rep.*, 164, Judge Butler was of the opinion that each State, by virtue of the act of 1789, had power to license pilots, and regulate their employment, in common, however, with its neighbors. This he looked on as the natural result of the equal right each State has in public navigable waters of the United States. But that right is of navigation, and for a State to compel vessels not sailing to or from its ports to take pilots can in no sense be called an exercise of its right of free navigation. If it be so, then every State, without regard to its situation, has an equal right to regulate pilotage. Kentucky and Kansas, as well as Delaware, may supply pilots to vessels bound to and from Philadelphia, because they have an equal right for the purposes of navigation in the waters of the Delaware river and bay. If, on the other

hand, the right be confined, as Judge Butler appears to intend, to the States bordering upon the same waters, then it can only be rested on the principle that the vessel, during her navigation, passes through navigable waters of the United States within the territorial limits of those particular States, which is utterly inconsistent with the free use of those waters for navigation, and is the extremest possible extension of the doctrine of States rights.

This power, Judge Butler thought, having led to conflicting legislation, Congress passed the Act of 1837 to restrain the States from legislation excluding each other. "It might readily have been foreseen that the States, thus left to separate independent action, would soon come into conflict. Two or more bounding on the same water, each intent upon its individual interests, would be impelled to conflicting hostile legislation. Such a result did follow, and to provide for it Congress in March, 1837, enacted, &c. (the act of 1837)." He relied upon *Flanigen* vs. *The Ins. Co.*, 6 Barr., 306, and proviso of the Act of Congress of 1867 (called in the opinion the act of 1847), in confirmation of this view.

Now, these two conclusions are founded on mistakes of fact. The States never intended or attempted to legislate within each others' territories, and the act of 1837 was not passed to prevent conflicts. No conflicts existed, and it was neither a declaratory nor a restraining act, but was emphatically an enabling one.

Before examining the legislation of the States it ought first to be remarked that an act is not extra-territorial because it requires something to be done, as a pilot to be taken on the high seas, or on waters without the territory of the State enacting the law. That is simply the condition upon which, and upon which only, the State will allow the vessel to enter

its ports. The law only becomes effectual when the vessel does enter. When on the high seas the law is of no force. She may do as she pleases, refuse the pilot, and go elsewhere; but if she refuses, and then enters, she will subject herself to the law by so doing. This was well explained by Dr. Lushington in *The Annapolis*, Lush., 295 :—

"Admitting the pilot station off Port Lynas to be out of British jurisdiction for some purposes, I think it was competent to the British Legislature to make this enactment without any violation of international law. In revenue, quarantine, and pilotage matters the necessity of the case seems to require a more extended jurisdiction than the three-mile limit. This enactment is not to be taken simply by itself, as prescribing something to be done out of British waters, but must be construed in conjunction with the circumstance of the ship's entry into the port of Liverpool."

And also in *Cisco* vs. *Roberts*, 36 N. Y., 292; *The Bark Nevada*, 7 Bew., 386.

The States which now compose the Union never attempted, either as Colonies, as Members of the Confederation, or as Members of the Federal Union, down to the year 1837, to do more than to regulate the pilotage of vessels bound to and from *their own ports* respectively. Wherever any Legislation existed as to pilotage through passes or over bars or shoals without exclusive reference to the destination of the vessel, like the Act of Massachusetts of February 24, 1820, Laws of Massachusetts, 1818-1822 v. 412, entitled "an Act for establishing the compensation for piloting vessels through the Vineyard Sound over Nantucket Shoals in certain cases," the employment of a pilot was made voluntary and not compulsory.

An examination of the Statute Laws of the various States will bear this statement out, and it would not be practica-

ble to incorporate in an argument like this such a mass of legislation. It would be easy for the other side to point out instances of legislation inconsistent with it if they can be found. Of course, if they do exist it must be in the legislation of adjacent States lying on common waters, because it could not be pretended, even on the theory of the equal right of every State in the public navigable waters of the United States, that States distant from each other, like Florida and New York, could pass laws affecting each other's ports.

The States so situated are *Maine* and *New Hampshire*, with reference to the Piscataqua River :

New York and *New Jersey*, with reference to New York Bay :

Delaware, *New Jersey* and *Pennsylvania*, with reference to Delaware Bay and River :

Maryland and *Virginia*, with reference to the Chesapeake Bay and Potomac River :

South Carolina and *Georgia*, with reference to the Savannah River :

Georgia and *Florida*, with reference to the St. Mary's River :

Texas and *Louisiana*, with reference to the Sabine River :

Washington and *Oregon*, with reference to the Columbia River :

And then inland along the Mississippi River : *Louisiana*, *Mississippi*, *Arkansas*, *Tennessee*, *Missouri*, *Kentucky*, *Illinois*, *Iowa*, *Wisconsin :*

Along the Ohio : *Kentucky*, *Illinois*, *Indiana*, *Ohio*, *West Virginia.*

It is proposed to show from their legislation that all these States, up to the year 1837, confined themselves to regulating shipping bound to and from *their own ports.* Resort has been had for this purpose to the Law Library at Philadelphia, whose collection not being complete, much may have been missed.

But it is thought that enough positive confirmation of what has been said has been found.

The first law of Maine is that of February 24, 1821 (*Laws of Maine*, Vol. I., 613), entitled, "An act for regulating pilotage in the several *ports of this State*." There is no legislation of this State as to Piscataqua river or the port of Portsmouth.

The first law of New Hampshire is 22 June, 1785, (Vol. I., 282), entitled, "An act for regulating pilotage in the *port of Piscataqua*." There is no legislation for any other place.

The first law of New York is 14 April, 1784 (*1 Laws of New York*, 86), entitled, "An act for the regulation of pilots and pilotage for the *port of New York*, and for other purposes therein mentioned," the preamble of which is: "Whereas, the safety of the navigation to and from *the port of New York* will be much promoted by the establishment of proper regulations for the pilots and of their rates of pilotage," be it enacted, &c. No port but that of New York is mentioned in its legislation.

The first law of New Jersey is 8 Feb., 1837 (*Laws of New Jersey, 1836, 1837*, p. 110,) entitled, "An act to establish and regulate pilots for the *ports of Jersey City, Newark*, and *Perth Amboy*, by the way of Sandy Hook," the preamble being, "Whereas, the *Commerce of New Jersey* requires every facility and aid usually extended to maritime States; and whereas, at this time there are no licensed pilots for the safe conduct of *our increasing commerce*, rendering us wholly dependent on a neighboring State, therefore be it enacted," &c.

Section XVIII. is in the following words:—

"That if the Master of any vessel (except schooners and sloops employed in the coasting trade, licensed for that purpose, and not making the usual signal for a pilot), coming into the ports of Jersey City, Newark, or Perth Amboy, or into any of the waters of New Jersey, shall refuse to receive

on board and employ a pilot who shall have offered to go on board and take charge of the pilotage of such vessel, the Master, owner, or consignee of such vessel shall pay to the pilot half pilotage from the place at which such pilot shall have offered himself to the port of destination; but no half-pilotage shall be collected from any vessel in charge of a New York pilot; *Provided*, Vessels in charge of a New Jersey pilot be permitted to enter and traverse the waters of New York without being compelled to pay half pilotage."

The first Law of Delaware is 5 February, 1819, (5 Laws of Delaware, 395) entitled "An Act for the relief of distressed and decayed pilots, their widows and children." It provided that every ship or vessel, with certain exceptions, "sailing from or bound to *any port in the State of Delaware*," shall be obliged to receive a pilot, *i. e.*, Pennsylvania pilot, there being no others licensed. Half pilotage was to be paid to the Pennsylvania Society.

The first Law of Pennsylvania is 26 February, 1773, (Hall and Sellers Laws of Pennsylvania, p. 464) entitled "An Act appointing Wardens *for the port of Philadelphia* and for other purposes therein mentioned." It was subsequently amended down to the year 1803, when it was repealed by the Law of 29 February, 1803, (4 Smith's Laws, 67) entitled "An Act to establish a Board of Wardens for the *port of Philadelphia*, and for the regulation of pilots and pilotages, and for other purposes therein mentioned," which is the one, with subsequent amendments, now in force. All these Acts applied solely to vessels bound to and from the port of Philadelphia.

The first Law of Maryland is Chapter XXVI of 1787, (Laws of Maryland, Vol. 2) entitled "an Act to establish pilots and regulate their fees." The preamble being in the following words: "Whereas, it is necessary for the safety and preservation of vessels bound *from this State* to sea, or

coming into Chesapeake Bay, and bound *up any river of this State* and to some *port thereof*, that able and experienced pilots should be established to conduct and pilot such vessels for reasonable fees to their several moorings, and that ignorant and unskilful persons should be prevented from undertaking such pilotage." Be it enacted, etc.

And Section 20 being :

" And be it enacted that no person licensed in virtue of this Act shall undertake to conduct or pilot any vessel from sea and bound to any port in the State of Virginia, unless such vessel is below the Horse-shoe, and no pilot appointed by Law of that State shall be below the Horse-shoe and shall offer to pilot such vessel, and in such case the pilot from this State shall deliver up such vessel to the Virginia pilot and shall demand no reward, and it is expected that the Legislature of Virginia will make a similar regulation as to vessels from sea and bound to some port in this state."

The first Law of Virginia is Chapter XI of 1755, (6 Hening's Stat at Large, 490) entitled " an Act for establishing pilots and regulating their fees." The preamble being : " Whereas, it is necessary for the safety and preservation of ships and vessels coming into the bay of Chesapeake, bound *up the rivers of this dominion*, that able and experienced pilots should be established to conduct such vessels for reasonable fees to their several moorings, and to prevent ignorant and unqualified persons from undertaking such pilotage." Be it therefore, etc.

Then follow rates of pilotage to various ports on the rivers of Virginia. No ports but those of Virginia are mentioned.

The first Law of South Carolina is 25 March, 1691, (3 Stat at Large, of South Carolina, p. 50) entitled, " An Act for the settling of pilotage," applying only to vessels on the Ashley River.

Subsequently an Act was passed 28 March, 1778, (4 Stat at Large of South Carolina, 431) entitled, " An Act for the better regulating of pilots for the *ports and harbors of Charlestown, Beaufort, Georgetown* and *Stone*, and for other purposes therein mentioned."

The preamble being the following words :

" Whereas, it will tend greatly to the advantage of merchants and others trading to the *several ports and harbors of this State*, if the pilots and pilotage thereof are laid under proper regulations and restrictions, and as the pilot boats belonging to the port and harbor of Charlestown are, by law, now under the care of the Commissioner of the Navy of this State, it is expedient that the pilots should be likewise subject to their orders. Be it, etc."

No Legislation was ever attempted for the Savannah River.

The first law of Georgia, we find, although there evidently were earlier ones regulating pilots and pilotage, is an Act passed 24 December, 1836, (*Laws of Georgia, 1836, p. 176*) entitled, " An Act to regulate the fees of pilots for the *several ports of this State.*"

The first section being in the following words :—

" 1. That from and after the passage of this act the pilots for the *several ports and harbors of this State* shall receive as full and ample satisfaction unto the pilot bringing in or carrying out every ship or vessel inward to or outward from any of the *ports or harbors afosesaid* a sum equal to twenty per cent. on the rates and prices now established by the Board of Commissioners for the regulation of pilots' rates, and all matters relating to the pilotage for the *several ports of this State.*"

Florida passed many different laws, but all relating solely to her own ports.

Feb. 2, 1831, for St. John and Nassau Rivers.
Feb. 13, 1831, for Appalachicola.
Laws of Fla., 1831, pp. 14 and 32.

The first law of Louisiana is 31 March, 1805 (*Orleans Laws*, p. 122), entitled, "An act relative to the Harbour Master and Master and Wardens and Pilots of the *port of New Orleans*."

All her legislation was directed to vessels coming to and from her own ports.

Texas was not annexed to the United States until the year 1845.

Mississippi, Arkansas, Tennessee, Kentucky, Missouri, Illinois, Iowa, Wisconsin, Ohio, and Indiana had no laws on the subject prior to 1837.

It will thus be seen that before the year 1837 none of the States ever attempted to do more than regulate the vessels coming to and going from *their own ports*, and that in several instances they expressly recognized their lack of authority to do more; *e. g.*, in the eighteenth section of the Act of New Jersey of 8 Feb., 1837, the twentieth section of the Act of Maryland, chapter XXVI. of 1787, and in the act of Delaware of Feb. 5, 1819, which had to be passed in order that the Pennsylvania legislation under which the only pilots on the bay or river Delaware acted should extend to the ports of Delaware.

It is true that the State of Maryland had regulated pilotage of vessels coming to and from Georgetown and Virginia had done the same for Alexandria, which were included in the territory they subsequently ceded to the United States to form the District of Columbia in 1790, but Congress, by the act of 1789, passed before the cession, adopted that with all other existing legislation of the States until she should herself interfere.

It must be seen, from what has been said, that there was no conflicting legislation between the States, that, on the contrary, the greatest harmony existed between them, founded on the fact that from their earliest history to 1837 they had attempted to regulate nothing but shipping bound *to and from their own ports.* More particularly that there was no contest between New Jersey and New York as to the right of the former to supply pilots to shipping bound to the latter, because her pilot system did not come into existence before February, 1837, and when it did, did not pretend to apply anywhere but to her own ports—Jersey City, Newark and Perth Amboy. On the contrary, in the Eighteenth Section there was a proposal of an exchange of courtesies between the States as to vessels bound to each other's ports.

The origin of the Act of 2 March, 1837, was as follows:

The greatest port of the United States is, and always has been, New York, and up to 1837, all its commerce had been regulated on admitted principles by the State of New York. The result was, that for want of competition, the pilots became negligent, and two most distressing wrecks occurred, namely, those of the packets "Bristol" and "Mexico," by which many lives were lost under the most apalling circumstances. The attention of the New York merchants and underwriters was thus awakened, and the result was the passage of the Act of Congress of 2 March, 1837.

The sole object of this Act was to enable the State of New Jersey to do what without it she could not, viz.: supply pilots to vessels bound to and from New York. It was not to settle conflicting legislation between the States, because, as has been seen, no conflict whatever existed, and it was not to affirm a disputed right, for no State had claimed it. It was an enabling act to create a new right. But as soon as the Act was passed conflicts began to arise. New York felt her sovereignty infringed. Maryland and Virginia were not quite sure whether they had a right to supply pilots for each other's

shipping or not. Persistent efforts were made to repeal the disturbing Act, and the Legislatures of the States most affected by it, adopted resolutions instructing their Senators and Representatives in Congress upon the subject. These resolutions are here given in full as being conclusive evidence that the Act, instead of being passed to solve existing difficulties, was itself the cause of the difficulties. During the contest, feeling ran so high in New York that she repealed her Pilot Laws altogether by an Act 1 April, 1845, (*Laws of New York, 1845, p. 30*).

RELATIVE TO THE PILOT SYSTEM.

Be it resolved by the Senate and General Assembly of the State of New Jersey, That the Act of Congress of March second, eighteen hundred and thirty-seven, entitled, "An Act concerning pilots, authorizing the commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters to pilot said vessel to and from said ports has, in the opinion of the Legislature, been a useful and salutary law, and that the operation of the same has materially diminished the perils to which ships and cargoes, and the lives of those, both passengers and crew, who navigate the ocean, are exposed.

Resolved, That the act in question, by *producing competition*, has stimulated exertion, secured to the most active and enterprising the fair rewards of their labour, and aroused from their lethargy those who are content to gain an easy living without effort and without exposure, while enjoying the

monopoly allowed them by the *regulations existing before the passage of that act*, and of the New Jersey pilot laws.

Resolved, That, in the opinion of this legislature, the said act is within the range of the constitutional power of Congress to regulate commerce among the several States, and that its constitutionality may be considered as settled by the decision pronounced by the highest judicial tribunal of the Union in the well-known steamboat controversy; and, while we would regret and oppose any encroachment by the general government upon the powers of the States, we call on that government to maintain in its full vigour a power legitimately belonging to it, and the operation of which, as exercised by the Act of Congress before referred to, has been useful and salutary, beneficial to commerce, and injurious to none but those who enjoyed the profits of a *monopoly*.

Resolved, That our Senators, and Representatives in Congress be earnestly requested to use their best efforts to prevent the repeal of the said act.

Resolved, That the Secretary of State be directed to transmit a certified copy of these resolutions to each of the Senators and Representatives to Congress from this State.

Approved, January 27, 1846.

Laws of New Jersey, 1843–1846, p. 233.

RELATIVE TO THE PILOT LAWS OF THE UNITED STATES.

1. *Be it resolved by the Senate and General Assembly of the State of New Jersey*, That the passage of the Act of March

second, eighteen hundred and thirty-seven, by Congress, by which the business of pilotage in the bays and harbours adjoining this State and the State of New York was *thrown open to citizens of this State*, appointed as pilots under our laws, was an act of justice to the State of New Jersey, and loudly called for by the appalling disasters upon our coasts, which before that time continued to occur in quick succession.

2. *And be it resolved*, That the results of the experience of the last ten years, the greatly diminished number of wrecks of vessels approaching our shores, the superior vigilance and care of the New Jersey pilots, the danger of a renewal of the melancholy scenes and loss of life which attended the wrecks of the Mexico and Bristol, the impolicy and injustice of again erecting a *monopoly*, encouraging criminal remissness on the part of the pilots, all combine to furnish an unanswerable argument against the repeal of the present law.

3. *And be it resolved*, That the recent establishment of a line of ocean steamships from Great Britain, whose terminus is at the port of Jersey City, furnishes an additional argument against the repeal of that Act.

4. *And be it resolved*, That the Governor of this State be requested to forward a copy of the foregoing resolutions to our Senators and Representatives in Congress.

Approved February 11, 1848.

Acts of New Jersey, 1848, page 256.

STATE OF NEW YORK.

In Assembly, March 10, 1846.

Resolved, (if the Senate concur,) That it be recommended to the Senators and Representatives of the State of New York,

in the Congress of the United States, to use their best efforts to procure the passage of a Law, during the present session of Congress, that will regulate and establish the pilot system of the United States upon equitable and proper principles, securing to the citizens of *each State their just rights*, and also proper competition in the business of piloting, and establishing in each State a Board for the examination of all pilots before they shall be permitted to enter upon the duties of so important an office, requiring similar qualifications in all pilots.

Resolved, (if the Senate concur,) That in case so desirable an object cannot be effected, that they endeavor to procure the passage of a Law giving to *each State the power to pass laws* for the appointment and regulation *of the pilots for themselves.*

Resolved, (if the Senate concur,) That the Governor be requested to transmit a copy of the above resolutions to each of the Senators and Representatives in Congress from this State.

By order of the Assembly,

WILLIAM C. CRAIN, *Speaker.*

WILLIAM W. DEAN, *Clerk.*

STATE OF NEW YORK,

In Senate, April 22, 1846.

Resolved, That the Senate do concur with the Assembly in the foregoing resolutions.

By order of the Senate,

A. GARDINER, *President.*

ISAAC R. ELWOOD, *Clerk.*

Laws of New York, 1846, page 484.

STATE OF NEW YORK.

In Assembly, March 4, 1848.

Resolved, (if the Senate concur,) That our Senators in Congress be instructed, and our Representatives be requested, to oppose any change in the "Act concerning pilots," as would destroy or diminish the competition now existing.

Resolved, That the Governor be requested to forward copies of this resolution to our Senators and Representatives in Congress.

By order of the Assembly,

P. B. PRINDLE, *Clerk.*

STATE OF NEW YORK.

In Senate, March 6, 1848.

Resolved, That the Senate do concur in the foregoing resotions.

By order of the Senate,

A. H. CALHOUN, *Clerk.*

Laws of New York, 1848, page 582.

PREAMBLE AND RESOLUTION IN RELATION TO PILOTS.

WHEREAS, On the fourth of March, eighteen hundred and thirty-seven, Congress passed an act entitled, "An act concerning Pilots," in the following words:—"*Be it enacted*, That it shall and may be lawful for the Master and commander of

any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot any vessel to or from said port, any law, usage, or custom to the contrary notwithstanding ;"

AND WHEREAS, Said act is exceedingly imperfect, and is unaccompanied by all detail or provision for its own proper execution, but permits the conflicting jurisdiction of adjacent States to disturb and derange the best systems of pilotage which either may adopt, therefore,

Be it resolved by the General Assembly of Maryland, That our Senators and Representatives in Congress be requested to use their best efforts to have said law amended or repealed.

Passed March 10, 1846.

Laws of Maryland, 1845, 1846, 1847.

Observe that in the first joint resolution of New Jersey, the act is approved of as having *produced* competition, not as having regulated existing competition, as Judge Butler supposed, but as having brought competition into existence. In its second resolution the act was commended as one "by which the business of pilotage in the bays and harbors adjoining this State and the State of New York was *thrown open* to citizens of this State appointed as pilots under our laws," and as "an act of justice to the State of New Jersey." The wrecks of the "Bristol" and the "Mexico" are expressly referred to, as well as the negligence of the New York pilots while they enjoyed a monopoly. The first joint resolution of New York instructed its representatives to advocate an act of Congress regulating the whole subject of pilotage, and securing

to the citizens *of each State their just rights*, viz., as appears from the next paragraph, "the power to pass laws for the appointment and regulation of the pilots *for themselves*." Maryland directed her representatives to advocate a repeal of the act, because "it permits the conflicting jurisdiction of adjacent States to disturb and derange the best systems of pilotage which either may adopt." What more conclusive contemporaneous evidence, from witnesses having opposite interests, could there be that Congress, for the purpose of exciting competition, passed the act of 1837, creating a new right, which caused, as might have been expected, conflicts between adjacent States?

And an examination of the debates in the Senate of the United States, which the Court will look at, not for the purpose of construing the words of the Act, but to see out of what public emergency or necessity it arose, will show that it was aimed at the port of New York to produce competition in the pilot service. The Act was originally passed on motion of Mr. Wall, the Senator from New Jersey. The *Congressional Globe* contains no evidence of any discussion, and Senator Dix, of New York, in his debate, June 30, 1848, upon the bill introduced to repeal the Act of 1837, said it was passed in a great hurry and without deliberation. (*Congressional Globe*, Vol. 18, p. 884.)

But the Bill to repeal the Act of 1837, which was originally introduced by Mr. Reverdy Johnson, the Senator from Maryland, in 1846, in accordance with the resolution of the Legislature of that State, and advocated at subsequent sessions of Congress by Senator Dix, of New York, was twice discussed in the Senate (Vol. 18, *Congressional Globe*, pp. 623, 625 and 884) by Senators Dix, Miller of New Jersey, and Davis of Massachusetts, all the speakers agreeing that it was passed, not to settle disputes arising between the States out of admitted powers, but to confer a new power upon States situated in a certain way relatively to each other, and most especially on

the State of New Jersey, in order to improve the pilot service of the harbor of New York, and to prevent further calamities, like the wrecks of the "Bristol" and "Mexico."

It seems therefore very clear that the Act of 1837 was not declaratory, but that it was, as declared by Judge Curtis, in *Cooley* vs. *The Wardens*, and by Chief Justice Taney, in the *License Cases*, exceptional legislation, intended to confer a new right, viz: the right of a State to affect by its legislation shipping bound to and from the ports of another State by suspending as to vessels so supplied the compulsory provisions of the Law of the State which possesses the port. And the fact that Congress had to interfere by an express enactment to accomplish this, is a positive recognition of the fact that before that Act the exclusive right to regulate the pilotage of shipping was in the State to or from whose ports it was bound.

It follows from what has been said that Delaware has not the power to legislate for shipping bound to and from Philadelphia, unless she gets it by the act of 1837, and the last inquiry accordingly is, does she fall within that act?

The real ground of *Flanigen* vs. *The Ins. Co.*, 7 Barr, 306, was that the provisions of the act of 29 Feb., 1803, as to compulsory pilotage did not create a statutory unseaworthiness, whereby any vessel lost without a pilot on board would be considered constructively unseaworthy. This disposed of the case.

But it was further said, and this was *obiter* that the plea was defective in averring only that the vessel sailed without having on board a pilot, in accordance with the act of Assembly, because as other than Pennsylvania pilots might have been employed by virtue of the Act of Congress of 1837, it ought also to have averred that the vessel had no such pilot. But this was a matter, to use the language of the Court, "simply relating to the form of the pleading."

Everything Judge Rogers said on this point would be satis-

fied by the fact that New Jersey, as is admitted on all hands, could have supplied a pilot under the Act of Congress. This would have been enough to make the plea defective. It is true he did say Delaware could do so also, but he was not construing the Act, and there was no occasion in the case before him to scrutinize the rights of Delaware under the Act, with reference to Pennsylvania shipping.

He does not seem to have been aware of the fact that neither Delaware or New Jersey had ever licensed a pilot for Delaware river or bay, and that for nearly a century no licenses but those of Pennsylvania had existed. It is to this fact, and not to a disposition to encroach upon her neighbors, that larger language has been used in some of her statutes, for example, that of 1846, than is proper. The words were made naturally to conform to the true state of affairs, to wit: that there were no pilots on the Dalaware river and bay except those licensed by Pennsylvania, in which state of affairs New Jersey and Delaware had acquiesced. Of course, any pretension that Pennsylvania has exclusive control over the navigation of Delaware river and bay "is founded on error," and the language of her acts, where too large, will be restrained by the courts to its proper limits. But so much of them as is legally enforceable must be enforced. For instance, the Act of 1846, the language of which applies to every one acting as a pilot in Delaware river and bay without a license from Pennsylvania will be held to extend to and cover only shipping bound to and from the ports of that State, and not to cover shipping bound to and from the ports of Delaware and New Jersey. Judge Rodgers was misinformed as to the origin of the Act of 1837, as may be seen from the following language:—

"It is understood that the Act of Congress grew out of a dispute between the States of New York and New Jersey as to the employment of pilots, the former asserting a right to

prescribe that none but pilots licensed by their Law should be employed in navigating vessels bound to their port," which probably led Judge Butler to give the explanation of the Act he did in the case of *The Clymene.*

It must be admitted that Judge Curtis fell into a similar error in *Cooley* vs. *The Wardens*, saying: "Conflicts between the Laws of neighboring States and discriminations favorable or adverse to commerce with particular foreign nations might be created by State Laws regulating pilotage, deeply affecting that equality of commercial rights and that freedom from State interference which those who formed the constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely, for in 1837 Congress actually interposed to relieve the commerce of the country from serious embarrassment arising from the Laws of different States situate upon waters which are the boundary between them. This was done by an enactment of the second of March, A. D. 1837, in the following words" He knew of the conflicts that had since occurred, and probably inferred that they had existed before, which was an immaterial error in the case before him, because the construction of the Act of 1837 was not involved.

It is singular that if Judge Butler's reading of the Act of 1837 be correct, this is the first attempt in the forty-four years of its existence that any State in the position of Delaware has made to avail of it. New Jersey has availed herself of it, with reference to New York Bay; Georgia, with reference to St. Mary's River; Washington Territory, with reference to the Columbia River; Indiana, with reference to the Ohio River; all being unmistakably within the Act. The following cases have arisen: *Hopkins* vs. *Wyckoff*, 1 Daly, 176; *Cribbs* vs. *The State*, 9 Fla., 420; *The Glencarne*, 7 Fed. Rep., 604; *Dryden* vs. *The Commonwealth*, 16 Ben. Monroe, 598. But Virginia has never attempted to supply pilots to Baltimore

shipping, nor the States along the Mississippi to shipping bound to New Orleans. This attempt of Delaware in 1881 stands alone.

The Court said in *Cribbs* vs. *The State*, 9 Fla., 420: "There is no doubt that the respective States are the most competent to regulate the pilotage *within their own ports*, and that it is for the general advantage that it should rest with them. With the exception of the said Act of 1837, regulating pilotage in ports situate upon waters which are the boundary between two States, it has been left to them. The question naturally suggests itself, Why did Congress make this exception? The answer is, to relieve the commerce of the country from any embarrassment arising from the Laws of different States situate upon waters which are the boundary between them. In some such States their Laws compelled Masters of vessels to take their pilots aboard. Each State, where there is a port situate upon waters which are the boundary between, without this regulation of Congress, might embarrass commerce by insisting that *their pilot* should be taken as pilot. It was also to remedy the strife between the two States, so embarrassing to the Masters, that this Act was passed. In fact, it was to meet just such a state of things as exist between the States of Georgia and Florida, at the ports of Fernandina and St. Mary's" and Taney, C. J., said of it in *The License Cases*, 5 Howard, 580: "There is but one Law of Congress making any specific regulation upon this subject, and that passed as late as 1837, and intended, as it is understood, to alter only a single provision of the New York Law, leaving the residue of its provisions entirely untouched."

The explanation of the proviso in the Act of 1867, referred to by Judge Butler as the Act of 1847, is as follows:—Congress in 1852 passed an act regulating steam vessels, which contained among other things provisions establishing inspectors, from whom the Master of every American steam vessel was obliged to get a license as a pilot. The question at once

arose whether this was such legislation on the part of Congress as repealed the State laws upon the subject of pilotage, and was differently decided in various Federal courts. Finally, the Supreme Court, in *Steamship Co.* vs. *Joliffe*, 2 Wall, 450, by a divided Court, held that the Act of Congress in no way affected the State legislation, which decision was incorporated in this proviso, so that the doubt might be laid at rest forever. It is noticeable, however, that the compiler of the United States Revised Statutes changed the word of the proviso from "port" to "State," so that it reads:—"or if a State situate upon the waters of the same *State*," which would be more consistent with Judge Butler's views. But of course no change in the words of the proviso would alter the existing law, as it does not pretend to enact anything new, but simply to declare that the Act of 1867 should in no way interfere with the existing law.

The language of both these acts, however, shows as clearly as it is possible to do that Congress understood the right to regulate commerce upon the subject of pilotage to be in the State *to or from whose ports it is bound*, except so far as it is altered by Act of Congress. Before going into the construction of the act of 1837 the following language in Judge Butler's opinion, must be considered: "In this view of the case the respondent's contention that "pilotage is the subject of local regulation of the State in which the port lies," and therefore that Pennsylvania, in the absence of statutory prohibition, has exclusive jurisdiction of pilotage respecting the port of Philadelphia and its commerce, is unimportant. It is not improper, however, to say, as before intimated, that I could not adopt this position, even in the absence of the statute last referred to." This statute was the act of 1867, which, as we have seen, was nothing more than a recital, and, as printed in the Revised Statutes, a mis-recital of existing law. But the language just quoted can not be reconciled with the case of *Cooley* vs. *The Wardens*, an examination of which will show

that every reason given by the Court in support of the State legislation is founded upon the fact that pilotage is a subject of *local regulation*, and that the State which is best fitted and most interested to regulate it is the State *to or from whose ports* the shipping goes.

One is at a loss to conceive how such a proposition can be doubted, or how it can be supposed that any State *ex proprio vigore*, and without the assistance of Congress, can pass a law which shall be effective in the territory of another State. If Pennsylvania should think it better that compulsory pilotage should not exist at all, will it be contended that Delaware or any other State could require vessels coming to and departing from Philadelphia to take her pilots? And yet to this the argument must come. If other States than those that have the ports can regulate the pilotage of commerce, then the whole reasoning in *Cooley* vs. *The Wardens* becomes absurd.

Congress evidently did not intend by the act of 1837 to disturb the familiar principle that no sovereign can give his laws extra-territorial effect. See *The Appollon*, 9 Wheat., 368. The intention was, to use the words of Taney, C. J., "to alter only a single provision of the New York law," viz., to *suspend* the compulsory feature of the laws of the State to or from which the vessel was bound, provided she had on board a pilot licensed by another State in the statutory situation.

The act of 1837, recognizing that by existing law vessels were subject to the regulation of the State to and from whose port they were going, made an exception in favor of vessels bound to ports situated in a certain way whereby they might take a pilot from another State than the one to or from whose port they were bound, and yet be relieved from the compulsory features of the laws of the latter State. What ports are within the act? Those which are situated upon waters which are "the boundary between two States." From what other State than the one to or from which she is bound may she take a pilot? The State bounded upon the waters of the

port. The language of the acts can only be explained on the supposition that Congress recognized the fact that by existing laws the regulation of pilotage was in the State to or from whose ports the vessels were bound. If, as Judge Butler supposes, any State situated on the same waters had the right of regulating it, and the intention of Congress had been to reconcile the conflicting laws of such States by saying the pilot of any State shall be a defence to the vessel against the laws of the other States, it is impossible to see why the privilege was so laboriously confined to ports situate upon waters which are the boundary between *two States*, and to waters which are boundaries only. The rights of the States in navigable waters of the United States are the same whether they are boundaries or whether they lie entirely within particular States. So far as the rights of navigation are concerned, there is no difference between a vessel bound to a wharf at Philadelphia on the Schuylkill, and one bound to a wharf on the Delaware, nor, to take an illustration from the case of *The Glenarne, supra*, between a vessel bound to a port on the Columbia river, and one bound to a port on its tributary, the Wallamette. As the legislation is obviously exceptional, it should not be extended beyond its plain import, and to give it the construction adopted by Judge Butler is to make it very unreasonable. Instead of being in harmony with the free rights of navigation of all the States, it is impossible to conceive a more remarkable illustration of the doctrine of States' rights.

H. G. WARD,
R. C. M'MURTRIE,
Proctors for Relator.

DEC 3 1881

IN THE SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE SUGGESTION OF WALTER F. HAGAR FOR A WRIT OF PROHIBITION TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE, SITTING AS A COURT OF ADMIRALTY.

No. 9, Original. *October Term, 1881.*

Argument Against the Rule to Show Cause.

GEORGE GRAY,
EDWARD G. BRADFORD, JR.,
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Argument Against the Rule to Show Cause.

The application for the writ of prohibition in this case is based upon the alleged want of jurisdiction of the United States District Court for the District of Delaware over the claim for which the libel in question was filed. Two grounds against the jurisdiction are urged by the learned counsel for the rule as follows, (pp. 2, 3, Arg. in support of Suggestion.)

"*First*, The statute gives no lien or claim against the vessel, but only a claim *in personam* against the master, owner or consignee."

"*Second*, The statute of Delaware cannot impose a pilot on a vessel not bound to or ultimately going to or coming from a port of that State."

Before discussing the questions whether or not the Act of the State of Delaware of April 5, 1881, gives a lien or claim against the vessel in case of a wrongful refusal to receive a pilot, and whether or not the State of Delaware had the power by that statute to "impose a pilot on a vessel not bound to or ultimately going to or coming from a port of that State," it is material to consider a preliminary question

affecting the propriety of the present application. Assuming, for the sake of the argument, that the learned counsel for the rule are right in both of their above propositions, has any proper case been presented to this Court for the issuance of a writ of prohibition?

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction." *U. S. Rev Stat.* § 688. This statute not having indicated the grounds upon which the writ may issue, the principles of the common law must serve as a guide. High says; "In all cases where the remedy by prohibition is provided by statute, but the statute fails to point out or prescribe the causes for which it may be allowed, reference must be had to the common law to determine whether an appropriate case is presented for the exercise of the jurisdiction." *High's Extra. Leg. Rem.* § 784. It seems well settled that at common law the writ lies against temporal courts only where the inferior tribunal is acting either wholly without jurisdiction, or in excess of its jurisdiction. 3 *Bl. Comm.* 112. Broom says: "Prohibition to the temporal courts is limited to those cases where they act either without, or in excess of jurisdiction." *Broom's Comm. on Com. Law*, *234. In *Lord Cambden et al. vs. Home*, 4 *Term. Rep.* 381, it was held that a writ of prohibition should not be granted to restrain the Court of Lords' Commissioners of Appeals from proceeding in a prize cause. In that case Mr. Justice Ashhurst says: "Though this is a case of great importance, I do not think it a question of much difficulty as to the principal point. It is admitted that the Courts of Admiralty have exclusive jurisdiction over all questions of prize, and if so, they must have the same jurisdiction over all matters that arise incidentally either in construing acts of parliament or proclamations, in order to form their opinion on the principal question." In the same case Mr. Justice Buller says: "If it were competent to us to decide on the second question, whether or not the Court of Appeals had misconstrued the act of parliament, I should desire further time, in order to look into the authorities. * * * But I think that it is not now

competent to this Court to examine that question. It is to be remembered that the question now before us is, whether we shall prohibit the Court of Appeals from proceeding in a prize cause? And in such questions the only point for our consideration is, whether the Court, to which the prohibition is prayed, has a jurisdiction over the subject. Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the Court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for a prohibition, but is only matter of appeal." The same doctrine in its relation to courts of admiralty is recognized in *Place vs. Potts*. 8 *Exch.* 705. High says: "Another fundamental principle, and one which is to be constantly borne in mind in determining whether an appropriate case is presented for the exercise of this extraordinary jurisdiction is, that the writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals. And the courts will not permit the writ of prohibition, which proceeds upon the ground of an excess of jurisdiction, to take the place of or be confounded with a writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction, which is conceded. The proper function of a prohibition being to check the usurpations of inferior tribunals, and to confine them within the limits prescribed for their operation by law, it does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. * * * In the application of the principle, it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction." *High's Extra. Leg. Rem.* § 772.

Such clearly seems to be the doctrine recognized in this tribunal. This Court, in *Ex parte Easton*, 5 *Otto*, 68, 77, where application was made for a writ of prohibition to restrain the United States District Court for the Eastern District of New

York from exercising jurisdiction over a proceeding *in rem* to enforce an alleged lien for wharfage, say : " Application for the writ of prohibition is properly made in such a case, upon the ground that the District Court has transcended its jurisdiction in entertaining the described proceeding ; and whether it has or not must depend not upon facts stated *dehors* the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment. Mere matters of defence, whether going to oust the jurisdiction of the court, or to establish the want of merits in the libellants' case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defence for the consideration of the court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court. * * * Congress has empowered the Supreme Court to issue writs of prohibition to the district courts 'when proceeding as courts of admiralty and maritime jurisdiction,' by which it is understood that the power is limited to a proceeding in admiralty. * * * Such a writ is issued to forbid a subordinate court to proceed in a cause there depending, on suggestion that the cognizance thereof belongeth not to the court." So, in *Ex parte Christy*, 3 *How.* 292, 308, where application was made for a writ of prohibition to restrain the United States District Court for the District of Louisiana from taking further proceedings in a certain bankruptcy case there pending, this Court, speaking through Mr. Justice Story, after stating that the application was made upon the ground that the District Court had transcended its jurisdiction, say : "Other matters, whether going to oust the jurisdiction of the court, or to establish the want of merits in the case of the plaintiff, constitute properly a defence to the suit, to be propounded for the consideration of the district court by suitable pleadings, supported by suitable proofs, and cannot be admitted here to displace the right of the district court to entertain the suit."

As the writ of prohibition can properly issue only where the inferior tribunal is acting without or in excess of jurisdic-

tion, it is material to inquire what jurisdiction is. This Court, in *The State of Rhode Island vs. The State of Massachusetts*, 12 *Pet.* 657, 718, say: "Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether in a case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."

Tested by these principles the case before the Court does not warrant the issuance of a writ of prohibition. The Constitution provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." *Art. III.* § 2. Congress by the Judiciary Act of 1789 established the District Courts, and conferred upon them "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it." Under this provision the District Courts have exclusive original jurisdiction over proceedings *in rem* for the enforcement of maritime liens, the common law not being competent to give such a remedy; but have only concurrent jurisdiction with the Circuit or State courts over proceedings *in personam* for the recovery of claims arising from maritime contracts or torts, because the common law is competent to give a remedy. *The Hine vs. Trevor*, 4 *Wall.* 555. *Leon vs. Galceran*, 11 *Wall.* 185.

Whether or not a given claim is within the admiralty and maritime jurisdiction of the District Court depends, if it arise from contract, upon the nature of the subject-matter of that contract, and, if it arise from tort, upon the locality where the tort was committed. *People's Ferry Company of Boston vs. Beers et al.* 20 *How.* 393, 401. *Phila. Wil. and Balt. R. R. Co. vs. Phila. and Havre de Grace Steam Towboat Co.* 23 *How.*

law raised an implied promise to pay the amount specified in the Statute. Courts of Admiralty have undoubted jurisdiction of all marine contracts and torts. That contracts relating to pilotage are within the sphere of the admiralty jurisdiction has not been controverted by the counsel for the petitioner. The question is not an open one in this court."

The *nature* of the claim set forth in the libel in question clearly bringing it within the admiralty and maritime jurisdiction of the District Court, that court has jurisdiction over the cause. It will not be denied by the learned counsel for the rule that the District Court, in entertaining the libel, is "proceeding as a court of admiralty and maritime jurisdiction," for unless that court were so proceeding, this Court would have no power, under any circumstances, to issue the writ of prohibition. *Ex parte Christy*, 3 *How.*, 292, 322; *Ex parte Graham*, 10 *Wall.*, 541.

Nor will it be denied that the District Court has acquired jurisdiction, in its more limited sense, over the *res*, through process of arrest and the giving of stipulation for the claim. But, it is objected that the Act of the State of Delaware gives no lien or claim *against the vessel;* and hence, it is argued, the District Court has no jurisdiction over the cause; being a proceeding *in rem.* That is to say, although the claim from its very nature be within the admiralty and maritime jurisdiction of the District Court, and although that court, in entertaining the libel, is proceeding as a court of admiralty and maritime jurisdiction, yet it has no jurisdiction over the proceeding, because it is *in rem.* This objection confounds the *remedy* with the *jurisdiction.* If the court be proceeding as a court of admiralty and maritime jurisdiction, and if the claim be within that jurisdiction, the question whether the proceeding should be *in personam* or *in rem* is not a question of jurisdiction, but of remedy. "Suits and proceedings in admiralty are divided into two great classes; suits and proceedings *in rem* and suits and proceedings *in personam.*" *Benedict's Adm.*, § 359. These are the two appointed and well understood modes of proceeding in courts of admiralty in the exercise of their jurisdiction. Whether in a given case

the one or the other, or either indifferently, shall be the appropriate remedy must depend upon the nature and circumstances of the case. The proceeding *in rem*, for instance, presupposes the existence of a maritime lien, and is not an appropriate remedy unless such a lien exists. *The Rock Island Bridge*, 6 *Wall*, 213. But if the claim be maritime in its nature, the question whether such a lien exists, and, consequently, whether a proceeding *in rem* can be supported, is surely not a question of jurisdiction, but of right in the libellant to a particular remedy, which right he must sustain, or fail in his cause.

Could it be seriously contended that where the claim is of a maritime nature, as in the case of furnishing supplies to a vessel in her home port, and a libel *in rem* has been improperly filed, the District Court in Admiralty would not have the legal authority, instead of dismissing the libel, to decide the cause against the libellant? Yet if the court has the legal authority to make such a decision, it has jurisdiction over the proceeding; and may, without transcending the limits of that jurisdiction, determine the question of lien or no lien either in the affirmative or negative. So, in the present case, the claim being of a maritime nature, the District Court in determining the question of lien or no lien, will pass upon the right of the libellant, as affecting his remedy, but will not touch the question of jurisdiction. Authority is not wanting in support of the proposition that, the claim being of a maritime nature, the inquiry whether a proceeding *in rem*, on the one hand, or *in personam*, on the other, can be sustained in the particular case, is not a question of jurisdiction over such proceeding, but merely a question of right or remedy, affecting the parties. Benedict says: "It is not uncommon in the reports to find counsel, and even judges, insisting that the court has not jurisdiction in a particular maritime cause of action *in personam*, while they admit the jurisdiction over the same cause of action *in rem*. And it has been sometimes very gravely asserted, that the Admiralty Courts have jurisdiction only *in rem*, or at most, but very rarely *in personam*, and only as ancillary to the jurisdiction *in rem*. * * * But the distinc-

tion between proceedings *in rem* and *in personam*, has no proper relation to the question of jurisdiction. If mariners' wages, salvage, freight, and bottomry, are maritime causes o action, then the Court of Admiralty has jurisdiction of them, and may use any of its appointed modes to give the party any remedy to which the law entitles him. The substratum of the action is the liabilty of one party to respond to another, and the court may enforce it against the person, or against a particular portion of his property, or against his property generally, as the law may have provided the right. * * * In such cases, the question before the court is not whether the court have jurisdiction, but whether the party have right; it is not a question in abatement, but a question of the merits of the action."—*Benedict's Adm.*, § 204. In *The Robert J. Mercer*, *Sprague*, 284, cited by the learned counsel for the rule, where it was held that a claim by a pilot, under the law of Massachusetts, for pilotage fees on account of the refusal of the master to accept his services, created no lien upon the vessel, the Court clearly treated the question not as one of jurisdiction, but of right to a particular remedy.

This Court, in *The Steamer St. Lawrence* 1 *Black*, 522, in discussing the 12th rule of admiralty practice, adopted in 1844, and its alteration in 1858, say: "But there is a wide difference between the power of the court upon a question of jurisdiction and its authority over its mode of proceeding and process. And the alteration in the rules applies altogether to to the character of the process to be used in certain cases, and has no relation to the question of jurisdiction. * * * A brief history of the legislation of Congress upon this subject will explain the grounds upon which the rule of 1844 was adopted, and also the reason that induced the court to change it; and will also show that no question of jurisdiction was supposed to be involved in the adoption of the original rule, nor in the change that was afterwards made." In the above case this Court held that it could not enlarge or diminish the admiralty and maritime jurisdiction by rule; but that it was clothed with power by act of Congress to alter and change the forms and modes of proceeding in admiralty; and that it was

in the exercise of this power that the rule of 1844 was both made and changed. Such also is the doctrine of this Court in *The Lottawanna*, 21 *Wall.*, 558. It is true that it was there held that the 12th rule in admiralty, as amended in 1872, would not authorize a proceeding *in rem* in any case unless a lien existed by law, "since a lien is a right of property and not a mere matter of procedure," p. 579. But that the question of lien or no lien has nothing to do with jurisdiction is evident from the strong intimation by the Court, p. 577, that Congress would have the power to create a lien for supplies and repairs furnished to a vessel in her home port, although Congress clearly has not the power to enlarge or contract the limits of admiralty and maritime jurisdiction. It therefore seems clear that any question as to the existence of a lien in the case before the Court is a question of right affecting the remedy, and not a question of jurisdiction to be considered upon an application for a writ of prohibition.

Again: A suit for the enforcement of an alleged lien arising from a maritime transaction, and consequently the determination of the propriety of a preceeding *in rem*, certainly fall within the original jurisdiction of *some* court. Yet neither this Court nor the Circuit Courts have original cognizance of the question, and it is clear that the State courts have no jurisdiction over it, as their jurisdiction in relation to maritime matters is restricted to cases where the common law is competent to give a remedy, and common law remedies do not embrace proceedings *in rem*. The District Court, therefore, has jurisdiction over the proceeding in question.

But it is contended by the learned counsel for the rule that "the statute of Delaware cannot impose a pilot on a vessel not bound to or ultimately going to or coming from a port of that State." Whether the State of Delaware can do this, —whether the Act of April 5, 1881, does it—is not a question of jurisdiction of the District Court, but simply of the validity of a statute purporting to create a right within the unquestionable jurisdiction of that court. If an action of debt be brought in a common law court under an unconstitutional statute, there could be no doubt of the jurisdiction of the

court over the suit, although the plaintiff would not in point of law be entitled to recover. The jurisdiction in such case does not depend upon the statute ; it already exists ; and the question of the validity of the statute touches only the right of the plaintiff to recover. So, in the present case, the claim set forth in the libel clearly being within the admiralty and maritime jurisdiction of the District Court, that jurisdiction exists, although in case of the invalidity of the statute, the libellant would not be entitled to recover. The test of jurisdiction in such a case is whether, upon the assumption that the libellant is entitled in law and in fact to the claim as set forth in his libel, the court has the legal power to hear, determine and enforce it, by its appointed modes or forms of proceeding. For it is the claim as set forth in the libel that calls for an adjudication between parties, which is the essence of jurisdiction. All questions as to the invalidity or existence of the claim, or the propriety of the remedy sought, are matters properly to be propounded by way of defence, whether of fact or law, and to be determined by the District Court. They relate to right, not jurisdiction.

Again : It is settled that no State law can confer admiralty and maritime jurisdiction upon the District Court. The question, therefore, whether a State law is valid, or operative to create the right in dispute, cannot be a question of jurisdiction of that court, but only of right, to be passed upon by that court.

In *Ex parte McNiel*, 13 *Wall.*, 236, it was insisted by counsel that the New York statute requiring the payment of half-pilotage fees, in case of refusal by the master to take a pilot, was in conflict with the power of Congress to regulate commerce, and void, and that, therefore, the District Court had no jurisdiction of the cause of action stated in the libel. This Court say, p. 243 : "It is further urged that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal court ; but that is not a question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right

may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy."

The claim as set forth in the libel being unquestionably of a maritime nature, and within the jurisdiction of the District Court in Admiralty, and the questions raised by the learned counsel for the rule not relating to the jurisdiction of that court, and the proceeding adopted by the libellant being one of the appointed and usual remedies used by that court in the exercise of its admiralty jurisdiction, it is respectfully submitted that it has not been shown that the District Court is acting either without or in excess of its jurisdiction, and that, therefore, the present rule should be discharged with costs.

But even upon the supposition that it is not necessary that the objections here raised by the learned counsel for the rule should relate to the matter of jurisdiction, the rule should be discharged because the right of the case is with the libellant.

Section 5, of the Delaware statute, provides; "That every ship or vessel propelled by steam or sails arriving from or bound to any foreign port or place, except such as are solely coal laden, passing in or out of the Delaware Bay by the way of Cape Henlopen shall be obliged to receive a pilot. That every such ship or vessel bound to the Delaware Breakwater for orders and not proceeding further up the Delaware Bay shall be obliged to receive a pilot; provided she is spoken or a pilot offers his services outside of the Cape Henlopen Light house, bearing south-west." Section 18 of the same statute, after establishing the rates of pilotage, provides; "That every ship or vessel bound to the Breakwater for orders, shall pay pilotage fees as follows: A sum equal to half pilotage to the port of Philadelphia, the same pilotage fees when outward bound, and if such ship or vessel proceeds to Philadelphia or any other port on the Bay or River Delaware, the full pilotage fees as fixed in addition." This provision clearly shows that the legislature, by the use of the

But the clause does not, in terms, exclude the exercise of any authority by the States to regulate pilots. On the contrary, the authority of the States to regulate the whole subject, in the absence of legislation on the part of Congress, has been recognized from the earliest period of the Government. On the formation of the Union there were laws in force in the different States bordering on the sea for the regulation of pilots and pilotage ; and at its first session, in 1789, Congress passed an act adopting the existing regulations and such as might be provided by subsequent legislation f the States."

It is material at this point to inquire whether the provision of the Delaware statute, to which the libel refers, would, in the absence of any legislation by Congress upon the subject, be a legitimate regulation by the State of Delaware of pilots and pilotage.

The learned counsel for the rule are in grave error in assuming that the Act of 1789 conferred upon the States the authority to regulate pilots, and in treating that act as "the foundation of all the jurisdiction." (p. 9 Arg. in support of Suggestion.) If the States had not possessed that authority, it would have been because they were deprived of it by the Constitution ; and if the Constitution had denied them that authority, manifestly an act of Congress could not vest it in them. The Act of 1789, so far as it relates to pilotage, was substantially a declaration by Congress that the regulation of the whole subject belonged to the several States, and should continue so to belong, until Congress should deem it proper in the exercise of its power, to exclude them from it. To use the language of this Court in *Cooley vs. Board of Wardens, of Port of Philadelphia*, when discussing the Act of 1789 : "It manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time ; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of

different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

The learned counsel for the rule, erroneously assuming that the Act of 1789 is the fountain of authority in the several States to regulate pilotage, have critically examined its terms, and have thereon based an ingenious argument intended to show that such authority is dependent upon the position of the ports of destination or departure, and that "the statute of Delaware cannot impose a pilot on a vessel not bound to or ultimately going to or coming from a port of that State."

It is not necessary to reply to this particular argument; for the Act of 1789 did not confer the authority to regulate pilotage, and it cannot reasonably be asserted that its intention was to *restrict* the power of the States over that subject; as such an assertion would be in direct opposition to the received doctrine of this Court. The propriety of the terms used in the Act of 1789 is not therefore the subject-matter of critical inquiry; but those terms are to be taken *generally* as indicating the intention of Congress that the whole subject of pilots and pilotage, whether in the bays, inlets, rivers, harbors, or ports of the United States, should be controlled by the regulations of the several States, in so far as the legislation of Congress should not be inconsistent therewith.

The question, then, is whether the provision of the Delaware statute, to which the libel refers, would, in the absence of any legislation by Congress upon the subject, be a legitimate regulation by the State of Delaware of pilots and pilotage. That State is certainly interested that the commerce of her own ports should be protected by a proper pilotage system. And it is evident that such a system, to be complete, should regulate navigation, not only above the Delaware Breakwater, but also between that point and the sea. Such has been the operation of the Pennsylvania system of pilotage. And the circumstance that a vessel is bound to the breakwater merely for orders cannot with reason be considered as excepting her from the class of shipping to the navigation of which a proper pilotage system should apply. For, first, it would be an unreasonable system which would require pilots to incur

the peril, loss of time, and labor of speaking vessels at sea, which are about entering the Delaware Bay, upon an uncertainty of employment, depending upon the destination of such vessels. Secondly, where vessels are bound to the breakwater for orders, *non constat*, until orders are received, but that their ultimate destination is a Delaware port; and if it was the intention that they should proceed to Delaware ports, they certainly should have been subject to the regulations of the Delaware pilotage system between the sea and the breakwater.

Again: The State of Delaware, for the protection of her own commerce, is interested that the channels of the navigable waters which serve as her boundary should be kept free from obstruction. This is certainly one of the legitimate ends of a pilotage system; and requires that its regulations should apply to vessels navigating such channels, whether they be bound to a Pennsylvania port or a Delaware port. The learned counsel for the rule, in support of their contention that Delaware cannot impose a pilot on a vessel unless it is bound to or from a Delaware port, refer to the language of this Court in *Cooley vs. Board of Wardens of Port of Philadelphia*. But this Court have not either in that or any other case decided that a State could not impose a pilot on a vessel navigating the channels of the waters upon which such State is situated, unless bound to or from a port in that State. The language used by this Court in the case referred to, to be properly understood, must be taken in connection with the question before the court. That related to the validity of a certain section of a Pennsylvania statute, of which this Court say: "This is one section of 'An Act to establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotage,' &c., and the scope of the act is, in conformity with the title, to regulate the whole subject of the pilotage of that port." The circumstance, therefore, that port pilotage is frequently mentioned in the opinion of the court is most natural; but by no means supports the position taken by the learned counsel for the rule.

Similar remarks may be applied to the case of *The Annapolis*, *Lush.* 295, referred to by the learned counsel for the

rule. The doctrine there laid down is not in the least inconsistent with the right of a State to regulate the pilotage of vessels navigating the channels upon which she is situate, whether or not such vessels are bound to the ports of that State.

In *The Schooner Thebes*, 12 *Hunt's Merch. Mag.* 82, referred to by the learned counsel for the rule, the decision was that the pilotage law, relating to the port of Boston, did not apply to the pilotage service tendered in that case. The court say: "Was this vessel bound into the port or harbor of Boston, within the meaning of the law, so as to entitle the libellant to his stated fees as a pilot?" It was a question of statutory construction and wholly fails to support the contention of the learned counsel for the rule.

Regulations of navigation should seek to prevent the obstruction of the channels of public navigable waters arising from wrecks or any other cause. And when such prevention does not require the application of a national rule, regulations to that end, as regulations of commerce, may well be left to the several States interested. This Court, in *Gilman vs. Philadelphia*, 3 *Wall.*, 713, 724, 726, say: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise: to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. * * * The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent

the power to regulate commerce may be exercised by the States."

The prevention of obstructions in the channels of public navigable waters being a legitimate aim of regulations of navigation, and pilotage regulations conducing largely to the accomplishment of that aim, it is submitted that upon this ground alone, were there nothing else, and without reference to the situation of ports of destination and departure, the pilotage regulation in question can be sustained. Indeed, the truth of this proposition must be admitted when it is considered that the State of Delaware is so largely interested in shipping—building more vessels than the whole State of Pennsylvania.

Again: the State of Delaware, for the extension of her commerce, is materially interested that the Delaware Breakwater should become a great port of call, and therefore has the power, through her pilotage regulations looking to the maintenance of a body of trained and skilled pilots, whose known presence shall be a guarantee of safety, to protect the shipping calling there for orders

To contend that the validity of pilotage regulations depends upon the position of the ports of destination or departure, although the pilotage ground embraces channels in navigable waters bounding the State which has made such regulations, is to indicate altogether too narrow a view of the subject. Benedict says; "The name of pilot, or steersman, is applied either to a particular officer serving on board the ship during the course of the voyage, and having the charge of the helm and of the ship's route; *or to a person taken on board at a particular place, for the purpose of conducting a ship through a river, road, or channel, or from or into port.*" *Benedict's Adm.*, § 289. The same definition is given in *Abbott on shipping*, [195]. This definition has received the approval of this Court. In *Hobart vs. Drogan*, 10 *Pet*, 108, the Court say: "Lord Tenterden, in his excellent Treatise on Shipping, part 2, c. 5, § 1, p. 148, has defined a pilot to be 'a person, taken on board at a particular place, for the purpose of conducting a ship through a river, road, or channel, or from or into a port.' His duty, therefore, is properly the duty to

navigate the ship over and through his pilotage limits, or, as it is commonly called, his pilotage ground." Here is the clearest recognition by this Court that the proper subject-matter of pilotage regulations may be the conducting of vessels through rivers, roads, or channels, *or* from or into ports. This Court in *Cooley vs. Board of Wardens of Port of Philadelphia*, say: "It is true that, according to the usages of modern commerce in the ocean, the pilot is on board only during a part of the voyage between ports of different States, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage, and may regulate those who conduct or assist in conducting navigation in one part of a voyage as much as in another part, or during the whole voyage." This doctrine is in perfect harmony with received ideas relating to the nature of commerce, of which pilotage systems are but regulations. This Court, in *Gibbons vs. Ogden*, 9 *Wheat.*, 1, speaking through Mr. Chief Justice Marshall, say: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

It is, therefore, submitted that, saving any objections hereinafter considered, the provision of the Delaware statute to which the libel relates would, in the absence of any legislation by Congress upon the subject, be a legitimate pilotage regulation, and, consequently, is such, there being no act of Congress inconsistent therewith.

It is hardly necessary to remark that questions of supposed hardship or inconvenience in the operation of this pilotage regulation bear no relation to its validity, but could at most serve to induce Congress to supersede it by a national regulation.

In fact, though, it could be shown, if necessary, that the pilotage fees under the Delaware statute are less than those fixed by some of the leading maritime states of the Union, notably, the State of New York, and until the present year, the State of Pennsylvania. The pilotage rates under the Delaware statute are not oppressive, and are no more than sufficient to secure the services of persons properly qualified to act as pilots and give them reasonable compensation. And the former legislation of the State of Delaware in relation to pilots was most liberal and generous. Prior to the Act of April 5, 1881, without creating pilots of her own, she required vessels coming into her ports from, or departing thence to, foreign ports, to receive a pilot duly licensed under the laws of other States, and provided that pilotage fees forfeited for refusal to receive a pilot should be paid, not into her own treasury, but to the "Society for the Relief of Distressed and Decayed Pilots their Widows and Children," a corporation of the State of Pennsylvania.

It is contended by the learned counsel for the rule that the Delaware statute in so far as it attempts to regulate the pilotage of vessels going to the Delaware Breakwater for orders is invalid, because the site of the breakwater was ceded by the State of Delaware to the United States by the Act of Jan. 26, 1827. That act provides: "That all the jurisdiction and title of the State of Delaware over and to so much of the shore, bed and waters of the Delaware bay as are necessary for the erection of a breakwater or other harbour, and for the construction of such defences as may be thought proper at or near the mouth of said bay, be and the same is hereby ceded to the United States of America, for the purpose of erecting and keeping up such breakwater or other harbour, or such defences, and for no other uses and purposes whatsoever," upon condition that such harbor and defences should be constructed and maintained at the sole expense of the United States, and that civil and criminal process of the State of Delaware should be served there, and that the construction of such breakwater or harbor should be commenced within ten years, or the cession of jurisdiction should be avoided. *Delaware Laws, Vol. 7, p.* 31.

Speaking of this cession, the Court of Oyer and Terminer of the State of Delaware, in *State vs. Morris*, 1 *Harr.* 326, say: "The extent of this cession is indefinite—so much as is necessary—for the erection of a breakwater and the act points out no means of determining what portion of the shore, bed and waters is necessary for this purpose; and we are unable to measure its extent, except by reference to what is actually used, to wit, the line of the breakwater as made or contemplated to be made, its length, breadth and depth. This must be the fair construction of the act; for no more land can be necessary for a particular purpose than is used, in effecting that purpose, and it reduces the extent of the State's grant in this instance to a very narrow compass."

It would, therefore, follow that the exclusive jurisdiction claimed for the United States extends only over the spot covered by the breakwater, and can by no possibility be inconsistent with the operation of the Delaware pilotage law.

But admitting, for the sake of the argument, that exclusive jurisdiction over the breakwater and harbor between it and Delaware shore is by virtue of the cession above mentioned vested in the United States, it by no means follows that the pilotage regulation in question is invalid. The authorities cited by the learned counsel for the rule upon this point utterly fail to establish their proposition and are wholly inapplicable to the present case. They only show that acts, committed on territory over which the United States has acquired exclusive jurisdiction by purchase with the consent of the legislature of the State in which such territory is situate, are not punishable in the courts of such State, although such acts if committed elsewhere in such State would be so punishable. The ground of these decisions is that the laws of the State, after the acquisition of exclusive jurisdiction by the United States, are no longer operative over the given territory. But the provision of the Delaware pilotage act, to which the libel relates, does not extend over the breakwater or the harbor between it and the Delaware shore, but merely over the Delaware pilotage ground from the sea to the Delaware Breakwater. Under that provision the pilotage fees are earned or ac-

crue *between* the limits of that pilotage ground in the sea, as one terminus, and the Delaware Breakwater, as the other. The statute does not impose pilots upon vessels to conduct them either through or into the harbor between the breakwater and the shore. Indeed, by settled usage, vessels of the size of the "William Law" bound to the Delaware Breakwater for orders do not, in fact they cannot, enter that harbor, but anchor in Cape Henlopen Roads, a short distance outside. It is, therefore, clear that the provision of the Delaware statute in question cannot be treated as invalid by reason of the possession of any exclusive jurisdiction by the United States over the Delaware Breakwater or the harbor between it and the Delaware shore, unless the United States can justly be considered as having, through its construction of the breakwater and its acquisition of jurisdiction thereover, adopted a regulation of commerce inconsistent with the operation of the statutory provision under discussion. But there is no such inconsistency. The Delaware Breakwater was constructed and intended by the United States to serve as a refuge for shipping from stress of weather, ice, &c. A pilotage regulation for safely conducting vessels to the breakwater, therefore, far from hindering the attainment of the ends for which the breakwater was constructed, is directly calculated to secure their accomplishment; first, by furnishing pilots thoroughly acquainted with the local channels and shoals, and able to safely conduct vessels in stress of weather to the breakwater; and, secondly, by the prevention of obstruction, by wrecks, to navigation in the channels leading to the breakwater. It is to be noted, however, that the Delaware statute requires a pilot to be taken by vessels, proceeding to the breakwater, only when bound there for orders, and imposes no burden upon vessels proceeding there by reason of stress of weather.

In *Steamship Company vs. Joliffe*, 2 *Wall.* 450, one of the main questions was as to the validity of a California statute regulating pilotage. It was claimed that the Act of Congress of 1852, relating to the pilotage of steam vessels, was in conflict with the State law, and the argument against the validity of that law was infinitely stronger than any that can

be made against the provision of the Delaware statute in question, based upon any supposed inconsistency arising from the asserted exclusive jurisdiction of the United States over the breakwater. Yet this Court upheld the California statute.

It is, therefore, submitted that the provision of the Delaware statute to which the libel relates cannot be considered invalid, on account of the exclusive jurisdiction which is claimed for the United States over the Delaware Breakwater and the harbor between it and the Delaware shore.

It seems to be claimed by the learned counsel for the rule (pp. 11, 12, Arg. in support of Suggestion,) that the State of Pennsylvania, as between herself and the State of Delaware, possesses some exclusive right or jurisdiction over the Delaware River and Bay to the South of her own limits, which is inconsistent with and renders nugatory the pilotage regulation to which the libel relates. And reference is made to the terms of the charter granted by Charles II to William Penn in 1681. But, even if it were a proper subject-matter of inquiry in this case, it would be impossible to support such a pretension.

William Penn, by virtue of the charter granted by Charles II, bearing date March 4, 1681, and two deeds of feoffment, both bearing date August 24, 1682, executed by the Duke of York, became proprietary in fee of the territory now embraced within the States of Pennsylvania and Delaware. The charter of Charles II granted "the free and undisturbed use and continuance in, and passage into and out of all and Singuler Ports, Harbours, Bays, Waters, Rivers, Isles, and Inletts, belonging unto, or leading to and from the Countrey or Islands aforesaid, And all the Soyle, lands, fields, woods, underwoods, mountaines, hills, fenns, Isles, Lakes, Rivers, waters, Rivuletts, Bays, and Inletts, scituate or being within, or belonging unto the Limitts and Bounds aforesaid." *Charters and Constitutions, Part 2, p.* 1510. The deed of feoffment of the Duke of York, relating to the twelve mile circle, granted and conveyed "all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying, and

being upon the river Delaware, in America; and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southermost part of the said circle of twelve miles about the said town." *App. to Vol.* 1 *Delaware Laws, p.* 2. The deed of feoffment of the Duke of York, relating to the territory embraced within the State of Delaware South of the twelve mile circle, granted and conveyed "all that tract of land upon Delaware river and bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Whorekills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bays, waters, rivers, isles, and inlets, belonging to, or leading to the same; together with the soil, fields, woods, underwoods, mountains, hills, fens isles, lakes, rivers, rivulets, bays and inlets, situate in, or belonging unto, the limits and bounds aforesaid." *App. to Vol.* 1, *Delaware Laws, p.* 5. William Penn having thus become the proprietary of the territory embraced within the States of Pennsylvania and Delaware, and entitled to the use of and control over the waters of the Delaware River and Bay, it was provided, December 7, 1682, by the "Act of Union, for annexing and uniting of the counties of New Castle, Jones's, and Whorekills, *alias* New-Dale, to the province of Pennsylvania," that "the counties of New Castle, Jones's, and Whorekills, *alias* New-Dale, shall be annexed, and by the authority aforesaid, are hereby annexed unto the province of Pennsylvania, as of the proper territory thereof; and the people therein shall be governed by the same laws, and enjoy the same privileges in all respects, as the inhabitants of Pennsylvania do, or shall enjoy from time to time therein, any thing in this law, or any other law, act or thing in this province, to the contrary thereof in anywise notwithstanding." *App. to Vol.* 1, *Delaware Laws, p.* 9. In "The Charter of Privileges, granted by William Penn, esq., to the inhabitants of Pennsylvania, and territories," October 28, 1701, it is said: "that nothwithstanding any clause or clauses in the above mentioned charter, obliging the province and territories to join together in legislation, I am content, and do hereby declare,

that if the Representatives of the province and territories shall not hereafter agree to join together in legislation, and that the same shall be signified unto me, or my deputy, in open Assembly, or otherwise, from under the hands and seals of the Representatives, for the time being, of the province and territories, or the major part of either of them, at any time within three years from the date hereof, that in such case, the inhabitants of each of the three counties of this province, shall not have less than eight persons to represent them in Assembly, for the province; and the inhabitants of the town of Philadelphia (when the said town is incorporated) two persons to represent them in Assembly; and the inhabitants of each county in the territories, shall have as many persons to represent them in a distinct Assembly for the territories, as shall be by them requested as aforesaid. *Notwithstanding* which separation of the province and territories, in respect of legislation, I do hereby promise, grant and declare, That the inhabitants of both province and territories, shall separately enjoy all other liberties, privileges and benefits, granted jointly to them in this charter, any law, usage or custom of this government, heretofore made and practiçed, or any law made and passed by this General Assembly, to the contrary hereof notwithstanding." *App. to Vol.* 1, *Delaware Laws*, *p.* 43.

The union between the province of Pennsylvania and the three lower counties having continued from December, 1682, until October, 1701, they did not thereafter join in any acts of legislation, although several attempts were made to induce them to preserve that union. But even in the last act of separation the House of Representatives of the Province of Pennsylvania addressed the "Representatives of the freemen of the territories of the province of Pennsylvania," April 13, 1704, as follows: "We need not inform you, that by this charter" [the charter of Privileges of October 28, 1701,] "you still have the opportunity of forming yourselves into a distinct Assembly, and enjoying the privileges thereof as well as the province." *App. to Vol.* 1, *Delaware Laws*, *pp.* 47, 49.

From the time of their above separation Pennsylvania and Delaware have always remained apart, and each has enacted

her own laws and governed her own people. In view of these facts, it is astonishing that Pennsylvania should, as between herself and Delaware, claim any right or jurisdiction of an exclusive nature, over the Delaware Bay or River below her southern boundary line. Nothing can be clearer than that the three lower counties, after they separated from the province of Pennsylvania, possessed over the bay and portion of the river along their front jurisdiction of the same nature as that possessed by the province of Pennsylvania over the portion of the river along her front. Even had there been no guarantee of equal rights to the three lower counties at the time of their separation, they would,—certainly when through the Revolution they became a sovereign State,—have possessed, as between themselves and Pennsylvania, jurisdiction over the Delaware River and Bay along their front. 1 *Kent's Comm.* *26 *Wheat. El. Intern. Law, Part II, ch.* 4, § 6

But when the relations between Pennsylvania and Delaware at the time of their separation, and the express guarantees of equal rights to the latter, are considered, the claim now put forth on behalf of the former State hardly merits serious discussion. And the course pursued by both States has been utterly inconsistent with the existence of any such exclusive right or jurisdiction as is now claimed for Pennsylvania. Delaware has always claimed and exercised jurisdiction over the Delaware River and Bay along her front. Pennsylvania, on the contrary, has not, since the Revolution nor for a long time theretofore, claimed or exercised any exclusive right or jurisdiction over the bay or river below her southern boundary line, nor does her process run on the river below that line.

So utterly has Pennsylvania failed to make any such claim as is now set up for her, that when the question of jurisdiction over the navigable waters along the Delaware front has arisen, it has been considered not as a question affecting the interests of Pennsylvania, but, where no Federal right was involved, solely as one between the States of New Jersey and Delaware.

In *State vs. Morris*, 1 *Harr.* (*Del.*), 326, where an indictment had been found "for the murder of the captain of a brig

lying off Lewis Town, near the breakwater," the Court, in discussing the question of jurisdiction, say: "It may not be necessary for the court, on this occasion, to determine the full extent of this State's jurisdiction over the Delaware bay so as precisely to locate its eastern boundary; but it will be necessary for us to inquire whether the State has jurisdiction over that part of the bay which was the scene of this alledged murder. * * * The State of Delaware has uniformly claimed the sole and exclusive jurisdiction over the whole of the Delaware bay to low water mark on the Jersey shore, and it has to a certain extent used and exercised jurisdiction over the bay and river by grants of territory, acts of restrictive legislation, and service of process. On the part of the United States there has been no resistance of this claim; but, on the contrary, such acknowledgment of the State's jurisdiction as can be inferred from the acceptance on several occasions of cessions by this State of certain parts of the bay and river for the purpose of erecting forts, piers and breakwaters, for defence against the enemy, or for the protection of commerce. On the part, also, of the State of New Jersey, this claim, though resisted in its full extent, has been partially acceded to and acknowledged, that State having limited her claim of jurisdiction to the main ship channel of the bay. * * * Thus stands the case at present. The State of Delaware claiming the sole and exclusive jurisdiction and title to the Delaware Bay, as well by virtue of ancient charters as constant occupation, enjoyment and usage to a time running back previously to, and at the declaration of independence—a claim not controverted or denied, but rather admitted, by the United States—a claim at one time admitted on the part of the State of New Jersey, so far as the fixing the boundaries of her counties in accordance with it, may fairly be construed an admission, and now only denied by that State so far as regards one-half of the bay, from the main ship channel eastwardly to the Jersey shore. We speak of the *claim* of this State because we apprehend that from continual claim, or rather from the undisturbed and undisputed use, occupancy and enjoyment of territory extending back beyond the declaration of independence, the *right* and *title* to such territory is estab-

lished better and more certainly than by reference to chartered limits. Since that great event the States of this Union hold their territory not under charters from the British crown, but under the charter which was sealed with the blood and established by the persevering valour of our revolutionary fathers; from that time each State became itself a proprietor; holding of no other; absolutely seized of the independent sovereignty and uncontrolled jurisdiction within and over the territory then actually in its occupation and enjoyment; with this territory, thus defined, and only thus limited, she entered the confederacy and still holds to the same extent, unless she has granted any of her territory to the United States as most of the States have done for particular objects. At the date of our independence, then, the Delaware Bay was claimed by and in the occupation and enjoyment of the State of Delaware. From the Delaware shore out so far as the main ship channel or middle of the bay the State of New Jersey did not then and has not since asserted any title or set up any claim of jurisdiction; to this extent, therefore, this State has always been in the undisputed and undisturbed occupation and use of the bay, claiming title and exercising jurisdiction over its bed and waters."

It appears from the foregoing facts and authorities that, even if it were properly a subject-matter of inquiry in the present case, the claim set up on behalf of the State of Pennsylvania to some exclusive right or jurisdiction over the Delaware River and Bay along the Delaware front, should be rejected as wholly without foundation.

But, it is submitted, that the present case is not a proper one in which to consider and determine any such claim on the part of Pennsylvania. Such a claim should be passed upon not collaterally, but only in a suit between the States of Pennsylvania and Delaware. So long as no right of the Federal government is involved, the jurisdiction of Delaware, as between her and Pennsylvania, over the navigable waters along her front, being *prima facie*, should be recognized, until questioned and negatived in a direct proceeding by the State of Pennsylvania for that purpose.

The limits of pilotage ground in the sea depend upon usage or custom, varying according to local necessities or other circumstances; and the tender and refusal of the pilotage services of the libellant were made within the pilotage ground for shipping entering the Delaware Bay by way of Cape Henlopen. *Wilson vs. McNamee*, 12 *Otto*. 572. *The Annapolis, Lush*. 295. *Cisco vs. Roberts*, 36 *N. Y*. 292. *The Bark Nevada*, 7 *Ben*. 386. *Hope et al. vs. The Brig Dido*, 2 *Paine*, 243. It is not necessary to dispute the proposition of the learned counsel for the rule that, if a vessel should approach the Delaware Bay, refuse a pilot, and then, without entering the bay, change her destination to New York or Europe, she could not be held liable for pilotage fees. It is sufficient that those vessels are liable for pilotage from the limits of the pilotage ground in the sea, which in fact do enter the waters over which Delaware has jurisdiction.

The learned counsel for the rule contend that the Delaware pilotage law has not created any lien on the vessel for pilotage fees in case of refusal to receive a pilot, and therefore, that the libel, being *in rem*, cannot be sustained.

It may be a serious question whether, upon a proper construction of the law in all its parts, it would not be found to provide such a lien. But it is not necessary to rely upon such a construction of the law. The maritime law recognizes pilotage service as the proper subject-matter of a maritime claim, which can be enforced in admiralty by proceedings either *in rem* or *in personam*. *Hobart vs. Drogan*, 10 *Pet*. 108, 119. *The Anne*, 1 *Mason*, 508. *Benedict's Adm*. § 289. The 14th rule in admiralty, prescribed by this Court, also recognizes that such is the law.

A claim given by a State statute, where pilotage service is tendered and refused, is of the same nature as one where the service has been accepted and, in fact, wholly rendered. The act, being compulsory, creates an obligation to receive the duly authorized pilot who first tenders his services and to pay him the pilotage therein prescribed; from which obligation the law implies a contract to do these things. Such being the contract, a tender of pilotage service, accompanied by

ability to perform, which is refused, is equivalent to performance and entitles the pilot to the compensation prescribed in the act for that service. If, however, the act has fixed a different and smaller amount of compensation in case of tender and refusal of pilotage service, the pilot is entitled only to the reduced amount; for the contract, being merely implied from the obligation created by the act, is subject to modification by the express provisions of the act. But whether the pilot is, in case of a tender and refusal of service, to receive the whole or only a part of the amount fixed as compensation for the rendering of the service, in either case he is entitled to it *as pilotage*, and may proceed for its recovery either *in rem* or *in personam*. *Ex parte McNiel*, 13 *Wall.* 236. *Steamship Company vs. Joliffe*, 2 *Wall.* 450. *Cooley vs. Board of Wardens of Port of Philadelphia*, 12 *How.* 299. *The California*, 1 *Sawyer*, 463. *The George S. Wright*, *Deady*, 591.

It may be remarked in conclusion that the language of the Pennsylvania statute, considered in *Cooley vs. Board of Wardens of Port of Philadelphia*, is in one respect identical with that used in section 5 of the Delaware statute. In both, in case of tender and refusal of pilotage service, "the master, owner or consignee of such vessels shall forfeit and pay," &c.

It is submitted that the learned counsel for the rule have failed to show that the present case is not within the jurisdiction of the District Court; and, further, that it is evident that the right of the case is with the libellant. The rule should therefore be discharged with costs.

GEORGE GRAY,
EDWARD G. BRADFORD, JR.,
Proctors for Libellant.

HENRY FLANDERS,
THOMAS F. BAYARD,
Associate Counsel.

Act of April 15. 1847

Mich. Gaz. pub. act
70th Session

Mich. p. 384

6 Smed. & M. 541

2 Bailey S. C. 561.
State v. Rodgers

4 Wallace 556

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 582.

MATTHEW GOTTFRIED, APPELLANT,

vs.

FREDERICK MILLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED AUGUST 28, 1885.

Act of April 15. 1847

Hinds Gale pilot act
70th Session

Mayh p. 781

6 Smedes & M. 541

2 Bailey S. C. 561.

State v Rodgers

4 Wallace 556

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 882.

MATTHEW GOTTFRIED, APPELLANT,

vs.

FREDERICK MILLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED AUGUST 22, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 882.

MATTHEW GOTTFRIED, APPELLANT,

vs.

FREDERICK MILLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 Circuit court of the United States for the eastern district of Wisconsin:

UNITED STATES OF AMERICA:
Eastern District of Wisconsin, ss:

At a special term of the circuit court of the United States for the eastern district of Wisconsin, begun and held at the city of Milwaukee, in said district, on the second Thursday (being the twelfth day) of May, A. D. 1881—present, the Hon. Charles E. Dyer, district judge, presiding; Henry Fink, marshal, and Edward Kurtz, clerk—among other the following proceedings were had, to wit:

MATTHEW GOTTFRIED, COMPLAINANT,
vs.
FREDERICK MILLER, DEFENDANT. } In equity.

Be it remembered that heretofore, to wit, on the 20th day of January, A. D. 1880, came the above-named complainant and John F. T. Holbeck, by their solicitors, Messrs. Banning & Banning, and filed their bill of complaint against the above-named defendant, as follows:

Bill of complaint.

Circuit court of the United States, eastern district of Wisconsin.

To the honorable the judges of the circuit court of the United States for the eastern district of Wisconsin:

Matthew Gottfried and John F. T. Holbeck, of the city of
2 Chicago, in the State of Illinois, and citizens of the State of Illinois, bring this their bill of complaint against Frederick Miller, of the town of Wauwatosa, in the State of Wisconsin, and a citizen of the State of Wisconsin. And thereupon your orators complain and say—

I. That prior to the third day of May, 1864, your orators were the original and first inventors and discoverers of a new and useful improvement in pitching barrels, not known or used by others before their invention thereof, and which had not at the time of their application for a patent therefor been in public use or on sale for more than two years, as they verily believe; and that upon due application letters patent of the United States No. 42580, in due form, were issued to your orators, dated the said third day of May, 1864, granting to them, their heirs, administrators or assigns, for the term of seventeen years, the full and exclusive right of making, using and vending to others to be used the said invention, as by reference to the said letters patent here in court to be produced will more fully appear.

II. That by virtue of the premises and written assignments given for good and valuable considerations, and duly executed and recorded, your orators became and now are the sole and exclusive owners of the
3 entire right, title and interest in and to said letters patent, that is to say, your orator Gottfried is the sole and exclusive owner of the legal title to said patent, but that he holds a part thereof in trust for your orator Holbeck to secure the payment of certain moneys due him for the purchase of his interest therein; and that your orators are entitled to all the damages occasioned by infringements of said patent, and all the gains, profits, savings, and advantages made or re-

ceived by others by reason thereof, and are by law entitled to sue for and receive the same to their own use.

III. That said letters patent are in all respects good and valid in law, and the public generally acquiesce in the validity thereof; and that your orators have made many settlements and granted many licenses thereunder and have received large amounts of money therefor.

That on the fourth day of October, 1877, your orators filed their bills of complaint against Frank Bartholomae and Bernard Roesing, Peter Fortune and John Fortune, and Peter Schoenhofer, respectively, in the circuit court of the United States for the northern district of Illinois, setting forth the said letters patent, and the infringement thereof by said defendants, and praying an account and injunction against them respectively; that the said defendants afterwards filed their re-
4 spective answers to said bills, denying, among other things, the validity of said letters patent, and setting up that your orators were not the first and original inventors and discoverers of the said invention, but that the same had been patented in England, and known and publicly used by others in this country, long prior to the date of their invention; that issues being joined and proofs taken at length and for a long time, all of said causes were brought to a hearing on their merits on the 8th day of May, 1878, before his honor Judge Henry W. Blodgett, and were argued before him by the counsel for your orators and said parties respectively, and were afterwards held under advisement by said judge until the 24th day of June, 1878, when judgment was duly pronounced, and that said court then decided, among other things, that the said letters patent were good and valid in law, and that your orators were the original and first inventors and discoverers of the said invention, patented as aforesaid, and by decrees entered of record in two of said causes (a special arrangement being made by counsel as to the other) perpetually enjoined the said defendants Bartholomae and Roesing and Fortune Bro's from using the said patented invention, and ordered accounts to be taken of the profits and damages due by reason of their infringements already committed; that on the 6th day of January, 1879, on the application of the
5 defendants, said decrees were set aside and all of said defendants allowed to make further defense, and that amended answers were afterwards filed setting up additional defenses, and new proofs taken at length and for a long time in each of said cases.

That on the 3d day of June, 1878, your orators filed their bill of complaint against Valentine Blatz, and on the 9th day of August, 1878, their bills of complaint against the Phillip Best Brewing Company, the Joseph Schlitz Brewing Company, and Jacob Obermann and Max Fueger, respectively, in the circuit court of the United States for the eastern district of Wisconsin, setting forth the said letters patent, and the infringement thereof by the said defendants, and praying an account and injunction against them, respectively; that the said defendants afterwards filed their respective answers to said bills denying, among other things, the validity of said letters patent, and setting up that your orators were not the first and original inventors and discoverers of the said invention, but that the same had been patented in England, and known and used by others in this country, long prior to the date of their invention; that issues being joined and proofs taken at length and for a long time, all of said seven causes above named were brought to a hearing on their merits, on the 12th day of June,
6 1879, and were heard and argued together before his honor Judge Charles E. Dyer; that the said hearing and arguments

were very full and exhaustive and lasted five days; that said causes were afterwards held under advisement by said judge until the first day of December, 1879, when judgement was duly pronounced; and that said court, in a very long and full opinion, then decided among other things that said letters patent were good and valid in law, and that your orators were the original and first inventors and discoverers of the said invention patented as aforesaid, and by decrees entered of record perpetually enjoined all of said defendants from using the said patented invention, and ordered accounts to be taken of the profits and damages due by reason of their infringements already committed—all which will more fully appear by a reference to the opinions of said judges and the record of the proceedings in said suits.

That after said decision, the said The Phillip Best Brewing Company, The Joseph Schlitz Brewing Company, Valentine Blatz, and Jacob Obermann, and Max Fueger, acquiescing therein, and in the validity of said patent, settled with your orators for their past infringement, and purchased licenses for the future use of said patented inven-
7 tion, and paid your orators therefor a large sum of money amounting to many thousands of dollars; and that thereupon final decrees were entered in the cases against them respectively, from which no appeals have ever been taken.

IV. That since the granting of said letters patent, and at divers times and occasions between that time and the filing of this your orators' bill, Frederick Miller, the defendant herein, well knowing the premises, and in infringement of the said letters patent, and in violation of the exclusive rights of your orators thereunder, and without the license of your orators or either of them, or any one ever interested in said patent, at or near Wauwatosa, to wit, at the district aforesaid, has used, and still continues to use, the said invention patented as aforesaid; whereby great injury has resulted to your orators and great gains and profits have accrued to the said defendant, the full amount of which is unknown to your orators, but which in equity belong to them, and should be accounted for by the said defendant and paid over to your orators as the avails of their exclusive rights aforesaid and profits and gains which they would have derived therefrom but for the unlawful acts of the said defendant.

V. That your orators have no adequate remedy in the premises save in a court of equity where matters of this nature are properly cognizable.

8 Wherefore, your orators pray—

1. That the defendant may answer the premises, and may fully disclose the number of pitching machines he is using and has used, how long he has used such machines, the names thereof, by whom the same were manufactured, and by whom and when patented, and whether in such machine or machines the air is heated by its being forced through or in contact with the fire on its passage from the blower to the cask or barrel to be pitched; and, if not, how it is heated, stating fully the construction and operation of the machine.

2. That the defendant, his agents, attorneys, servants, and workmen, and each and every of them, may be restrined and enjoined, as well a preliminarily and provisionally as perpetually, from such infringement of said letters patent.

3. That the defendant may render to your orators a true account of the number of casks, barrels, or kegs which he has pitched, or heated for pitching, by the use of a blast of heated air forced into such casks, barrels, or kegs, and of the gains and benefits derived therefrom, and

may be decreed to pay over to your orators any and all of the gains, profits, savings, and advantages to be duly determined, made,
9 derived or received by the said defendant from the use of said patented invention, and in violation of your orators' rights as aforesaid, and all damages resulting to your orators from the use by the said defendant of the said patented invention, together with such increase over the actual damages suffered as is warranted by law and may seem to your honors just and proper.

4. And that your orators may have such other and further relief in the premises as may be agreeable to equity and good conscience, and as to your honors shall seem meet.

To this end may it please your honors to grant unto your orators—

1. The writ of subpœna issued out of and under the seal of this honorable court, directed to the said defendant, Frederick Miller, commanding him by a certain day, and under a certain penalty, to be and appear in this honorable court, and then and there to answer the premises and stand to and abide by such order and decree as may be made against him.

2. The writ of injunction, as well preliminary and provisional as perpetual, issuing out of and under the seal of this honorable court, enjoining and restraining the said defendant, Frederick Miller, his servants, agents, attorneys, and workmen, and each and every of them, as is heretofore in that behalf prayed.

10 And your orators will ever pray, etc.

MATTHEW GOTTFRIED.
JOHN F. T. HOLBECK.

BANNING & BANNING,
Solicitors for Complainants and of Counsel, Chicago, Ill's.

UNITED STATES OF AMERICA,
Northern District of Illinois,
State of Illinois, Cook County, ss:

Matthew Gottfried, being duly sworn, upon oath says that he is one of the complainants named in the foregoing bill of complaint by him subscribed; that he has read the said bill and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to these he believes it to be true; and that he verily believes that the said letters patent No. 42580 are in all respects good and valid, and that the title thereto is in the complainants, as stated in said bill.

MATTHEW GOTTFRIED.

Subscribed and sworn to before me this 5th day of January, A. D. 1880.

[SEAL.] W. F. DUMMER,
Notary Public.

Whereupon a subpœna issued, returnable the first Monday of March next, as follows:

11 UNITED STATES OF AMERICA,
Eastern District of Wisconsin:

The President of the United States of America to Frederick Miller, greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the

eastern district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of March next ensuing, at Milwaukee, to answer to a bill of complaint exhibited against you in our said court by Matthew Gottfried and John F. T. Holbeck; and to do further and receive what our said court shall have considered in that behalf; and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Frederick Miller, if to be found in his district, and due return thereof make.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this twentieth day of January, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fourth.

[SEAL.] EDWARD KURTZ, *Clerk.*

BANNING & BANNING, *Solicitors.*

It is ordered by our said court that the said Frederick Miller, the defendant aforesaid, do enter his appearance in this suit in the clerk's office on or before the day and time at which this subpœna is returnable as aforesaid; otherwise the bill filed may be taken as confessed.

12 Subpœna returned; served on the within-named Frederick Miller, by delivering to him personally a copy of this subpœna, this twentieth day of January, A. D. 1880.

HENRY FINK,
U. S. Marshal.

FEBRUARY 11, 1880.

This day came the defendant, by his solicitors, Messrs. Nathan Pereles & Sons, and filed his appearance.

13 APRIL 5, 1880.

This day came the defendant, by his solicitors, and filed his answer as follows:

Answer.

United States circuit court, eastern district of Wisconsin.

MATTHEW GOTTFRIED AND JOHN F. T. HOLBECK *vs.* FREDERICK MILLER. } In equity.

The answer of Frederick Miller, defendant, to the bill of complaint of Matthew Gottfried and John F. T. Holbeck, complainants herein.

This defendant, now and at all times hereafter saving and reserving to himself all benefit and advantage of exception which can or may be had to the many errors, uncertainties, ambiguities, and other imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, says:

That he has no knowledge or information other than that given him by complainant's bill whether or not prior to the 3rd day of May, 1864, or at any time before or since, the said complainants were original or first inventions, or otherwise inventors and discoverers, of a new and useful improvement in pitching barrels not known or used by
14 others before their invention, or whether they had permitted the same to be used by the public two years before their application for letters patent, or whether letters patent ever issued to complainants as in their said bill alleged; and this defendant therefore leaves the complainants to make such proof thereof as they may be advised and this court shall permit them to make in the premises.

2. And, further answering, this defendant says that he has no knowledge or information besides or other than that contained in the complainant's bill of complaint contained as to whether by virtue of the grant of said letters patent and written assignments or otherwise the complainants have become or are the sole and exclusive or other owners of the entire right, title, and interest in and to said letters patent, if issued, or whether said complainants are entitled to all or any of the damages occasioned by infringements of said patent, if issued, and the profits, gains, and advantages secured thereby, or are entitled to sue for and recover the same to their own use; and he therefore leaves the complainants to make such proof thereof as they may be advised and this court shall permit them to make in the premises.

15 3. And, further answering, this defendant denies that said letters patent, if issued, are good and valid in law, and he further denies that the public generally acquiesce in the validity thereof, and he further denies that the complainants have made many settlements or granted many licenses thereunder, and have received large amounts of money therefor.

4. And, further answering, this defendant says that he has no knowledge or information sufficient to form a belief, or other or further than that contained in the complainants' bill of complaint, as to whether or not on the 4th day of October, 1877, or at any time, the complainants filed their bills of complaint against Frank Bartholomae, Bernhard Roesing, Peter Fortune, John Fortune, and Peter Schoenhofer, or some of them, or any of them in the circuit court of the United States at and in the northern district of Illinois, or elsewhere, or as to what said bills contained, or as to whether the same were answered unto or defended, or as to whether the same were argued or sustained by the court, and the relief therein prayed granted or otherwise, or as to any or what proceedings were had in said court in relation thereto, and this defendant therefore leaves these complainants to make such
16 proof thereof as they may be advised or the court under the circumstances shall permit.

5. And this defendant, further answering, says that as to whether on the 3rd day of June, 1878, or at any time, the complainants filed their bill of complaint against Valentine Blatz, or as to whether on the 9th day of August, 1878, or at any time the complainants filed bills of complaint or their bill of complaint against the Phillip Best Brewing Company, the Joseph Schlitz Brewing Company, Jacob Oberman, and Max Fueger, respectively, in the United States circuit court for the eastern district of Wisconsin, or elsewhere, for the alleged infringement of said letters patent, or as to whether said bills of complaint were answered unto or defended, or as to whether the court before which the same was brought decreed the relief therein prayed or otherwise, or as to any or what proceedings were had by the complainants or at their suit

in said court this defendant has no knowledge or information sufficient to form a belief, or any knowledge or information in regard thereto other than that contained in complainants' bill of complaint, and he therefore leaves complainants to make such proof in relation thereto as they the said complainants may be advised or as the court shall direct or permit.

17 6. And, further answering, this defendant denies that he has in any wise or manner since the granting of said letters patent, if granted, or at any time, infringed the same, or any right or rights whatsoever of the complainants, or either of them, secured thereby, or otherwise.

7. And this defendant, further answering, says that on or about the 25th day of November, 1872, one John H. Stromberg, then residing at and in the city of Baltimore, in the State of Maryland, was the owner of an undivided one-third of the entire interest of, in, and to letters patent of the United States, dated May 3rd, 1864, and numbered 42580, for improvements in a machine for pitching barrels, as this defendant is informed and verily believes, and that said John H. Stromberg, so being the owner as aforesaid, sold and delivered to this defendant, for his use forever, one certain machine for pitching barrels containing some of the improvements purporting to be secured by said last-mentioned letters patent; that this defendant paid for said machine the full price thereof, and has since said 25th day of November, 1872, hitherto continued to use, and is still using, the said identical machine so purchased as aforesaid from said John H. Stromberg, and that

18 this defendant, except as aforesaid, has never in any manner used or employed the method or improvements, or the process or machine, set forth in said letters patent.

8. And this defendant, further answering, says that the alleged cause of action stated in the complainant's bill of complaint as to all parts thereof accruing had, or done, or resting upon any actions, doings, or omissions occurring prior to the 25th day of November, 1872, did not accrue within six years from the commencement of this suit; without this, that any matter, allegation, or thing in said bill of complaint contained not well and sufficiently answered unto hereinbefore is true to the knowledge, information, or belief of this defendant, and this defendant is ready now and at all times to aver and maintain, and to prove all the said matters and things as this court shall direct.

And this defendant prays the judgment and decree of this court that he be hence dismissed with his costs and charges in this behalf most wrongfully and unjustly sustained.

March 2nd, 1880.

FREDERICK MILLER.

NATH. PERELES & SONS, *Def'ts Sol'rs.*
E. H. BOTTUM, *of Counsel.*

19 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

Frederick Miller, being duly sworn, says that he is the defendant named in the foregoing answer by him subscribed; that he has read said answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be on his information and belief, and those matters he verily believes to be true.

FREDERICK MILLER.

Subscribed and sworn to before me this 5th day of March, A. D. 1880.
RIP REUKEMA,
Notary Public, Milwaukee Co., Wis.

APRIL 6, 1880.

This day came the complainants, by their solicitor, and filed their replication, as follows:

Replication.

Circuit court of the United States, eastern district of Wisconsin.

MATTHEW GOTTFRIED ET AL. *vs.* FREDERICK MILLER. } In equity.

The replication of Matthew Gottfried and John F. T. Holbeck, complainants, to the answer of Frederick Miller, defendant.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage
20 of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.
BANNING & BANNING,
Complainants' Sol'rs.

OCTOBER 11, 1880.

This day came the parties by their counsel, and by consent it is ordered by the court that this cause be set for hearing on the twenty-sixth day of October instant.

FEBRUARY 23, 1881.

Testimony on part of complainant' filed.

21 And now, at this same term, to wit, January term, 1881, and on the fortieth day thereof, to wit, on the 24th day of February, A. D. 1881, the following proceedings were had, to wit:

Dismissal as to Compl't Holbeck, and hearing.

MATTHEW GOTTFRIED & JOHN F. T. HOLbeck *vs.* FREDERICK MILLER. } In equity.

This day came the parties by their counsel, and, on motion of complainants, it is ordered by the court that this bill of complaint be, and

hereby is, dismissed as to the complainant John F. T. Holbeck; and this cause came on to be heard upon the pleadings and proofs, and was argued by Mr. Ephraim Banning for the complainant, and by Mr. E. H. Bottum for the defendant, and being submitted, the court held the same under advisement.

And on said hearing the following testimony was read in evidence, to wit:

Complainants' testimony.

Circuit court of the United States for the eastern district of Wisconsin.

MATTHEW GOTTFRIED & JOHN F. T. HOLbeck
vs.
FREDERICK MILLER.
} In equity.

22 Testimony in the above-entitled cause, taken on behalf of the complainants, pursuant to the notice hereto annexed, before Edward Kurtz, clerk of said court, at his office in Milwaukee, Wis.

MONDAY, *May 24th*, A. D. 1880.

Present, Ephraim Banning, counsel for complainants.
J. M. Pereles & E. H. Bottum, " " defendant.

Complainants' counsel offers in evidence the following instruments, to wit:

1st. A certified copy of letters patent of the United States, No. 42580, issued May 3, 1864, to J. F. T. Holbeck and Matthew Gottfried, for an improved mode of pitching barrels, and the same is marked "Complainants' Exhibit Gottfried & Holbeck Patent."

2nd. A certified copy from the records of the Patent Office of all assignments of record under said patent No. 42580, the certificate thereto being dated March 24, 1879, and the same is marked "Complainants' Exhibit Gottfried Assignments."

3rd. Assignment under said patent No. 42580, executed by Matthew Gottfried, John F. T. Holbeck and John H. Stromberg, dated December 15, 1879, and recorded in the Patent Office, February 17, 1880, in liber F 25, page 161, and the same is marked "Complainants' Exhibit Stromberg Assignment."

4th. Transcript of record from the superior court of Baltimore
23 City, in the case of Charles F. Smith vs. Henry C. Comegys, the certificates thereto being dated March 21, 1879, and the same is marked "Compl'ts' Exhibit, Smith-Comegys' Suit."

5th. A certified copy of the charter of the Barrel-Pitching Machine Company of Baltimore City, and the same is marked "Complainants' Exhibit Pitching Co. Charter."

Deposition of defendant.

FREDERICK MILLER, being duly sworn on behalf of the complainants, deposes and says:

Direct examination by Mr. BANNING:

I am the defendant in this case; have been engaged in the brewing business in Milwaukee County for 25 years. I have been using a pitching-machine 6 or 7 years; have used only one pitching-machine, the one mentioned in my answer as purchased from Mr. Stromberg.

Q. 1. How does that machine operate, and how is it constructed?

A. There is a stove or furnace, and there is a blower about 3 or 4 feet from it that blows the air through a pipe into the furnace, and then there is another pipe that brings the air into the barrel. In large barrels or casks but one pipe is used. In kegs the pipe is divided into several branches, so as to run into several kegs at the same time. The pipe leading from the blower to the furnace connects near the
24 bottom of the furnace, and the pipe leading from the furnace to the cask connects at the top of the furnace. The furnace is about 4 feet high and about 3½ feet in circumference, or about 15 inches in diameter. The blower is operated, which makes the fire hot, and produces hot air, which is forced into the cask. The pipe which leads from the furnace to the cask to conduct the hot air in is detachable, so that it can be removed, but there is a piece about a foot long that is fastened to the furnace, and is of the same material as the furnace. The balance of the pipe is sheet-iron, and can be removed.

Adjourned until May 25th, 1880, at 9 o'clock a. m.

TUESDAY, *May 25th*, A. D. 1880.

Present, same parties before mentioned.

Q. 2. Then, as I understand it, your pitching-machine consists of a furnace, a fan-blower and pipes, the furnace having a grate and fire-chamber inside, and the pipes being arranged so that the one connects the blower to the furnace and conducts the cold air into the furnace, and the other connects the cask to the furnace and conducts the hot air into the cask, the latter being removable. Is this correct?

A. Yes, sir.

25 Q. 3. And in operation the air is forced by the blower into the furnace below the fire, and then passing up through the fire, and thus becoming hot, is forced out through the discharge-pipe into the cask or keg to be pitched. Is this correct?

A. Yes, sir.

Q. 4. If you have any cut or drawing representing your pitching-machine please produce the same and make it a part of your dep'n.

A. I have a cut taken from a monthly number of a brewers' magazine which represents my pitching-machine. There may be slight differences in regard to the size of the furnace, but otherwise the cut is all right. I here produce the cut and attach it to my deposition as "Complainants' Exhibit Defendants' Machine."

Cross-examination waived.

FREDERICK MILLER.

Agreement of counsel.

Counsel for defendant admits and agrees that it may be considered and taken as proved that the pitching-machine mentioned in Mr. Miller's foregoing deposition contains and applies the invention described in said patent No. 42580, and that its use by the defendant, if unauthorized, was an infringement of said patent.

Counsel for complainants admits and agrees that it may be con-
26 sidered and taken as proved that the bills of complaint against the Philip Best Brewing Company and others in the cases referred to in the bill herein were filed in 1877 and 1878 in the name of Matthew Gottfried, John F. T. Holbeck, and John H. Stromberg as complainants; that the allegation of title in said bills was as follows:

"II. That, by virtue of the premises and written assignments given

for good and valuable considerations, which are of record in the United States Patent Office, and certified copies of which your orators are ready here in court to produce, your orators became and now are the sole and exclusive owners of the entire right, title, and interest in and to the said letters patent, and that the said letters patent are in all respects good and valid."

And that the affidavit attached to said bill was as follows in the bill against the Philip Best Brewing Company, and substantially the same in the others, to wit:

"UNITED STATES OF AMERICA,
"*Northern District of Illinois,*
"*State of Illinois, Cook County, ss:*

"John F. T. Holbeck, being duly sworn, deposes and says that he is one of the complainants named in the foregoing bill of complaint
27 by him subscribed; that he has read the said bill and knows the contents thereof, and that the same is true except as to the matters therein stated on information and belief, and as to these he believes it to be true; and he also believes that the said letters patent are in all respects good and valid.

"JOHN F. T. HOLBECK.

"Subscribed and sworn to before me this 8th day of August, A. D. 1878.

[SEAL.] "THOMAS A. BANNING,
"*Notary Public.*"

It is further stipulated by counsel for both parties that the patent sued on need not be produced at the hearing or in any further proceedings herein; that the cut or picture produced by Mr. Miller and offered to be attached to his deposition as "Complainants' Exhibit Defendant's Machine" may also be omitted from the record of this cause, and that the bill herein may be dismissed as to the complainant Holbeck.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States for the eastern district of Wisconsin, do hereby certify that all the proceedings aforesaid were had as stated, pursuant to the notice
28 hereto annexed; that I was attended by the counsel named in the caption at the time and place therein stated, and by the witness, Frederick Miller, who was of sound mind and lawful age; and that said witness was first by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was reduced to writing in his presence and from his statements; and that after carefully reading the same over to him he subscribed the same in my presence and in presence of the counsel before mentioned.

I further certify that I am not of counsel or solicitor for either of the parties in said cause, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand this 25th day of May, A. D. 1880.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Eastern District of Wisconsin.

29 *Complainants' Exhibit Gottfried Assignments*

DEPARTMENT OF THE INTERIOR.

United States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of all assignments of record under letters patent No. 42580, recorded in the volumes as stated upon the margin of each copy respectively; and that said annexed copies have been compared by me with the originals; and that they are correct transcripts therefrom and of the whole of the originals.

In testimony whereof I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and seventy-nine and of the Independence of the United States the one hundred and third.

[L. S.] W. H. DOOLITTLE,
Acting Commissioner.

In consideration of five dollars to me in hand paid, and in consideration of a royalty of ten dollars per machine to be paid to me by John F. T. Holbeck, of the city of Chicago, for every machine for pitching barrels manufactured by said Holbeck or any associates that he may have, under the letters patent of the United States granted to me and to said Holbeck, number 42580, dated May 3d, 1864, I do hereby sell, assign, transfer, and set over to said Holbeck and his assigns all my right, title, and interest in and to the said letters patent and the invention secured thereby, reserving to myself the right to revoke this assignment if the royalty herein reserved be not paid.

30 Witness my hand and seal this 19th day of December, A. D. 1870.

MATHEW GOTTFRIED. [L. S.]

I agree to the foregoing, and warrant to pay the royalty therein reserved. Witness my hand and seal this 19th day of December, A. D. 1870.

JOHN F. T. HOLBECK. [L. S.]

In the presence of—
W. F. WHITEHOUSE.

Liber R 13, p. 278. Recorded Jan. 6, 1871.
Ex'd, S. P. P., L. P. H.

Assignment.

Whereas John F. T. Holbeck and Matthew Gottfried, both of Chicago, in the county of Cook and State of Illinois, did obtain letters patent of the United States for their new and useful improvement in mode of pitching barrels, which letters patent are dated the third day of May, A. D. 1864, and numbered 42580; and whereas I, John F. T. Holbeck, above named, did, by reason of an assignment duly recorded in the records of transfers of the U. S. Patent Office, obtain all the right, title, and interest of the said Matthew Gottfried in the said letters patent; and whereas Charles F. Smith and Henry C. Comegys, both of the city

and county of Baltimore, in the State of Maryland, are desirous of acquiring an interest in the said letters patent:

Now this indenture witnesseth, that, for and in consideration of five hundred dollars to me in hand paid, receipt of which I hereby acknowledge, I have sold, assigned, and set over, and I do hereby sell, assign, and set over unto the said Smith and Comegys, an undivided two-thirds of all my right, title, and interest in and to the above said letters patent. The same to be held by the said Smith and Comegys the same as it would have been held and enjoyed by me if this assignment and sale had not been made.

31 Witness my hand and seal this third day of January, 1871.

JOHN F. T. HOLBECK. [L. S.]

Signed, sealed, and delivered in presence of—
W. F. WHITEHOUSE.

Liber R 13, p. 279. Recorded Jan. 6, 1871.
Ex'd, S. P. P., L. P. H.

Whereas John F. T. Holbeck and Matthew Gottfried, both of Chicago, Cook County, Illinois, did obtain letters patent of the United States for their improved mode of pitching barrels, dated the 3rd day of May, 1864, and numbered 42580; and whereas Louis Schulze, of Louïsville, Jefferson County, Kentucky, did obtain letters patent of the United States for his improvement in apparatus for pitching barrels, dated the 30th day of August, 1870, and numbered 106964; and whereas Alexander A. C. Klaucke, of Washington, in the District of Columbia, did obtain letters patent of the United States for his improvement in apparatus for pitching barrels, dated the 20th day of December, 1870, and numbered 110373; and whereas we, Charles F. Smith and Henry C. Comegys, both of Baltimore, Maryland, and John F. T. Holbeck, of Chicago, Illinois, by reason of certain assignments duly recorded in the records of transfers of the United States Patent Office, did obtain all the right, title, and interest in and to the above-named patents to Holbeck and Gottfried, and to Klaucke, and an undivided one-third interest in and to the above-named patent of Schulze; and whereas "The Barrel Pitching Machine Company of Baltimore City" is desirous of obtaining all our interest, right, and title in the above-named patents:

Now this indenture witnesseth, that, for and in consideration of one dollar to us in hand paid, receipt of which we hereby acknowledge, and for other valuable consideration, we have sold, assigned, and set

32 over, and we do hereby sell, assign, and set over, unto "The Barrel Pitching Machine Company of Baltimore City," all our right, title, and interest in and to the above-named patents. The same to be held and enjoyed by the said company as fully and entirely as they would have been held by us, if this assignment and sale had not been made; with the exception that the said company shall not assign to any one but ourselves any or all the interest in and to the above-named patents in the proportion as they are now held by us. This assignment to hold good until the dissolution or liquidation of the said com-

pany, when the said company shall reassign to us in the same proportions as now assigned by us.

Witness our hands and seals this 25th day of January, 1871.

CHARLES F. SMITH. [L. S.]
H. C. COMEGYS. [L. S.]
JOHN F. T. HOLBECK. [L. S.]

Witnesses to signature of Smith and Comegys:
C. H. FITZGERALD,
HARRY DOYLE.

Witness to signature of Holbeck:
MATTEW GOTTFRIED,
JOHN UEBELMESSER.

Liber W 13, p. 38. Recorded Jan. 28, 1871.
Ex'd, L. P. H., S. P. P.

Whereas John F. T. Holbeck and Matthew Gottfried, both of Chicago, Cook County, Illinois, did obtain letters patent of the United States for their improved mode of pitching barrels, dated the 3rd day of May, 1864, and numbered 42580; and whereas Louis Schulze, of Louisville, Jefferson County, Kentucky, did obtain letters patent of the United States for his improvement in apparatus for pitching barrels, dated the 30th day of August, 1870, and numbered 106964; and whereas Alexander A. C. Klaucke, of Washington, in the District of Co-
33 lumbia, did obtain letters patent of the United States for his improvement in apparatus for pitching barrels, dated the 20th day of December, 1870, and numbered 110373; and whereas by virtue of certain assignments, duly recorded in the records of transfers of the United States Patent Office, Charles F. Smith and Henry C. Comegys, both of Baltimore City, Maryland, and the said John F. T. Holbeck, of Chicago, did obtain all the right, title, and interest in and to the above-named patents to Holbeck and Gottfried, and to Klaucke, an undivided one-third interest in and to the above-named patent to Schulze; and whereas by a certain assignment, dated the 25th day of January, 1871, and recorded in said book of transfers of said Patent Office, the said Smith, Comegys, and Holbeck assigned all their interest in said two patents of Holbeck and Gottfried, and of Klaucke, and in and to said one undivided third interest of said patent of Schulze, to "the Barrel Pitching Machine Company of Baltimore City;" and whereas it has been deemed proper that these presents should be executed in order more fully and completely to vest in said company the title to said two patents and to said one-third interest in the Schulze patent:

Now, therefore, in consideration of the premises, and of the sum of one dollar to the grantors herein paid by the said "The Barrel Pitching Machine Company of Baltimore City," and for divers other good and valuable considerations, the said Charles F. Smith, Henry C. Comegys, and John F. T. Holbeck do hereby sell, assign, and set over unto the said "The Barrel Pitching Machine Company of Baltimore City" all the right, title, interest, and estate of them, the said Smith, Comegys, and Holbeck, in and to the said patents issued to Holbeck and Gottfried, and to Klaucke, and to the one undivided third interest in the patent issued to Schulze; the same to be held and enjoyed by the said corporation as fully and completely as they would have been held by the said grantors above named had this assignment not been made, with the exception, however, that said corporation shall not as-
34 sign any or all or any part of the interests hereby assigned in said

patents to any other person or persons except the grantors herein named, in proportion to their several and respective interests in the same as held by them before any assignment to said corporation; and provided, also, that this assignment shall continue in full force until the dissolution of said company, in which event, or in the event of the liquidation of the affairs of said company, the several interests of each grantor in said patents shall, subject to the lawful rights of the creditors of said corporation, be reassigned to each grantor.

Witness our hands and seals this first day of June, 1871.

JOHN F. T. HOLBECK. [L. S.]
CHARLES F. SMITH. [L. S.]
H. C. COMEGYS. [L. S.]

Witness':
VICTOR CLOUD,
HARRY DOYLE.

Liber G 14, p. 257. Recorded June 8, 1871.
Ex'd, S. P. P., L. P. H.

Whereas letters patent of the United States were duly granted to me, Matthew Gottfried, and John F. T. Holbeck, dated May 3, 1864, No. 42580, for "mode of pitching barrels;" and whereas I, the said Matthew Gottfried, did on the nineteenth day of December, A. D. 1870, sell, assign, and set over to said John F. T. Holbeck all my right, title, and interest in said letters patent and the invention secured thereby, in consideration of a royalty to be paid to me of ten dollars per machine for every machine for pitching barrels manufactured by said Holbeck or any associates that he might have under said letters patent, I reserving to myself the right to revoke the said assignment if the royalty therein secured was not paid; and whereas sundry of said machines for pitching barrels have been manufactured by the said Holbeck and his associates upon which no royalty has been paid, but said Holbeck has neglected and refused to pay said royalty upon any or either of said machines:

35 Now, therefore, in consideration of the premises, I, the said Matthew Gottfried, do hereby revoke and rescind the said agreement and assignment, and declare the said interest in said letters patent reinvested in me as if the said assignment had not been made.

Given under my hand and seal this 25th day of March, in the year one thousand eight hundred and seventy-five.

MATTHEW GOTTFRIED. [SEAL.]

In the presence of—
STEPHEN A. GOODWIN.
HENRY S. TOWLE.

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

On this 25th day of March, A. D. 1875, before me, John H. Whipple, a notary public in and for said city, in the county and State aforesaid, personally appeared Matthew Gottfried, personally known to me, and by me known to be the person who signed the foregoing instrument in writing, and acknowledged to me that he had executed the same freely and voluntarily for the purposes therein stated.

Witness my hand and seal the day and year above written.

[L. S.] JOHN H. WHIPPLE,
Notary Public.

Liber E 19, p. 55. Recorded March 29, 1875.
Ex'd, S. P. P., L. P. H.

This agreement made this twenty-seventh day of October, 1875, between John F. T. Holbeck, of Chicago, Ill., of the first part, and John H. Stromberg, of Baltimore City, Md., of the second part, witnesseth, that in consideration of the sum of one thousand dollars paid to the said John F. T. Holbeck by John H. Stromberg, the said John F. T. Holbeck does sell, assign, and set over to the said John H. Stromberg one undivided half of his rights and titles in his letters patent bearing date May third, 1864, and numbered 42580. And it is further agreed that the two parties named within shall make articles of copart-
36 nership, and the said John H. Stromberg shall furnish capital to carry on said business of manufacturing pitching-machines, as described in said letters patent.

JOHN F. T. HOLBECK. [SEAL.]

Wit.:
MARTIN KRATT.

Liber R 19, p. 333. Recorded Nov. 6, 1875.
Ex'd, L. P. H., S. P. P.

BALTIMORE, *Dec. 9th*, 1875.

At a meeting of the directors of the Barrel Pitching Machine Company of Baltimore City, held this day, were present, Charles F. Smith, John F. T. Holbeck, and Wm. A. Fisher, being a majority of the directors named in the articles of incorporation. On motion Charles F. Smith was called to the chair and Wm. A. Fisher was appointed secretary. It was then, on motion, resolved that all the right, title, and interest of the said company in and to certain letters patent of the United States, dated May 3, 1864, No. 42580, for a new mode of pitching barrels, granted to Holbeck and Gottfried under an assignment from Charles F. Smith, Henry C. Comegys, and John F. T. Holbeck, dated January 25, 1871, and recorded in the records of the Patent Office, January 28, 1871, be assigned and conveyed to the said Smith, Comegys, and Holbeck for the sum of five hundred dollars, agreeably to the condition contained in the assignment last aforesaid that the said company shall not assign to any one but said Smith, Comegys and Holbeck, the inducement to the present assignment being, in addition to the said money consideration, that since the execution of said assignment to said company the invention therein patented had not been manufactured or sold, nor have the said company any present purpose of manufacturing or selling the same. It was further resolved that Charles F. Smith be, and is hereby, directed to execute and deliver to the said Charles F. Smith, Henry C. Comegys, and John F. T. Holbeck the assignment above mentioned in the foregoing resolution on behalf of the
37 Barrel Pitching Company of Baltimore City, on receiving from the said parties the sum of five hundred dollars.

CHARLES F. SMITH,
Chairman.

WILLIAM A. FISHER,
Sec. pro tem.

Liber I 20, p. 84. Recorded Mar. 9, 1876.
Ex'd, L. P. H., H. M. L.

Know all men by these presents, that the Barrel Pitching Machine Company of Baltimore City, for and in consideration of the sum of five hundred dollars to it paid, by Charles F. Smith, John F. T. Holbeck

and Henry C. Comegys, have granted and assigned, and by these presents do grant and assign, unto the said Smith, Comegys and Holbeck all of the right, title, and interest of the said company in and to certain letters patent of the United States, dated May 3d, 1864, No. 42580, to John F. T. Holbeck and Matthew Gottfried, for mode of pitching barrels.

In testimony whereof, and in pursuance of a resolution passed by said company on the 9th day of December, 1875, a copy of which is appended hereto, the said Charles F. Smith hath hereto set his hand as the act of the said company this eleventh day of December, 1875.

Witness: CHARLES F. SMITH,
Pres't Barrel Pitching Co.

Liber I 20, p. 86. Recorded Mar. 9th, 1876.
Ex'd, L. P. H., H. M. L.

Know all men by these presents that I, Charles F. Smith, for and in consideration of the sum of five hundred dollars, to me in hand paid by John F. T. Holbeck, do grant and assign all my right, title, and interest in and to letters patent of the United States, dated May 3d, 1864, No. 42580, to Jno. F. T. Holbeck and Matthew Gottfried, for a new mode of pitching barrels.

38 Witness my hand this 11th day of December, in the year 1875.

Witness: CHARLES F. SMITH.

Liber I 20, p. 86. Recorded Mar. 9, 1876.
Ex'd, L. P. H., H. M. L.

PHILADELPHIA, *June 7th*, 1876.

Know all men by these presents that I, the underwriter, in consideration of the sum of fifty dollars, to me in hand paid by John H. Stromburg, of the city of Baltimore, Md., do hereby sell, assign, and set over to John H. Stromburg all my rights, titles, and interests, in the letters patent bearing date May 3d, 1864, and number 42580.

In witness thereof I set my hand and seal this day, Philadelphia, June 7th, 1876.

H. C. COMEGYS. [SEAL.]

Witness:
WALTER BOSWELL. [SEAL.]

Liber S 20, p. 389. Recorded Aug. 30th, 1876.
Ex'd, S. P. P., L. P. H.

Know all men by these presents that, we, John F. T. Holbeck, Matthew Gottfried and John H. Stromberg, jointly interested in certain letters patent of the United States for a new mode of pitching barrels, dated May 3rd, 1864, No. 42580, have appointed John H. B. Latrobe, of the city of Baltimore, in the State of Maryland, our attorney, with authority to commence and prosecute, in any court of competent jurisdiction, suits at law or equity against infringers of said letters patent, and to compromise or adjust the same, with power to employ such local counsel as he may consider advisable; and it is understood that all expenses, costs, and charges, including counsel fees attending the litigation, if any, shall be deducted from the collections aforesaid, and the balance paid over to the parties hereto in the proportion of their interest in the said patents, and particularly it is under-

39 stood that the said John H. Stromberg shall be paid out of said collections, as fast as made, all monies that he may have advanced in the prosecution of claims under said letters patent. Nothing herein contained is to be taken as requiring said John H. B. Latrobe to make advances in the execution of his agency in this behalf.

In testimony whereof the parties hereto have set their hands and seals this ninth day of October, in the year 1876.

JOHN F. T. HOLBECK. [SEAL.]
M. GOTTFRIED. [SEAL.]
J. M. STROMBERG. [SEAL.]

Liber W 21, p. 85. Recorded May 22nd, 1877.
Ex'd, L. P. H., S. P. P.

Whereas we, Matthew Gottfried and John F. T. Holbeck, of Chicago, Illinois, with John H. Stromberg, of Baltimore, Maryland, by a certain instrument in writing or letter of attorney, bearing date the ninth day of October, 1876, and recorded on the 22d day of May, A. D. 1877, in the Patent Office at Washington, in Liber W 21, page 85, did appoint John H. B. Latrobe, also of Baltimore, our true and lawful attorney to commence and prosecute suits, and compromise and adjust claims for infringement, and otherwise to act for us and represent our interests in reference to letters patent of the United States No. 42580, granted to us on the third day of May, A. D. 1864, for an improved mode of pitching barrels, as by the said instrument or letter of attorney, reference being thereto had, will fully appear:

Now, therefore, we, the said Matthew Gottfried and John F. T. Holbeck, have recalled, revoked, countermanded and made void, and by these presents do recall, revoke, countermand and make void, to all intents and purposes, the said power of attorney, and all powers and authority thereby given to the said John H. B. Latrobe, and all acts and things which shall or may be done by virtue thereof in any manner whatsoever.

40 In witness whereof we have hereunto set out hands and seals this 25th day of June, A. D. 1878.

MATTHEW GOTTFRIED. [SEAL.]
JOHN F. T. HOLBECK. [SEAL.]

STATE OF ILLINOIS, *Cook County, ss:*

I, Arnold Tripp, a notary public in and for said county, in the State aforesaid, hereby certify that Matthew Gottfried and John F. T. Holbeck, personally known to me to be the same persons whose names are subscribed to the foregoing instrument in writing, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and notarial seal this 25th day of June, 1878.

[L. S.] ARNOLD TRIPP,
Notary Public.

Liber X 22, p. 417. Recorded June 28, 1878.
Ex'd, L. P. H., S. P. P.

Whereas at a meeting of the directors of the Barrel Pitching Machine Company of Baltimore City, held on the ninth day of December, A. D. 1875, it was resolved that all the right, title, and interest of the

said company in and to certain letters patent of the United States, dated May 3, 1864, No. 42580, granted to John F. T. Holbeck and Matthew Gottfried, for an improved mode of pitching barrels, under an assignment from Charles F. Smith, Henry C. Comegys and John F. T. Holbeck, dated January 25, 1871, and recorded in the records of the Patent Office, January 28, 1871, should be assigned and conveyed back to the said Smith, Comegys and Holbeck for the sum of five hundred dollars, agreeably to the condition contained in the assignment last aforesaid that the said company should not assign to any one but the said Smith, Comegys and Holbeck; and that the said Charles F.
41 Smith should be, and was thereby, directed to execute and deliver to the said Smith, Comegys and Holbeck, on behalf of said company, on receiving from them the said sum of five hundred dollars; which resolutions were duly recorded in the Patent Office at Washington on the ninth day of March, A. D. 1876, and are hereby referred to and made a part of this instrument.

And whereas the said Charles F. Smith, in pursuance of said resolutions, executed a certain instrument in writing, dated the eleventh day of December, A. D. 1875, and recorded on the ninth day of March, A. D. 1876, which instrument, however, failed to meet the purposes and carry out the objects of said resolutions:

Now, therefore, in consideration of the premises, and of the said sum of five hundred dollars, and the further sum of one dollar in hand paid, the receipt whereof is hereby acknowledged, and in pursuance of said resolutions, and by virtue of its general powers, the said The Barrel Pitching Machine Company of Baltimore City do hereby sell and assign unto the said Charles F. Smith, Henry C. Comegys, and John F. T. Holbeck all the right, title, and interest of said company in and to letters patent of the United States No. 42580, dated May 3, 1864, granted to John F. T. Holbeck and Matthew Gottfried, for an improved mode of pitching barrels, and in and to all claims of every kind for the past infringement of said letters patent, and all rights of action whatever arising out of or connected with said infringements; the same to be held, enjoyed, and collected by the said Smith, Comegys, and Holbeck to the full end of the term for which said letters patent are granted or may be extended as fully and entirely as the same would have been held and enjoyed by said company if this assignment and sale had not been made.

In testimony whereof the said The Barrel Pitching Machine Company of Baltimore City has signed these presents in its corporate
42 name and affixed its seal thereto, at Baltimore, Maryland, this twenty-fourth day of February, A. D. 1879.

THE BARREL PITCHING MACHINE
COMPANY OF BALTIMORE CITY, [S AL.]
By CHARLES F. SMITH, *President.*

Witness the words "one dollar" first interlined:
W. L. AMOSS.

Liber Y 23, page 178, recorded Mar. 7, 1879.
Ex'd, M. A. L.

In consideration of fifty dollars to me in hand paid by John F. T. Holbeck, of Chicago, Illinois, the receipt whereof is hereby acknowledged, I hereby sell and assign to the said John F. T. Holbeck all my right, title, and interest in and to letters patent of the United States No. 42580, dated May 3, 1864, granted to John F. T. Holbeck and

Matthew Gottfried, for an improved mode of pitching barrels, and in and to all claims of every kind for the past infringement of said letters patent, and all rights of action whatever arising out of or connected with such infringements; the same to be held, enjoyed, and collected by the said Holbeck to the full end of the term for which said letters patent are granted or may be extended as fully and entirely as the same would have been held, and enjoyed, or collected by me if this assignment and sale had not been made.

In testimony whereof I have hereunto set my hand and seal this twenty-sixth day of February, A. D. 1879.

HENRY C. COMEGYS. [SEAL.]

Witness:
D. H. LEWIS.

Liber Y 23, p. 180. Recorded March 7, 1879.
Ex'd, M. A. L.

In consideration of three hundred dollars and other good and valuable considerations to me in hand paid by John F. T. Holbeck, of Chicago, Illinois, the receipt whereof is hereby acknowledged, I
43 hereby sell and assign to the said John F. T. Holbeck all my right, title, and interest in and to letters patent of the United States No. 42580, dated May 3, 1864, granted to John F. T. Holbeck and Matthew Gottfried, for an improved mode of pitching barrels, and in and to all claims of every kind for the past infringement of said letters patent, and all rights of action whatever arising out of or connected with said infringements; the same to be held, enjoyed, and collected by the said Holbeck to the full end of the term for which said letters patent are granted or may be extended as fully and entirely as the same would have been held enjoyed or collected by me if this assignment and sale had not been made.

In testimony whereof I have hereunto set my hand and seal this 24th day of February, A. D. 1879.

CHARLES F. SMITH. [SEAL.]

Witness the words "three hundred dollars" being first interlined:
W. L. AMOSS.

Liber Y 23, page 180. Recorded Mar. 6, 1879.
Ex'd, M. A. L.

Complainants' Exhibit Stromberg Assignment.

Know all men by these presents that I, John H. Stromberg, of the city of Baltimore, in the State of Maryland, in consideration of the sum of five thousand dollars, have assigned and set over unto Matthew Gottfried, of Chicago, all my right, title, and interest in and to letters patent of the United States No. 42580, dated May 3rd, 1864, to John F. T. Hofbeck and Matthew Gottfried, for an improved mode of pitching barrels, and in and to all claims of every kind or nature for past infringements of said letters patent, and all rights of action whatsoever arising out of or connected with said infringements, and com-
44 monly known as back damages, arising out of or connected with said infringements; the same to be held and enjoyed by the said Matthew Gottfried to the full end and term for which said letters patent were granted or may be extended as fully and entirely as the same would have been held and enjoyed or collected by me if this assignment and sale had not been made.

And whereas the said John H. Stromberg has heretofore disposed of rights and licenses under the said letters patent, as a part owner under mesne assignments of the same, and has caused suits to be instituted against infringers in the city of New York and the city of Baltimore, and has made sundry collections on account thereof, and has employed counsel in both of said cities for that purpose, to wit, General Samuel A. Duncan in the city of New York, and John H. B. Latrobe in the city of Baltimore; and whereas it is a part of the consideration of the present assignment that the said John H. Stromberg shall be released from all claims which the said Matthew Gottfried or the said John F. T. Holbeck, or either of them, or any person to whom the said Holbeck and Gottfried, or either of them, may have assigned an interest in said letters patent, might or could have against him, the said John H. Stromberg, or his counsel aforesaid, or against the said John H. B. Latrobe, attorney for the parties interested in said letters patent, for or by reason of any collections heretofore made by the said Stromberg or the said Duncan or Latrobe, or against any person or persons to whom the said Stromberg or the said Latrobe may have granted licenses to use the said patented improvement:

Now, therefore, the said Matthew Gottfried and the said John F. T. Holbeck, the said Holbeck uniting herein for the purpose of carrying out the agreement aforesaid, for and in consideration of the premises, have released, and by these 'resents do hereby release, the said John H. Stromberg from all claim that they or either of them might or could have against the said Stromberg for or by reason of any collection he may have made from parties to whom he or his attorneys, the said Duncan and Latrobe, may have granted licenses to use the said patented improvement, hereby ratifying and confirming all such licenses and all the acts of the said Stromberg and his attorneys in the premises.

And the said Matthew Gottfried doth hereby covenant and agree that he will save harmless the said Stromberg and his attorneys from all claims that may be made against them, or either of them, for or by reason of any interest which the said Gottfried and Holbeck, or either of them, may have given to any other party in the said letters patent. And the said Gottfried, for himself, as assignee of the said letters patent, doth hereby assume the conduct and responsibilities of the litigation already commenced in New York and Baltimore, and to save harmless the said Stromberg on account thereof. And it is further agreed that the said Stromberg shall have the privilege of selling six machines that he has on hand, without liability to the parties hereto.

In testimony whereof the said John H. Stromberg, Matthew Gottfried, and John F. T. Holbeck have hereto set their hands and seals this 15th day of December, in the year 1879.

MATTHEW GOTTFRIED. [L. S.]
JOHN F. T. HOLBECK. [L. S.]
J. H. STROMBERG. [L. S.]

Witness as to the signature of Matthew Gottfried and John F. T. Holbeck:

THOMAS A. BANNING.

Witness as to the signature of John H. Stromberg:

JNO. H. B. LATROBE.

This paper has been executed with the understanding that in lieu of six machines twenty may be sold by Stromberg.

January 24th, 1880.

BANNING & BANNING,
Attorneys for Gottfried & Holbeck.
JNO. H. B. LATROBE,
Attorney for Stromberg.

Liber F 25, p. 161. Recorded Feb. 17, 1880.
Ex'd, F. C. T.

46 *Complainants' Exhibit Smith.—Comegys' suit*

STATE OF MARYLAND,
City of Baltimore, set:

At a session of the superior court of Baltimore City, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house in the city of Baltimore, in and for the city aforesaid, on the second Monday of September (being the eighth day of the same month), in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable George W. Dobbin, associate judge of the supreme bench of Baltimore City, assigned to and presiding in the superior court of Baltimore City; George P. Kane, esq., sheriff; George Robinson, clerk.

Among others were the following proceedings, to wit:

CHARLES F. SMITH, PLAINTIFF,
vs.
HENRY C. COMEGYS, DEFENDANT.

Be it remembered that heretofore, to wit, on the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and seventy-three, William H. Hayward, esquire, a justice of the peace of the State of Maryland in and for the city of Baltimore, pursuant to the statute in such case made and provided, sent to the clerk of the superior court of Baltimore City here a certain affidavit made before him, the said William H. Hayward, esquire, with an account thereto annexed, together with the warrant of him, the said William H. Hayward, under his hand and seal, which said affidavit, account, and warrant are in the words and of the tenor following:

Affidavit.

STATE OF MARYLAND,
City of Baltimore, to wit:

Be it remembered that on this 22nd day of May, in the year one thousand eight hundred and seventy-three, before me, the subscriber, a justice of the peace in and for the city aforesaid, personally appeared Charles F. Smith, and made oath in due form of law, on
47 the Holy Evangely of Almighty God, that a certain Henry C. Comegys, late of the city of Baltimore, is justly and bona fide indebted unto him, the said Charles F. Smith, in the full and just sum of four hundred and seventy-two dollars and seventy-three cents, over and above all discounts. And at the said time the said Charles F. Smith produced before me the account on and by which the said Henry

C. Comegys is so indebted, which is hereunto annexed. And the said Charles F. Smith did also make oath that he is credibly informed, and verily believes, that the said Henry C. Comegys hath absconded.

W. H. HAYWARD, *J. P.*

ACCOUNT.

H. C. Comegys to Charles F. Smith, Dr.

1870.				
Nov.	26.	To cash paid L. B. Brady for one-third interest in patent for pitching casks		$1,500 00
Dec.	3–29.	" cash paid A. A. C. & Co		179 40
	29.	" I. F. S. Hilbert for patent for pitching casks		500 00
1871.				
Jan.	13–21.	" A. A. C. Klauke & Co		154 00
Feb.	2.	" 4 Blaedes, &c		375 60
Mar.	1–25.	" cash sundries		257 01
April	4–11.	" S. A. Sheppard & Co. and Flynn & Emrich		248 52
May	1–31.	" cash sundries		291 76
June	6–23.	" "		129 00
	Sept. 30	" Flynn & Emrich		9 93
48	Oct.	" blowers' gas-jets		35 00
				$3,680 22
		½ of which was for acc. Comegys		1,840 11
Nov.	9.	To cash loaned H. C. Comegys	300 00	
		Less cash, $45 48, Dec. 10, '75	120 48	
				179 52
				$2,019 63

CR.

1870.				
Dec.	22.	By cash	$42 33	
1871.				
Jan'y.		" do.	361 20	
Feb.		" do.	270 75	
March.		" do.	117 57	
April.		" do.	111 44	
May.		" do.	106 68	
Aug.		" do.	247 62	
Oct.	4.	" do.	166 68	
Oct.	7.	" do.	35 00	
1872.				
Jan.	24.	" do. & Co	122 39	
				1,581 66
		Due by Comegys, Jan'y 24, 1872		437 97
		Int. to May 21, 1873		34 76
				$472 73

Warrant.

To the clerk of the superior court of Baltimore City:

49 Mr. ROBINSON: You are hereby commanded, on receipt of this warrant and the above account, and annexed voucher on which the same is granted, to issue an attachment against the land, tenements, goods, chattels, and credits of the said Henry C. Comegys, to answer unto the said Charles F. Smith the above-mentioned sum of four hundred and seventy-two dollars and seventy-three cents, current money, in the said affidavit specified, and costs of the attachment, according to the provisions of the code of the State of Maryland in such case made and provided; and this warrant shall be your sufficient authority therefor.

Given under my hand and seal this 24th day of May, in the year eighteen hundred and seventy.

W. H. HAYWARD, [SEAL.]
A Justice of the Peace of the State of Maryland in and for the City of Baltimore.

$1.00 paid by plaintiff.

And thereupon and by virtue of said warrant, and in pursuance of the code of public general laws aforesaid, the said Charles F. Smith, by William A. Fisher and Charles Marshall, esquires, his attorneys, prosecuted and sued forth out of the superior court of Baltimore City here the writ of the State of Maryland of attachment, to the sheriff of Baltimore City directed, in the words and of the tenor following, to wit:

State of Maryland to the sheriff of Baltimore City, greeting:

[L. S.] Whereas William H. Hayward, esquire, one of the justices of the peace of the State of Maryland in and for Baltimore City, hath this day issued his warrant to the clerk of the superior court of said city directing him to issue attachment against the lands, tenements, goods, chattels, and credits of Henry C. Comegys, to answer unto Charles F. Smith the sum of four hundred and seventy-two dollars and seventy-three cents:

50 We therefore command you that you attach the lands, tenements, goods, chattels, and credits of the said Henry C. Comegys to the value of $472.73, current money, and costs of this attachment, according to the form of the code of public general laws in such cases made and provided.

And we further command you that you make known unto the person or persons in whose hands you shall lay this attachment that he, she, or they be and appear before the judge of the superior court of Baltimore City, at the court-house in the same city, on the second Monday of September next, to show cause (if any he, she, or they have) why the lands, tenements, goods, chattels, and credits by you attached by virtue of this writ, in his, her, or their hands, shall not be condemned, and execution thereof had and made to and for the use of the said Charles F. Smith, as of the lands, tenements, goods, chattels, and credits of the aforesaid Henry C. Comegys, according to the code of public general laws in such cases made and provided, if to him, her, or them it shall seem meet; and how you shall execute this writ make known to our said judge at the day and place aforesaid, and have you then and there this writ.

Witness the honorable T. Parkin Scott, chief judge of the supreme

bench of Baltimore City, the 12th day of May, 1873. Issued 24th day of May, 1873.

GEORGE ROBINSON, *Clerk.*

And the said Charles F. Smith, by his attorneys aforesaid, at the time of suing forth the foregoing writ of attachment, prosecuted and sued forth the writ of the State of Maryland of summons directed to the sheriff of Baltimore City aforesaid, in the words and of the tenor following, to wit:

BALTIMORE CITY, *to wit:*

[L. S.] State of Maryland to the sheriff of Baltimore City, greeting:

You are hereby commanded to summon Henry C. Comegys to appear before the superior court of Baltimore City, to be held at the court-house in the same city, on the second Monday of September next,
51 to answer an action at the suit of Charles F. Smith, and have you then and there this writ.

Witness the honorable T. Parkin Scott, chief judge of the supreme bench of Baltimore City, the 12th day of May, 1873. Issued 24th day of May, 1873.

GEO. ROBINSON, *Clerk.*

And thereupon the said Charles F. Smith, by his attorneys aforesaid, files in court here the following short note, to wit:

CHARLES F. SMITH *against* HENRY C. COMEGYS. } Action in the superior court of Baltimore City, of assumpsit.

This suit is instituted to recover the sum of four hundred and seventy-two dollars and seventy-three cents due and owing from the defendant to the plaintiff: 1. For money lent by the plaintiff to the defendant; 2. For money paid by the plaintiff for the defendant at his request; 3. For money found to be due from the defendant to the plaintiff on an account stated between them.

MARSHALL & FISHER,
Att'ys for Plaintiff.

A copy of which said short note was made and sent, with the writs aforesaid thereon endorsed, "to be set up at the court-house door."

At which said second Monday of September, in the year of our Lord 1873, being the return-day of the foregoing writs, comes into the superior court of Baltimore City here the said Charles F. Smith, by his attorneys aforesaid; and the sheriff of Baltimore City aforesaid, to wit, George P. Kane, gentleman, to whom the writ first aforesaid was in form aforesaid directed, makes return of the said writ to the court here, thus indorsed, to wit:

Attached as per schedule and copy of sheriff's notice, under article 88, section 34, and certificate of William A. Fisher, president of
52 the Barrel Pitching Machine Company of Baltimore City, of number of shares, etc., standing in name of defendant, herewith returned.

GEORGE P. KANE, *Sheriff.*

The schedule, copy of sheriff's notice, and answer of Wm. A. Fisher,

president, etc., referred to in the foregoing return to the sheriff, are as follows, to wit:

A schedule of the goods, chattels, lands, tenements, and credits of Henry C. Comegys, seized and taken by virtue of a writ of atta. on warrant issued out of the superior court of Baltimore City, and to the sheriff thereof directed, at the suit of Charles F. Smith, and appraised by us, the subscribers, who first being duly summoned and sworn for that purpose.

Given under our hands and seals this 5th day of September, 1873.

(64) Sixty-four shares of the capital stock of the Barrel Pitching Machine Company of Baltimore City, valued at $3 per share, $192.00.

J. R. CARR, [SEAL.]
RUBEN JONES. [SEAL.]
JOHN C. LEWIS. [SEAL.]

To the Barrel Pitching Machine Company of Baltimore City:

You are hereby notified that by virtue of a writ of attachment on warrant issued out of the superior court of Baltimore City on the 24th day of May, 1873, and returnable to the September term, 1873, of said court, against the goods and chattels of a certain Henry C. Comegys, at the suit of Charles F. Smith, to me directed to be served, I have seized and taken all the interest of the said Henry C. Comegys in the capital stock and also in the debt of the Barrel Pitching Machine Company, of Baltimore City, transferable on the books of said association.

Witness my hand this 5th day of September, 1873.

GEORGE P. KANE,
Sheriff of Baltimore City.

53 True copy of notice served on Wm. A. Fisher, president, on the 5th day of September, 1873, by

GEORGE W. ROSEMAN,
Deputy Sheriff.

In the superior court of Baltimore City.

CHARLES F. SMITH
vs.
HENRY C. COMEGYS.

To Geo. P. Kane, esq., sheriff of Baltimore City:

In accordance with the notice served upon me, I hereby certify that the defendant is entitled to sixty-four shares of the capital stock of the Barrel Pitching Machine Company of Baltimore City, the par value whereof is five dollars per share.

WILLIAM A. FISHER,
President of the Barrel Pitching Machine Co. of Baltimore City.

And the sheriff aforesaid to whom the writ of summons was in form aforesaid directed, and to whom the copy of the said short note was in a manner aforesaid sent, makes return of said last-mentioned writ to the court here, thus endorsed, to wit: "Non est; copy set up at the court-house door."

And the said Henry C. Comegys, although called, comes not; thereupon the said Charles F. Smith, plaintiff, by his attorneys aforesaid, prays that the stock of the said Henry C. Comegys attached in form

aforesaid may be condemned towards satisfying the said Charles F. Smith, as well the foregoing sum of four hundred and seventy-two dollars and seventy-three cents in the said writ of attachment specified as the costs and charges of the said Charles F. Smith, plaintiff, in this behalf expended.

Therefore it is considered by the court here that the said stock of the said Henry C. Comegys so as aforesaid attached be condemned, according to the code of public general laws in such case made and provided, towards satisfying unto the said Charles F. Smith as well the aforesaid sum of $472.73 in the writ of attachment specified as
54 the sum of $23.36 by the court hereunto, the said plaintiff, on his assent, adjudged for his costs and charges by him in this behalf expended.

MEMORANDUM.—Judgment of condemnation was entered by the court against the property attached on the seventeenth day of October, in the year of our Lord 1873.

Test:

GEO. ROBINSON, *Clerk.*

STATE OF MARYLAND,
City of Baltimore, sct:

I, Francis A. Prevost, clerk of the superior court of Baltimore City, do hereby certify that the aforegoing is a full, true, and entire transcript taken from the record and proceedings of the said court in the therein-entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore City aforesaid, on this 21st day of March, eighteen hundred and seventy-nine.

[SEAL.] F. A. PREVOST, *Clerk.*

MARYLAND, *sct:*

I, George W. Dobbin, associate judge of the supreme bench of Baltimore City, assigned to and presiding in the superior court of Baltimore City, in the eighth judicial circuit of said State, do certify that the foregoing attestation of Francis A. Prevost, clerk of the said superior court of Baltimore City, is in due form and by the proper officer.

Given under my hand, at the city of Baltimore, this twenty-first day of March, in the year one thousand eight hundred and seventy-nine.

GEORGE W. DOBBIN.

STATE OF MARYLAND,
City of Baltimore, sct:

I, Francis A. Prevost, clerk of the superior court of Baltimore City, do hereby certify that the honorable George W. Dobbin, who has certified and signed the above attestation, was, at the time of so doing, presiding judge of the superior court of Baltimore City, in the
55 eighth judicial circuit of the State of Maryland, duly commissioned and qualified, and that to all acts done by him in that capacity full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof I hereunto subscribe my name and affix the seal of the superior court of Baltimore City, on this 21st day of March, A. D. eighteen hundred and seventy-nine.

[SEAL.] F. A. PREVOST,
Clerk of the Superior Court of Baltimore City.

Complainants' Exhibit Pitching Company Charter.

[2 5-c. stamps, cancelled.]

Barrel Pitching Machine Co. of Baltimore City. Certificate of incorporation.

Know all men by these presents that we, Charles F. Smith, 190 Franklin street, city of Baltimore; Henry C. Comegys, of the city of Baltimore; Alexander A. C. Klaucke, No. 1250 Ninth street, city of Washington; William A. Fisher, corner of North avenue and Decker street, Baltimore County; and John F. T. Holbeck, of city of Chicago and State of Illinois, being citizens of the United States and a majority of whom are citizens of the State of Maryland, do hereby certify that we do, under and by virtue of the general laws of this State authorizing the formation of corporations, hereby form a corporation under the name of the Barrel Pitching Machine Company of Baltimore City.

2. We do further certify that the said corporation so formed is a corporation for the manufacture and sale of machines for pitching barrels, tubs, and other wooden vessels; that the term of existence of the said corporation is limited to forty years, commencing on the day of the date of these presents, and that the said corporation is formed upon the articles, conditions, and provisions herein expressed, and
56 subject in all particulars to the limitations relating to corporations which are contained in the general laws of this State.

3. We do further certify that the operations of the said corporation are to be carried on in the city of Baltimore, and that the principal office of the said corporation will be located in the city of Baltimore.

4. We do further certify that the aggregate of the capital stock of the said corporation is one thousand dollars, and that the said capital is divided into two hundred shares of the par value of five dollars each.

5. We do further certify that the said corporation will be managed by four directors, and that said Smith, Comegys, and Holbeck and said Fisher are the names of the directors who will manage the concerns of the said corporation for the first year.

In witness whereof we have hereunto set our hands and seals this 29th day of December, in the year (1870) eighteen hundred and seventy.

CHARLES F. SMITH.	[SEAL.]
ALEX. A. C. KLAUCKE.	[SEAL.]
WILLIAM A FISHER.	[SEAL.]
H. C. COMEGYS.	[SEAL.]
JOHN F. T. HOLBECK.	[SEAL.]

Witness:
GEO. A. HEMMICK,
W. F. WHITEHOUSE as to John F. T. Holbeck.

STATE OF MARYLAND,
Baltimore City, to wit:

Before the subscriber, a justice of the peace of the State of Maryland in and for the city of Baltimore, personally appeared, on this 29th day of December, 1870, Charles F. Smith, Alexander A. C. Klaucke, Henry C. Comegys, and William A. Fisher, and did severally acknowledge the foregoing certificate to be their act and deed.

GEO. A. HEMMICK, *J. P.*

I, T. Parkin Scott, chief judge of the supreme bench of Baltimore City, do hereby certify that the foregoing certificate has been
57 submitted to me for my examination, and I do further certify that the said certificate is in conformity with the provisions of the law authorizing the formation of said corporation.

Jan. 30, 1871.

T. PARKIN SCOTT, *C. J.*

STATE OF ILLINOIS,
City of Chicago, set:

This third day of January, A. D. 1871, before the subscriber, a commissioner of deeds for the State of Maryland, duly commissioned and sworn and competent to take the acknowledgement of deeds and other instruments, personally appeared John F. T. Holbeck and acknowledged the foregoing certificate to be his act and deed.

In witness whereof I have hereunto set my hand and seal official, the day and year aforesaid.

[L. S.] PHILIP A. HOYNE,
Commissioner for Maryland in Chicago, Ill.

Filed for record Jan'y 30th, 1871, at 2¾ o'clock p. m. Same day recorded, and ex'd per Geo. Robinson, clerk.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify that the foregoing is a true copy taken Liber G. R. No. 16, folio 393, &c., one of the charter records of Baltimore City.

In testimony whereof, I hereto set my hand and affix the seal of the superior court of Baltimore, on this 15th day of June, A. D. 1880.

[L. S.] F. A. PREVOST, *Clerk.*

58 And afterwards, to wit, on the one hundred and fifteenth day of said term, to wit, on the 25th day of June, A. D. 1881, the following proceedings were had, to wit:

Decree dismissing bill.

MATTHEW GOTTFRIED *vs.* FREDERICK MILLER. } In equity.

This day came the parties, by their counsel, and this cause having been heretofore heard upon the pleadings and proofs, on consideration thereof it is ordered, adjudged, and decreed by the court that the complainant's bill of complaint be, and hereby is, dismissed, and that the said complainant pay the costs in this cause to be taxed, within ten days, or in default thereof that execution be issued for the same.

And afterwards, to wit, at a special term of said court begun and held on the second Thursday of July, at the city of Milwaukee, and on the second day of said term, to wit, on the 15th day of July, A. D. 1881, the following proceedings were had, to wit:

Appeal.

MATTHEW GOTTFRIED
vs.
FREDERICK MILLER. } In equity.

This day came the complainant, by his counsel, and prayed
59 an appeal to the Supreme Court of the United States, and filed his bond, with Ephraim Banning as surety, in the penalty of five hundred dollars, conditioned to prosecute said appeal to effect and pay all costs and damages that may be awarded against him if he fail to make his appeal good, which bond is approved by the district judge, and is as follows:

Appeal bond.

Circuit court of the United States, eastern district of Wisconsin.

MATTHEW GOTTFRIED
vs.
FREDERICK MILLER. } In equity.

Know all men by these presents that we, Matthew Gottfried and Ephraim Banning, of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto Frederick Miller, of the city and county of Milwaukee, in the State of Wisconsin, in the penal sum of five hundred dollars ($500), lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas, in the
60 25th day of June, A. D. 1881, a final decree was entered in the above-entitled cause dismissing the bill of complaint therein, and against the said Matthew Gottfried for costs, from which decree the said Matthew Gottfried has taken an appeal to the Supreme Court of the United States:

Now, therefore, if the said Matthew Gottfried shall prosecute his said appeal with effect and without delay, and shall pay all costs and damages that may be awarded against him if he fail to make his appeal good, then this obligation shall be void, otherwise it is to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this fifth day of July, A. D. 1881.

MATTHEW GOTTFRIED. [SEAL.]
EPHRAIM BANNING. [SEAL.]

(Endorsed:) Approved:

C. E. DYER,
Dist. Judge.

Whereupon it is ordered by the court that said appeal be, and hereby is, allowed.

61 *Opinion of the court.*

Circuit court of the United States, eastern district of Wisconsin.

MATTHEW GOTTFRIED
vs.
FREDERICK MILLER.
} In equity. June 25, 1881.

DYER, J. (orally):

I have not been able to prepare an opinion in this case, but as counsel desire to know what are the grounds of the judgment of the court, I will state them.

This is a bill in equity to restrain the infringement of a patent, numbered 42580, granted to the complainant and J. F. T. Holbeck, for an improved mode of pitching barrels, and for an account and damages.

The patent has been heretofore sustained in this court in a contest between the complainant and parties other than the present defendant. (Gottfried et al. vs. The Philip Best Brewing Company et. al., 17th Off. Gaz., 675.)

On the 25th day of November, 1872, one Stromberg sold to the defendant Miller a pitching-machine containing, as it is understood, the patented improvements, which he has since used. The material question in the present controversy relates to the validity of the defendant's title to the machine under his purchase from Stromberg, and consequently to his right to use the same. The determination
62 of this question involves necessarily the examination of a series of transactions between various parties who, at different times, had or claimed to have some interest in the patent, which transactions constitute the history of the title, and are disclosed by the evidence in the cause.

The patent was granted to Gottfried and Holbeck May 3, 1864. On the 19th day of December, 1870, Gottfried, by written assignment, in consideration of five dollars to him paid and a royalty to be paid of ten dollars on every machine to be manufactured by Holbeck, sold and transferred to Holbeck all his interest in the patent and the invention, reserving to himself, however, in the same instrument the right to revoke the assignment if the royalty reserved should not be paid; and on the 3rd day of January, 1871, Holbeck sold and assigned to Charles F. Smith and Henry C. Comegys an undivided two-thirds of all his right, title, and interest in and to the patent.

Then, on the 25th day of January, 1871, the title to the patent being at that time in Holbeck, Smith, and Comegys, they, by written assignment, transferred all their right, title, and interest in and to
63 various patents, including the Gottfried and Holbeck patent, to the "Barrel Pitching Machine Company" of Baltimore. The assignment contained this provision: "The same to be held and enjoyed by the said company as fully and entirely as they would have been held by us if this assignment and sale had not been made, with the exception that the said company shall not assign to any one but ourselves any or all the interest in and to the above-named patents in the proportion as they are now held by us. This assignment to hold good until the dissolution or liquidation of the said company, when the said company shall reassign to us in the same proportions as now assigned by us." In order, as it would seem, to more completely place in the Barrel Pitching Machine Company the title to the patents mentioned in the assignment of January 25th, 1871, Holbeck, Smith, and

Comegys, on the first day of June, 1871, made a further assignment to the company of their interest in the patents mentioned in the first assignment. This second assignment contained the provision "that said corporation shall not assign any or all or any part of the interests hereby assigned in said patents to any other person or persons except the
64 grantors herein named, in proportion to their several and respective interests in the same as held by them before any assignment to said corporation, and provided also that this assignment shall continue in full force until the dissolution of said company, in which event, or in the event of the liquidation of the affairs of said company, the several interests of each grantor in said patents shall, subject to the lawful rights of the creditors of said corporation, be reassigned to each grantor."

Now, as I have already stated, on the 25th day of November, 1872, which is the next date in chronological order, John H. Stromberg made a sale to the defendant in the present suit of a pitching-machine covered by the complainant's patent.

On the 25th day of March, 1875, Gottfried, by written instrument, undertook to revoke and rescind the assignment which he had made to Holbeck on the 19th day of December, 1870, for the reason, as recited in the instrument of revocation, that Holbeck had neglected to pay the royalty upon the machines which he had manufactured. On the 27th day of October, 1875, an agreement was entered into by and between Holbeck and Stromberg whereby Holbeck, in consideration of the sum of one thousand dollars paid to him,
65 undertook to sell and assign to Stromberg one undivided half of his right and title in and to the patent in question, and it was agreed that they should make articles of copartnership, and that Stromberg should furnish the capital to carry on the business of manufacturing pitching-machines as described in the patent. On the 9th day of December, 1875, the directors of the Barrel Pitching Machine Company resolved that all the right, title, and interest of the company in and to this patent acquired by the assignment from Smith, Comegys, and Holbeck should be assigned and conveyed back to those parties for the sum of five hundred dollars. And it was further resolved that Charles F. Smith, who was the president of the Barrel Pitching Machine Company, be directed to execute and deliver to Smith, Comegys, and Holbeck an assignment on behalf of the Pitching Machine Company.

On the 11th day of December, 1875, in pursuance of the resolution just mentioned, an instrument was executed which purported to be an assignment from the Barrel Pitching Machine Company to Smith, Comegys, and Holbeck of all the right, title, and interest of the company in and to the patent. The attestation clause and signature were as follows:

66 "In testimony whereof, and in pursuance of a resolution passed by said company on the 9th day of December, 1875, a copy of which is appended hereto, the said Charles F. Smith hath hereto set his hand, as the act of the said company, this 11th day of December, 1875.

(Signed) "CHARLES F. SMITH,
"*President Barrel Pitching Machine Company.*"

Then, on the same 11th day of December, 1875, Smith, for the alleged consideration of $500, granted and assigned to Holbeck and Got-

fried all his right and title to the patent; and afterwards, on the 7th day of June, 1876, Comegys transferred to Stromberg all his interest in the patent.

It next appears that on the 9th day of October, 1876, Gotfried, Holbeck, and Stromberg, who are named as jointly interested in the patent, by a certain instrument in writing, appointed one Latrobe, of Baltimore, their attorney, with authority to prosecute suits against infringers of the patent, and to compromise or adjust the same. This instrument contained the following clause:

"And it is understood that all expenses, costs, and charges, including counsel fees, attending the litigation, if any, shall be deducted
67 from the collections aforesaid, and the balance paid over to the parties hereto in the proportion of their interest in the said patents, and particularly it is understood that the said John H. Stromberg shall be paid out of said collections, as fast as made, all moneys that he may have advanced in the prosecution of claims under said letters patent." This instrument bears the signatures and seals of Holbeck, Gottfried, and Stromberg.

On the 25th day of June, 1878, Gottfried and Holbeck executed a further instrument in writing by which they, on their part, revoked and countermanded the above-recited power of attorney given to Latrobe, "and all acts and things which shall or may be done by virtue thereof, in any manner whatsoever."

It next appears that on the 24th day of February, 1879, the Barrel Pitching Machine Company executed to Smith, Comegys, and Holbeck a new assignment of all the right, title, and interest of the company in and to the patent. The execution of the prior assignment by the company is mentioned in this one, and it is stated that the first instrument failed to meet the purposes and carry out the objects of the resolutions of the directors of the company, and it would seem that it was for that reason that this new assignment of February 24th,
68 1879, and which was duly executed by the Barrel Pitching Machine Company, was made. Thereupon Smith and Comegys respectively executed new assignments to Holbeck; and on the 15th day of December, 1879, Stromberg, in consideration of the sum of five thousand dollars, assigned to Gottfried all his right, title, and interest in and to the patent, and in and to all claims of every kind or nature for past infringements, and all rights of action arising out of or connected with infringements. This instrument of assignment recited the fact that Stromberg had theretofore disposed of rights and licenses under the patent as a part owner under mesne assignments of the same, and had caused suits to be instituted against infringers, and that it was a part of the consideration of the assignment from him that he should be released from all claim which Gottfried or Holbeck, or their assignees, might or could have against him for or by reason of any collections theretofore made by him, or his attorneys, or against any person or persons to whom he had granted licenses to use the patented improvements; and it was then declared as follows:

"Now, therefore, the said Matthew Gottfried and the said John F. T. Holbeck (the said Holbeck uniting herein for the purpose of car-
69 rying out the agreement aforesaid), for and in consideration of the premises, have released, and by these presents do hereby release, the said John H. Stromberg from all claim that they or either of them might or could have against the said Stromberg for or by reason of any collection he may have made from parties to whom he or

his attorneys * * * may have granted licenses to use the said patented improvement, hereby ratifying and confirming all such licenses and all the acts of the said Stromberg and his attorneys in the premises. And the said Matthew Gottfried doth hereby covenant and agree that he will save harmless the said Stromberg and his attorneys from all claims that may be made against them or either of them for or by reason of any interest which the said Gottfried and Holbeck or either of them may have given to any other party in the said letters patent."

It appears also that in September, 1873, Charles F. Smith brought a suit against Henry C. Comegys in the superior court of Baltimore City upon an indebtedness from Comegys to him, in which an attachment was issued and a seizure made of the shares of capital stock held by Comegys in the Barrel Pitching Machine Company, which proceedings resulted in a judgment condemning the stock, according to the
70 laws of the State of Maryland, for the satisfaction of Smith's claim; and on the 27th day of October, 1873, judgment was entered accordingly.

This I believe is the history of the transactions between these various parties, and is therefore the history of the title of this patent.

Now it is contended by the learned counsel for complainant that at the time Stromberg sold the machine in question to Miller he had no title which he could convey, and that no conveyance he could then make would enable Miller to use the machine without infringement of the patent. Further, that as the title to the patent in 1875 was vested in the Barrel Pitching Machine Company of Baltimore, Holbeck could not and did not by his agreement with Stromberg convey to or vest in him any interest whatever in the patent.

It is also insisted that as the legal title did not pass from the Barrel Pitching Machine Company to Holbeck, Smith, and Comegys by virtue of the conveyance made December 11th, 1875, because of informalty in the execution of that conveyance, Comegys, on the 7th day of June, 1876, had no title or interest which he could convey to Stromberg, and that Stromberg did not at any time have any title to or interest
71 in this patent, and certainly none which enured to the benefit or for the protection of Miller, who had made his purchase long anterior to these transactions. It has been also argued that the title to the patent never passed out of the Barrel Pitching Machine Company, so that it became vested as a legal title in Holbeck, Smith, and Comegys, until the second assignment from the company, made in February, 1879, and that Smith and Comegys then assigned their entire interest to Holbeck.

It is true that neither the assignment from Holbeck to Stromberg nor that from Comegys to Stromberg contained any express warranty of title, and I am inclined to the opinion that, strictly speaking, counsel for complainant is right in his contention that the legal title which Holbeck and Comegys subsequently acquired did not enure to the benefit of Stromberg. It is also probably true that since the assignments from Holbeck to Stromberg, and from Comegys to Stromberg, did not contain an express warranty of title, no implied warranty could arise, because those assignments were not of the entire patent, but were only of the assignor's interest in the patent, whatever that might be. So that, standing upon strict legal principles applicable to after-acquired titles, it would seem that there is force in the claim that the subsequent
72 titles which Holbeck and Comegys acquired did not enure to the benefit of Stromberg. I think the court might be constrained so to hold if that were all there is of the case.

It appears, however, that after the first assignment was made from the Barrel Pitching Machine Company, which it may be admitted was irregularly executed, because it was signed only by Charles F. Smith, president, it was understood by the parties that the title had passed. They evidently proceeded to act upon that supposition, for, as we have seen, Smith at once made an assignment of his supposed interest to Gottfried and Holbeck, and Comegys assigned to Stromberg, and then Gottfried, Holbeck, and Stromberg entered into an agreement by which they declared that they were jointly interested in the patent, and agreed upon certain matters, in which they declared themselves mutually interested, as fully stated in the agreement, so that it has seemed to me that the second assignment from the Barrel Pitching Machine Company must be held to have been executed rather to correct what was understood at the time to be a technical defect in the execution of the first conveyance from the Barrel Pitching Machine Company than otherwise.

73 Now, upon this record we find that not only did these three parties, Holbeck, Gottfried, and Stromberg, in October, 1876, declare themselves to be jointly interested in this patent, but that in December, 1879, they united in the execution of an agreement by which Gottfried and Holbeck declared that they ratified and confirmed all the licenses to use the patented improvements which Stromberg had previously granted, and all the acts of the said Stromberg.

But it is argued in the brief of counsel that this had reference to the period when Stromberg was in fact a part owner of the patent. This, however, is not consistent with complainant's claim that Stromberg never was a part owner, and never had any interest in the patent; and in this connection it is a significant fact that if it be held that Stromberg acquired no interest from Comegys after the execution of the first assignment from the Barrel Pitching Machine Company, it seems to follow that Gottfried also acquired no interest at that time. Then the question arises, where must we look for the source of Gottfried's title; and in considering that question I have been unable to escape the conclusion that we must look for the source of his title, as he is now seeking to enforce rights against Miller, to the assignment which Stromberg executed to him in 1879; for if Stromberg

74 took nothing from Comegys by the latter's assignment, executed June 7, 1876, then Gottfried took nothing from Smith by virtue of his assignment, executed December 11, 1875, both of which assignments were based on the first transfer from the Pitching Machine Company to Smith, Holbeck, and Comegys; and if all this be so, then the inquiry follows, must not Gottfried, as Stromberg's grantee, be held privy to Stromberg's previous grant? It will be admitted, I think, that if Stromberg acquired a valid title to, or interest in, this patent, or a part of it, after his sale of the machine to Miller, he would not be permitted to turn about and sue Miller for infringing the patent by the use of the machine which he had himself sold to Miller. Suppose, for example, that at the time Stromberg made sale of the machine to Miller he had no title but that afterwards he acquired an interest or title, would he be permitted then to prosecute a suit against Miller for infringement? I think not; and the point appears to be well made by counsel for defendant that in a suit for infringement the whole interest in the patent must be represented by the complainants in such suit; so that if Stromberg had been in fact a part owner of this patent at the

75 time the present suit against Miller was brought, he would have been a necessary party to the suit; and if Gottfried's present title

has its source in the grant which Stromberg made to him in 1879, as appear to be the fact, then he is in the position of privy to Stromberg's prior grant, and can no more prosecute a suit against Stromberg's prior grantee than could Stromberg himself. On the whole, therefore, while it may be technically correct to say that by the transfer from Holbeck to Stromberg, and Comegys to Stromberg, the latter did not acquire a perfect legal title, nevertheless when we consider the fact that the complainant in this suit has once declared in an agreement which he made with Stromberg that the latter was jointly interested with him in the patent, and in a second agreement ratified and confirmed all licenses which Stromberg had previously granted to use the machine, and all acts of Stromberg, and when we consider that in suits which have been previously prosecuted in this court Stromberg was made a party thereto as jointly interested with Gottfried and Holbeck in the patent, and when we find further that if Stromberg acquired no interest in the patent by virtue of the transfer from Comegys to him, after the first assignment from the Barrel Pitching Machine Company
76 to Smith, Holbeck, and Comegys, then Gottfried acquired no title by the transfer to himself and Holbeck from Smith, made Dec. 11, 1875, and that Gottfried's present title has its source in the transfer to him from Stromberg, made in 1879, it seems to me that the complainant is in a position where he is as much disabled to prosecute Miller for infringement as Stromberg would himself be, and, considering the case in all its aspects, I am constrained to hold that the bill should be dismissed for want of equity. Holbeck has passed out of the case. The bill has been heretofore voluntarily dismissed as to him, so that it is a controversy between Gottfried and Miller alone.

The attempted revocation by Gottfried, in March, 1875, of the assignment of the patent which he had granted to Holbeck in December, 1870, cannot, I think, in view of all that subsequently occurred, with the apparent acquiescence of Gottfried, be held to restore the latter's original title.

77 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals, now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a full and complete transcript of the record and proceedings, pursuant to the agreement of the parties, in the case of Matthew Gottfried vs. Frederick Miller, in equity.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this eleventh day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th.

[SEAL.] EDWARD KURTZ, *Clerk.*

(Indorsement on cover:) No. 882. Matthew Gottfried, appellant, vs. Frederick Miller. E. Wisconsin C. C. U. S. Filed 22 August, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1881.

SUPREME COURT U. S.
FILED
OCT 31 1881
JAMES H. MCKENNEY, CLERK

MATTHEW GOTTFRIED
Appellant,

No. 882. *vs.*

FREDERICK MILLER
Appellee.

Appeal from the Circuit Court of the United States, Eastern District of Wisconsin.

BRIEF AND ARGUMENT FOR APPELLANT.

BANNING & BANNING,
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1881.

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BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF CASE.

Although founded on letters patent, this is not strictly a patent suit; the questions presented are purely questions of law, and involve appellee's right to use a certain pitching machine mentioned in the evidence. In other words, the main question is, whether, in view of the circumstances shown by the record, appellee has an implied right or license to use such machine.

The bill is exhibited by appellant against appellee, and in form charges appellee with an infringement of patent No. 42,580, issued to appellant and John F. T. Holbeck, May 3, 1864, for an improved mode of pitching barrels; the prayer of the bill is in the usual form.

Although immaterial to the present issues, it may be proper to state that the patent has been twice sustained in the Circuit Courts; (see *Gottfried* v. *Bartholomae*, 13 Off

Gaz., 1128, and *Gottfried* v. *Phillip Best Brewing Company*, 17 Off. Gaz., 675;) and that the subject matter of the invention relates to the preparation of casks or kegs for the receiving of beer. This preparation consists in lining or coating the inside of casks with pitch. The object of this "pitching" is to prevent the beer from coming in contact with the staves or wood; such contact would cause the beer to become flat or sour, and impart to it a foreign or woody taste, and would also generate impurities in the cask.

In November, 1872, John H. Stromberg, a manufacturer of Baltimore, sold to appellee the pitching machine in controversy, which appellee afterwards used for six or seven years, (Record, 9,) and the use of which, if unauthorized, is admitted to have been a clear infringement of appellant's patent. (Record, 10). At the time of this sale, Stromberg had no interest in the patent, or license under it, nor did he claim any; but three or four years later he procured the execution and recording of two papers under which he afterwards claimed to be a co-owner with appellant and Holbeck. To avoid trouble, appellant afterwards procured his re-assignment, or quit claim, as shown presently, but in our view this fact is not now material.

The present contention of appellee is, that Stromberg was once a part owner of the patent, and that his title enured to the benefit of appellee, as a purchaser of one of his machines, so that he is not now liable for infringement. On the other hand, appellant insists that Stromberg never had any interest in the patent, and, if wrong in this, that his title could not enure to the benefit of appellee so as to release him from liability for any infringements, much less infringements committed previous to the acquiring of such title.

The Circuit Court, Judge Dyer, decided in appellee's favor. After reaching the conclusion that Stromberg should be considered as at one time having an interest in the patent, the learned Judge states the further grounds of his decision

as follows: "If Stromberg acquired a valid title to, or interest in, this patent, or a part of it, after his sale of the machine to Miller, he would not be permitted to turn about and sue Miller for infringing the patent by the use of the machine which he had himself sold to Miller;" and "if Gottfried's present title has its source in the grant which Stromberg made to him in 1879, as appears to be the fact, then he is in the position of privy to Stromberg's prior grant, and can no more prosecute a suit against Stromberg's prior grantee than could Stromberg himself." (Record, 35). In other words, the Court held that appellant cannot maintain any claim against appellee, although appellee's machine was purchased from a stranger to the patent, and never mentioned or included in any subsequent dealings between appellant and that stranger. And, in order to reach this conclusion, the Court held that appellant was estopped from disputing Stromberg's title, because of recitals in some of the papers referred to, notwithstanding appellee claimed by title three or four years anterior to the date of such papers.

To determine the questions thus presented, it will be necessary to consider briefly the history of the title. This is shown by the record to be as follows:

On the 19th of December, 1870, appellant assigned his interest in the patent, one half, to Holbeck, conditionally, the assignment being recorded January 6, 1871. The consideration for this assignment was five dollars, and "a royalty of ten dollars per machine" for every machine manufactured by Holbeck or his associates; and appellant expressly reserved "the right to revoke this assignment if the royalty herein reserved be not paid" (Record, 12.)

On the third of January, 1871, Holbeck assigned two thirds of the patent to Charles F. Smith and Henry C. Comegys, the assignment being recorded, January 6, 1871, (Record, 12); and on the 25th of the same month Holbeck, Smith and Comegys assigned the whole patent, with others, to "The Barrel Pitching Machine Company of Baltimore

City." This assignment, which was recorded three days after its execution, contained the following clause: "The said company shall not assign to any one but ourselves any or all the interest in and to the above named patents in the proportion as they are now held by us; this assignment to hold good until the dissolution or liquidation of the said company, when the said company shall re-assign to us in the same proportions as now assigned by us." (Record, 13.)

This assignment being considered insufficient to protect creditors, or stockholders who might advance money on account of the business, another one was executed by the same parties to the pitching machine company, June 1, 1871, and recorded June 8, 1871; which contained the following provisions: "Said corporation shall not assign any or all or any part of the interests hereby assigned in said patents, to any other person or persons except the grantors herein named, in proportion to their several and respective interests in the same as held by them before any assignment to said corporation; and provided also that this assignment shall continue in full force until the dissolution of said company, in which event, or in the event of the liquidation of the affairs of said company, the several interests of each grantor in said patents shall, subject to the lawful rights of the creditors of said corporation, be re-assigned to each grantor." (Record, 14.)

On the 25th of March, 1875, appellant revoked the assignment to Holbeck above mentioned. This revocation, which was recorded four days after its execution, contains various recitals, the last of which is that "sundry of said machines for pitching barrels have been manufactured by the said Holbeck and his associates, upon which no royalty has been paid, but said Holbeck has neglected and refused to pay said royalty upon any or either of said machines." It then proceeds as follows: "Now, therefore, in consideration of the premises, I, the said Matthew Gottfried, do hereby revoke and rescind the said agreement and assign-

ment, and declare the said interest in said letters patent reinvested in me as if the said assignment had not been made." (Record, 15.)

Note.—By this revocation, it will be insisted, appellant became reinvested with the title to his original half of the patent, and hence, as to this half, should be considered as holding directly from the government.

On the 27th of October, 1875, an agreement, containing what purported to be an assignment, was executed between Holbeck and Stromberg, which was recorded November 6, 1875, and the substance of which was in the following words, namely: "In consideration of the sum of one thousand dollars paid to the said John F. T. Holbeck by John H. Stromberg, the said John F. T Holbeck does sell, assign and set over, to the said John H. Stromberg, one undivided half of his rights and titles in his letters patent, bearing date May third, 1864, and numbered 42,580; and it is further agreed that the two parties named within shall make articles of co-partnership, and the said John H. Stromberg shall furnish capital to carry on said business of manufacturing pitching machines, as described in said letters patent." (Record, 16.)

Note.—As will be presently shown, this instrument could not pass any interest to Stromberg *because Holbeck did not own any part of the patent at the time of its execution*, the title being then vested in appellant and the barrel pitching machine company; nor did it contain any covenants sufficient to pass any part of the title subsequently acquired by Holbeck.

At a meeting of the directors, held at Baltimore, December 9, 1875, it was resolved to re-assign the company's interest in the patent to Smith, Comegys and Holbeck, agreeably to the condition contained in the assignment to the company first above mentioned; and in furtherance of this object the following resolution was adopted: "That Charles F. Smith be and is hereby directed to execute

and deliver to the said Charles F. Smith, Henry C. Comegys and John F. T. Holbeck, the assignment above mentioned in the foregoing resolution, on behalf of the Barrel Pitching Company of Baltimore City, on receiving from the said parties the sum of five hundred dollars." (Record, 16.)

In pursuance of these resolutions, an instrument was executed December 11, 1875, and recorded March 9, 1876, which purported to be an assignment from the pitching machine company to Smith, Comegys and Holbeck. The attestation clause and signature to this instrument were as follows: "In testimony whereof, and in pursuance of a resolution passed by said company on the 9th day of December, 1875, a copy of which is appended hereto, the said Charles F. Smith hath hereto set his hand, as the act of the said company, this eleventh day of December, 1875. Charles F. Smith, Pres't Barrel Pitching Co." (Record, 17).

Note—This instrument was not under seal, and, owing to the form of its execution, *was merely the personal deed of Smith, and not the deed of the pitching machine company;* hence, as will be shown in argument, it was not sufficient to pass title from the company.

Simultaneously with the execution of this instrument, Smith attempted to assign his interest to Holbeck, the assignment being recorded March 9, 1876, (Record, 17); and afterwards, on June 7, 1876, Comegys attempted to assign his interest to Stromberg. This last instrument was recorded August 30, 1876, (Record, 17).

Note.—The form of its execution is not questioned, but it is urged that it could not pass any interest to Stromberg, first, *because Comegys did not have any interest in the patent*, the title still remaining in appellant and the pitching machine company; and, second, if this be incorrect, because Smith having a specific lien on his interest in the company, (as shown hereafter), *Comegys held in trust for him*, and could not make any valid assignment without his consent.

On the 9th of October, 1876, Holbeck, Stromberg, and

appellant executed a power of attorney to John H. B. Latrobe, of Baltimore, reciting that they were "jointly interested" in the patent, etc., (Record, 17); and on the 25th of June, 1878, this power of attorney was revoked by Holqeck and appellant. (Record, 18).

The instrument executed by Smith, December 11, 1875, being considered insufficient to pass title from the pitching machine company, and the company still considering itself an owner of the patent, a new assignment was made by it to Smith, Comegys and Holbeck, February 24, 1879. (Record, 19). This assignment, after referring to the resolutions of December 9, 1875, above given, contained a recital that "the said Charles F. Smith, in pursuance of said resolutions, executed a certain instrument in writing dated the eleventh day of December, A. D., 1875, and recorded on the ninth day of March, A. D., 1876, which instrument, however, failed to meet the purposes and carry out the objects of said resolutions." After this recital, which is the only reference to the instrument executed by Smith, it proceeds not only to assign its interest in the patent, as if still the owner thereof, but also its interests in "all claims of every kind for the past infringment of said letters patent, and all rights of action whatever arising out of or connected with said infringments," (Record, 19). It may be observed, in passing, that this is the first instrument in which any reference is made to infringement claims; before its execution such claims were vested in and belonged to appellant and the pitching machine company.

Title being thus reinvested in Smith, Comegys and Holbeck, for the first time since January 25, 1871, the date of their first assignment to the pitching machine company, Smith and Comegys immediately assigned to Holbeck, (Record, 20); and, on May 1, 1879, Holbeck assigned to appellant. This last assignment does not appear in the

record, but this is unimportant, as no question is made in reference to it.

Note.—By these instruments, commencing with the one from the pitching machine company of February 24, 1879, the patent, *and especially the infringement claims*, became directly vested in appellant; and hence, aside from the half reinvested by the revocation above mentioned, the true answer to Judge Dyer's question, "where must we look for the source of Gottfried's title," is, to the pitching machine company through Holbeck, and not to the pitching machine company through Stromberg.

On the 15th of December, 1879, Stromberg quit-claimed all his supposed interests to appellant, the instrument being recorded February 17, 1880. (Record, 20).

Note.—Previous to this there had been a violent disagreement between the parties, and the main object of the instrument in question was to avoid trouble on account of existing differences. A part of the agreement was that appellant would ratify certain acts of Stromberg, specifically mentioned in the instrument, namely, the rights and licenses which he had granted while claiming and acting as a part owner of the patent; and another part was that Stromberg should be released from certain liability, also specifically mentioned, namely, on account of collections which he had made in the granting of such licenses and from suits which he had commenced at New York and Baltimore. But although a different view seems to have been taken by the Court below, we think it too clear for argument, that this ratification and release were not intended to extend to any act or thing done by Stromberg before the acquiring of his supposed interest; such acts were not done by him "*as* a part owner" of the patent, but as a stranger to it, and instead of being done under it, or by its authority, were in direct violation of it.

In addition to these facts, shown by the records of the Patent Office, it also appears that on the 17th of October, 1873, by virtue of the proceedings in a certain attachment

suit in the Superior Court of Baltimore City, Smith acquired a specific lien on all Comegy's interest in the capital stock of the pitching machine company, if not an equitable title thereto. (Record, 27). The provisions of the statute under which these attachment proceedings were had will be found in the Maryland Code Supplement, 1868, Art. 26, §§ 198–208.

Note.—In view of these proceedings, Comegys had no interest in the stock of the company, or right to participate in the distribution of its assets, at the time of its re-assignments above mentioned; and hence he could not take any title personally, but only in trust for Smith, under such re-assignments.

The record further shows that various infringement suits were commenced between 1876 and 1879, in which Holbeck, Stromberg and appellant were all joined as parties complainant. The allegation of title in these suits was, "that by virtue of the premises and written assignments, * * your orators became and now are the sole and exclusive owners of the entire right, title and interest in and to the said letters patent." (Record, 10).

It appears from the foregoing, that there are two instruments through which Stromberg is claimed to have acquired an interest in the patent, namely, the one from Holbeck of October 27, 1875, and the one from Comegys of June 7, 1876. And Judge Dyer seems to consider that the assignment from the pitching machine company of February 24, 1879, operated in some way for the benefit of Stromberg, although he never had any connection with it, and although the two instruments just mentioned contained no covenants sufficient to pass Holbeck and Comegy's subsequently acquired title.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in holding that appellant's revocation of March 25, 1875, of the assignment to Holbeck

of December 19, 1870, was insufficient to restore appellant's original title.

2. The Court erred in holding, in substance, that Stromberg should be considered as at one time a part owner of the patent.

3. The Court erred in holding that the assignment from the pitching machine company of February 24, 1879, was intended as confirmatory of the attempted assignment by Smith of December 11, 1875, and to cure defects in the execution thereof.

4. The Court erred in not holding that such 1879 assignment operated to vest in Smith, Comegy's and Holbeck an entirely new title.

5. The Court erred in holding that any part of appellant's present title was derived from or through Stromberg.

6. The Court erred in holding that appellant is "in the position of privy to Stromberg's prior grant."

7. The Court erred in holding that appellant ever in any way ratified Stromberg's sale of machines, or any other acts on his part except those specifically mentioned in the instrument to appellant, executed December 15, 1879.

8. Even if right in holding that Stromberg should be considered as at one time a part owner of the patent, the Court erred in holding, substantially, that he was ever in any way interested in claims for damages arising out of past infringments thereof, that is to say, out of infringments committed previous to his becoming such part owner.

9. The Court erred in holding that if Stromberg acquired an interest in the patent after his sale of the machine in controversy to appellee, he could not maintian any suit against appellee for infringements committed by the use of such machine.

10. Even if right in holding that Stromberg's position was such that he could not maintian any suit against appellee,

the Court erred in holding that appellant was also in such position that he could not sue appellee for infringements committed by the use of the machine in question, and especially for infringements committed by the use of such machine previous to Stromberg's connection with the patent.

11. The Court erred in holding that appellee was not liable for infringement, and in dismissing appellant's bill.

BRIEF OF ARGUMENT.

1. Appellant's revocation sufficient to restore his original title, or half interest.

The first assignment of error is that the Circuit Court erred in holding that appellant's revocation of March 25, 1875, of the assignment to Holbeck of December 19, 1870, was insufficient to restore appellant's original title. It seems proper to consider this question first, in order that the exact status of the title at the time Stromberg acquired his supposed interest may be determined.

The patent having been issued to Holbeck and appellant, as joint inventors, of course appellant was originally the owner of an undivided half interest. As already shown, this interest was transferred to Holbeck, December 19,1870, on condition that a specified royalty should be paid on every machine manufactured, and that appellant should have the right to revoke the assignment in case of a failure to pay such royalty. Machines having been manufactured, but no royalty ever paid, and Holbeck having "neglected and refused" to pay any royalty, appellant, in March, 1875, duly exercised his power of revocation; he then placed on record an instrument stating in express terms, that he did thereby "revoke and rescind the said agreement and assignment, and declare the said interest in said letters patent reinvested in him as if the said assignment had not been made."

The only objection made to this revocation is, in the

words of Judge Dyer, that it cannot, "in view of all that subsequently occurred with the apparent acquiescence of Gottfried, be held to restore the latter's original title." (Record, 36.) The "all that subsequently occured," here referred to, were the power of attorney to Latrobe, the revocation thereof, the quit claim from Stromberg to appellant, and the joining of Stromberg in the suits above mentioned; and the Court below seems to have considered that appellant's position in these various matters was inconsistent with the claim that his original title was restored by the revocation in question.

Now, we submit that every one of these things might have "subsequently occurred," not only with the apparent but even with the actual acquiescence of appellant, without in any way affecting the revocation, or the title which it was intended to restore. Assuming that it was sufficient to restore appellant's original title, still it would not follow from this that Stromberg was never interested in the patent, under the other half, and therefore that he was not a proper party in "all that subsequently occured." In this case, his interest would have been only half as large as if there had never been any revocation, but still he might have had an interest. In this view, we cannot see how it was inconsistent with appellant's present claim, for him to join with Stromberg in the power of attorney or other instruments mentioned; they might have been "jointly interested," notwithstanding appellant's original title was restored by the revocation.

But there is another view which is decisive of this question, and which clearly shows that "*all that subsequently occurred*" *was in acquiescence and recognition of appellant's claim* that the revocation operated to restore his original title. Appellant's assignment to Holbeck was made in 1870, and no reassignment to him was made by any one until 1879. Now, how was it that he was "jointly interested" with anybody in the patent on the 9th of October,

1876, the date of the power of attorney to Latrobe, or on the 25th of June, 1878, the date of the revocation of such power of attorney, or at the time the suits, mentioned in Judge Dyer's opinion, were commenced? The answer to this question is very clear and simple—he was "jointly interested" *because the revocation had restored his original title*, but in no other way; and all the parties recognized and acknowledged this in "all that subsequently occurred."

Further than this, it may be asked, what more could appellant do? He placed his revocation on record, and then proceeded to act as a part owner of the patent; the others rocognized him as such part owner, and in "all that subsequently occurred" acquiesced in his claim that the revocation operated to restore his original title. Certainly nothing more was necessary on his part, or even possible.

In view of these considerations, it is submitted that the Circuit Court erred in holding that appellant's revocation was insufficient to restore his original title. It follows, if this view be correct, that appellant must be considered as standing in exactly the position he would occupy if he had always owned one half of the patent; and therefore that the only interest that Stromberg could possibly have acquired was a part of the other half, or as will be presently shown a sixth of the whole patent.

2. *Stromberg never owned any title or interest in the patent*

The second assignment of error is that the Court erred in holding, in substance, that Stromberg should be considered as at one time a part owner of the patent.

As already said, there are two instruments through which Stromberg is claimed to have acquired an interest in the patent, namely, the one from Holbeck of October 27, 1875, and the one from Comegys of June 7, 1876. And the main question now is, whether he acquired any interest by virtue of either of these instruments.

The Holbeck Instrument. As already sugested, this

Instrument could not pass any interest to Stromberg, because Holbeck did not own any part of the patent at the time of its execution; the title was then vested in equal interests in appellant and the pitching machine company. This objection, that Stromberg acquired nothing by the instrument in question, is like the mathematical proposition that one and one make two; it can neither be called in question nor made plainer by illustration or argument. Holbeck had nothing, and therefore could convey nothing, is all there is of it.

Nor could the instrument in question operate to give Stromberg any interest in Holbeck's right, reserved in the assignments to the pitching machine company, to have the patent reassigned to himself, in part, whenever the company should cease to do business. This right was a mere contingent possibility, and hence, as shown by the following authorities, not the subject of sale.

"Every right is not the subject of grant, though it relates to land, or an interest therein. Thus, a *bare possibility* of an interest which is uncertain is not grantable; though a possibility coupled with a present interest may be granted." 3. Washburn on Real Property, (4th ed.) 348. "A *mere contingent possibility*, not coupled with an interest, is no subject of sale." 1. Parsons on Contracts, * 523. "A *mere possibility* is not the subject of a grant, unless it be a possibility coupled with an interest." Kent, C. J., in *Jackson* v. *Catlin*, 2 Johns. * 261. "No title, not *in esse*, will pass by deed of bargain and sale, unless it contain a warranty, in which case it will operate as an estoppel." Syllabus in *Jackson* v. *Wright*, 14 Johns. * 193.

If it be said, notwithstanding this, that the instrument in question operated to vest in Stromberg any part of the title subsequently acquired by Holbeck, we answer that, in the absence of a covenant to that effect, an assignment of a patent cannot operate by estoppel or otherwise to pass subsequently acquired title. Like a quit claim deed to real

estate, it only conveys the interest of the assignor, whatever that may be, at the time of its execution.

As the written agreement does not contain any covenants, of course none can be implied or even shown by parol evidence; for "where the contract of sale is in writing, and contains no warranty, there parol evidence is not admissible to add a warranty." 1 Parsons on Contracts, (6th ed.,) * 589. Certainly then no warranty or covenants of any kind can be implied, much less such as would operate, by estoppel or otherwise, to give Stromberg an interest in the title subsequently purchased by Holbeck. But, without regard to this, there are three reasons why the case cannot be held to fall within the general rule that an implied warranty of title usually accompanies a sale of personal property.

First, the title being matter of record, Stromberg was put upon notice and could not rely upon the seller's representations; hence the reason of the general rule not existing in this case, the rule itself can have no application. In this respect the case is exactly analogous to a sale of real estate; and "if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because the thing being in the realty, *he might have looked into the title*, and there is no reason he should have an action by the law where he did not provide for himself." Sugden on Vendors, (2d Am. ed.) 347. It may be added in this connection, that "when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of real estate." Williams on Personal Property, * 379.

In the second place, the title being in appellant and the pitching machine company, Holbeck did not have possession of the property, either actual or constructive, at the time of the execution of the instrument in question; hence the case falls within the rule that there is no implied war-

ranty of title where the property sold is not in the vendor's possession. This rule, which in fact is merely an exception to the general rule above mentioned, is thus stated by Mr. Benjamin in his work on sales, (2d Am. ed., § 641): "As to goods in possession of the vendor there is an implied warranty of title; but where the goods sold are in possession of a third party at the time of the sale, *there is no such warranty, and the vendee buys at his peril.*" See also Story on Sales, § 367.

In the third place, the instrument does not purport to convey anything more than one-half of Holbeck's "rights and titles" in the patent; and hence the case falls within the rule, or rather exception to the general rule, that there is no implied warranty of title where the subject of the sale is merely the vendor's naked title or interest. Benjamin on Sales, § 639.

In the language of Chief Justice Redfield, "there is always in such cases an implied warranty in regard to the conveyance of personalty, *unless it appear to be the vendor's title*, and not the thing itself, which is intended to have been conveyed." *Sherman* v. *Champlain Transportation Company*, 31 Vt., 175.

"The excepted cases" to the general rule above mentioned, "must be substantially cases of sales of the *mere naked interest* of persons having no possession, actual or constructive; and in such cases no warranty of title is implied." *Whitney* v. *Heywood*, 6 Cushing, 86.

Changing the names, and the following language of Judge Blatchford in *Hamilton* v. *Kingsbury*, 17 Blatchf. 467, is pertinent: "The conveyance of April 29, 1868, from Lombard and Thompson, conveys only their 'right, title and interest' in the invention. * * There was enough in the terms, 'right, title and interest' in the assignment from Lombard and Thompson, to put any purchaser from them, immediate or subsequent, on inquiry, and to charge him with notice of what such inquiry, if made of their grantor, would

have disclosed. While, by the recorded assignment of August 27, 1866, the right to make may appear to have been vested in Lombard and Thompson, yet they did not undertake to convey what that assignment appeared to convey, but only their 'right, title and interest,' as it in fact existed. The case, therefore, does not fall within the principle of the two cases cited for the defendants. In this case no one made any inquiry of any person but Lombard and Thompson. Neither Hamilton nor the plaintiff is bound by any suppression of the truth by them, or any failure on their part to disclose all three of the instruments, so long as they assumed to convey only their 'right, title and interest.'" See also *Perry* v. *Corning*, 7 Blatchf. 204.

Applying these principles, it is clear that the case cannot be held to fall within the general rule above mentioned, that an implied warranty of title usually accompanies a sale of personalty. Hence, there being no express warranty, it follows that no part of the interest subsequently acquired by Holbeck could enure by estoppel or otherwise to the benefit of Stromberg.

Before leaving this branch of the case, it should be observed that the Court below does not disagree with us in these views, but on the contrary expressly concedes their correctness. He says: "It is true that neither the assignment from Holbeck to Stromberg nor that from Comegys to Stromberg contained any express warranty of title, and I am inclined to the opinion that, strictly speaking, counsel for complainant is right in his contention that the legal title which Holbeck and Comegys subsequently acquired did not enure to the benefit of Stromberg. It is also probably true that, since the assignments from Holbeck to Stromberg, and from Comegys to Stromberg, did not contain an express warranty of title, no implied warranty could arise, because those assignments were not of the entire patent, but were only of the assignor's interest in the patent, whatever that might be. So that, standing upon strict

legal principles applicable to after acquired titles, it would seem that there is force in the claim that the subsequent title which Holbeck and Comegys acquired did not enure to the benefit of Stromberg." (Record, 34.)

In view of all these considerations, it is submitted that Stromberg never acquired any interest in the patent by virtue of the Holbeck instrument.

The Comegys Instrument.—As already suggested, this instrument did not pass any title to Stromberg, first, because Comegys did not have any interest in the patent at the time of its execution, and second, because, if he did then have any interest, he held the same in trust for Smith and subject to his lien. In support of this first position, it will be urged that the title was still remaining in appellant and the pitching machine company at the time the instrument was executed; and in support of the second, that by the attachment of Comegy's stock, Smith became the equitable owner of all his interest in the company, and its assets, or at least acquired a specific lien thereon, and so was entitled to receive his share of the patent at the time mentioned.

The *only* interest that is claimed to have been vested in Comegys at the date of his dealings with Stromberg, is what he derived, if anything, through the instrument executed by Smith, December 11, 1875. An important inquiry then is whether he derived any title through this instrument. Our contention is that he did not, *because it was not an assignment by the company, but merely the personal deed of Smith.* It was signed "Charles F. Smith, Pres't Barrel Pitching Co." The words following Smith's name cannot possibly be considered as a signature by the company, but are merely *descriptio personae.* They are "Pres't Barrel Pitching Co.," as just given, and not "President Barrel Pitching Machine Company," as stated by Judge Dyer.

It is true that Smith was directed by resolution to execute the assignment "on behalf" of the company; but, as we understand it, this was simply a direction to execute it

in the usual manner. The resolution was a mere power of attorney, and did not authorize him to assign the patent by his own personal deed any more than an ordinary power of attorney to convey real estate authorizes the execution of a deed in the name of the agent instead of the owner. The law regulates the manner in which patents shall be assigned and deeds executed by corporations, and it must be presumed that the resolution in question contemplated at least a substantial compliance with these regulations, namely, that the assignment would be in writing and executed in the name of the corporation. In fact, the company could not authorize Smith to make an assignment in his own name by a mere resolution or power of attorney; anything less than an actual assignment, vesting the title in him, was insufficient to give such authority.

Assuming, then, that this was the meaning of the resolution, we proceed to the inquiry whether the instrument was properly executed so as to make it the deed of the company. If it was, then of course title passed; otherwise the grantees received nothing, and Comegys had nothing that he could transfer to Stromberg.

In reference to the execution of deeds by corporations, Judge Potter says: "When a deed is executed by an officer, as by the president of a corporation, in pursuance of a resolution authorizing him to do so, if it be executed by such officer in his own name, as for instance, 'I, the president,' etc., have hereto set '*my hand and seal*,' though he add his title of office to his name, opposite to a seal, which, on its face, purports to be only a private seal, it can be regarded as only the private deed of such officer who had no personal interest in the estate or property conveyed. *No recitals contained in the instrument itself add anything to its authenticity.*" Potter on Corporations, § 40.

In Field on Corporations it is said, (§ 197): "In the execution of a contract of the corporation by an agent, the proper way is to sign the *corporate name* to the instrument

and the name of the agent acting for it, and to seal it with the corporate seal. It should appear on the face of the instrument that the contract is the contract of the corporation and not the personal act and contract of the agent. He should execute the instrument, so as in form to bind the principal; and it should show that the principal is intended to be bound by its provisions and not the party who acts for him. For it has been said, 'that no person in making a contract is considered the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized, nor do I know of an instance in the books of an attempt to charge a person as the maker of any written contract, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature. It is also held that whatever authority the signer may have to bind another, if he does not sign as agent or attorney he binds himself and no other person. * *

"Whatever modification of the former rule there may have been, it is evident that in the execution of a written instrument the name of the party intended to be bound should appear, and that when an agent executes an instrument *he should do it in the name of the party for whom he acts.*"

Mr. Parsons thus considers almost the identical question involved in this case: "The question of execution appears to stand upon somewhat different ground from that of authority, for while a corporation is generally estopped from denying that a contract or an instrument was made by its authority; if it receive and hold the beneficial result of the contract or the instrument, as the price for property sold, or the like, it may, or its creditors may, deny that the instrument was legally executed, even if the authority were certainly possessed. Thus, if a conveyance purporting to be the conveyance of a corporation, made by one authorized

to make it for them, be in fact executed by the attorney as his own deed; it is not the deed of the corporation, although it was intended to be so, and the attorney had full authority to make it so. And if the deed be written through out as the deed of the corporation, and the attorney when executing it declares that he executes it on behalf of the company, but says, 'in witness whereof I set *my hand and seal*,' this is, in law, his deed only, and does not pass the land of the corporation. And a corporation must execute its deed under its corporate seal, otherwise the deed is void." 1 Parsons on Contracts, (6th ed.) * 139.

The general rule on this subject is thus considered by Justice Story: "In order to bind the principal, and to make it his contract, the instrument must purport on its face to be the contract of the principal, and his name must be inserted in it, *and signed to it*, and not merely the name of the agent, even though the latter be described as agent in the instrument; or at least the terms of the instrument should clearly show, that the principal is intended to be positively bound thereby, and that the agent acts plainly as his agent in executing it. Indeed, the rule has been laid down in broader terms; and it has been said to be an ancient rule of the law, that, when any one has authority, as attorney, to do any act, *he ought to do it in his name who gives the authority;* for he appoints the attorney to be in his place, and to represent his person; and, therefore, the attorney cannot do it in his own name, nor as his proper act; but in the name and as the act of him who gives the authority. * *

"This rule, thus laid down, is regularly true in regard to all solemn instruments under seal, although not, as we shall presently see, as to instruments not under seal. Therefore, if a person is authorized by a power of attorney to make a conveyance under seal of the lands of his principal, and he makes the conveyance by a deed in his own name, it will be a void conveyance. And it will made no difference in the

case, that, in the deed, the agent describes himself as such; as if he says, 'know all men by these presents, that I, A. B., as agent of C. D., do hereby grant, sell, convey,' etc.; or if he signs and seals it, 'A. B., for C. D.;' for, in such a case, it is still his own deed, and not the deed of his principal. For the same reason, if a person be authorized by a power of attorney to make a release, and he draws and executes the same in his own name, it will not bind his principal, or be the release of the latter. * *

"Upon the same ground, where an agent of the king is, by letters patent, authorized to execute a deed of lease for the king, the deed must be drawn and executed in the name of the king, and the king's seal must be affixed thereto; for if the agent affixes his own seal, and says, 'in testimony whereof I have hereunto set my seal,' the execution will be bad; for unless it be the king's seal, it cannot be his deed of lease. The same principle will apply to the case of a power of attorney given by a corporation to execute a deed. To bind the corporation, the deed must be under the seal of the corporation, and not under the seal of an attorney. [And in a late American case, a deed by a corporation, in which the formal part was, 'Know all men, etc., that the New England Silk Co., a corporation, by C. C. their treasurer, etc., do hereby grant,' etc., and signed thus: 'In witness whereof, I, the said C. C., in behalf of said company, and as their treasurer, do hereto set my hand and seal. C. C., Treasurer of New England Silk Co.,—was held not properly executed, and not the deed of the corporation.]

"The reason of this doctrine, although at first view it may seem somewhat artificial, is not wholly technical, but seems founded in good sense. Where an interest is to pass by an instrument, it must in terms purport to be conveyed by him in whom alone that interest is vested. A power of attorney to convey is but a naked power, and transfers no interest to the attorney; and, consequently, as no interest is vested thereby in the agent, his own conveyance can pass

none to his grantee. It can not pass the interest of the principal; for he is not a party thereto, or the grantor thereof; and it is not the instrument which he has authorized to be executed. In this respect, the case differs from that of a power coupled with an interest in the property; for there the deed of the agent may convey the interest vested in him in connection with the power." Story on Agency, (8th ed.) §§ 147–150.

If it be desired to pursue this inquiry further, a very able and interesting discussion of the whole subject, including a critical examination of authorities, may be found in 3 Am. Jurist, 65–86.

It should perhaps be observed that the qualifications to the general rule mentioned by these authors, relate to commercial transactions, such as the signing of bills, notes, etc., rather than to the execution of title papers. In speaking of these qualifications, Story says that "the general interests of trade and commerce require this expansion of the law of agency" (§ 162); and nearly all the cases referred to by the text writers in support of the qualifications, involve merely questions of commercial law, or questions intimately connected with commercial interests.

The true rule on this subject, then, seems to be, as stated by Story, that "where *an interest is to pass* by an instrument, it must in terms purport to be conveyed by him in whom alone that interest is vested." And it seems to us that where "an interest is to pass," it is wholly immaterial whether that interest be in real estate or personal property; the reason of the rule applies with as much force in one case as in the other. Especially is this true where the personal property forming the subject of sale is of that peculiar character that it can only be transferred by deed.

It is true that Story speaks, in another place, of "solemn instruments under seal;" but, since the rule in regard to the sealing of instruments by corporations has been practically qualified out of existence, it is not believed that any special

importance can be attached to these words. However, if this view be incorrect, and it be held that the old rule on the subject of seals is applicable, then we suggest that it will have to be applied to the full extent, and not merely, to the extent that will operate against appellant. And when thus applied it shows the instrument in question to be hopelessly bad, because not executed under the seal of the pitching machine company.

As already shown, the form of execution is to be determined by the inquiry whether "an interest is to pass," and not by the question whether the instrument relates to real or personal property. But assuming, for the purpose of argument, that the rule invoked has special application to conveyances of realty, and is not intended to apply to personal property generally, we still insist that, considering the peculiar nature of patent property and the manner in which it is transferred, it is applicable to assignments of patents.

As the title to such property can only be transferred in writing, and is made a matter of record, the same as the title to real estate, no reason is perceived why any of the formalities necessary to be observed in the conveyance of realty should be omitted in the assignment of patents, except as specially directed by act of congress. The patent law makes an "instrument in writing" necessary in transferring the title to a patent, but gives no directions as to the execution of such instrument. But, although a most liberal rule of construction has always been applied, it has never been held that it can be executed by anything less than the signature of the party "in whom alone the interest in vested." With the exception, then, that no seal or acknowledgement is required, (unless a seal be necessary in the case of a corporation,) such instrument should be executed in the same manner as a conveyance of realty; that is, it should be signed in the name of the party interested.

As already suggested, assignments of patents must be recorded the same as deeds to real estate; and certified copies

of such assignments can be used in evidence without the production of the originals or the giving of any reason for their non-production. Hence, as great frauds may be perpetrated as in real estate transactions, if such instruments can be executed in a loose or informal manner; the reasons which require care and the observance of technical rules in the conveyance of realty apply with equal force to the assignment of patents.

Another point of similarity is to be found in the fact that the ordinary rules of construction of conveyances of realty have often been applied to assignments of patents. Thus, as already said, such assignments have been considered the same as quit claim deeds to real estate, and subject to the same rules in regard to notice, covenants, etc. An illustration of this is to be found in the language of Judge Wheeler in *Secomb* v. *Campbell*, 2 Fed. Rep. 358, namely: "The titles to patents are required by law to be recorded, and a purchaser has the right to rely upon the apparent record title, so long as he acts in good faith, *the same as the purchaser of real estate* has where the title is required to be so shown."

And it is elementary law that where the title to personalty depends on written instruments, as in the case of patents, such instruments must be executed in the same general manner as conveyances of real estate. Thus it is said: "The title to personal property sometimes depends upon deeds, wills or other documents of title of the like nature, and cannot be shown without their production. * * In these cases the purchaser is entitled to an abstract of the deeds, wills, etc., which compose the title, *in the same manner as if the subject of the contract had been real estate.* * * And when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of *real estate.*" Williams on Personal Property, *379.

But we are not without direct authority on this point. In *Campbell* v. *James*, 17 Blatchf. 52, Judge Wheeler held, as of course, that an assignment, executed by the president of a corporation in exactly the same form as the one now under consideration, was the personal deed of the president, and not an assignment by the company.

The learned Judge said : " The execution by Secombe, although the addition to his name of 'president ' was made, was a good execution of the deed for himself, and good for that only, *and not good to convey any interest for the company, even though that had been the intention.* That execution made the instrument *his* deed, and it would carry whatever little he had in the subject of conveyance."

In support of this view Judge Wheeler refers to familiar common law authorities. So far as regards this point, there was evidently no distinction in his mind between assignments of patents and ordinary conveyances of real estate.

It may be observed, further, that Judge Dyer himself considers the instrument in question as the personal deed of Smith, and not an assignment by the pitching machine company. In one place he admits that it " was *irregularly* executed because it was signed only by Charles F. Smith, President," and in another he says that, after its execution, " Smith at once made an assignment of his *supposed* interest," etc.

In view of all these considerations, it is insisted that the instrument of December 11, 1875, was not properly executed, and hence was insufficient to pass any title from the pitching machine company. And as already said, it follows from this position, if sustained, that Comegys had no interest in the patent at the time his instrument to Stromberg was executed, and hence could not assign any to Stromberg.

It cannot be said, in opposition to any of these views, that the pitching machine company, or those claiming under it, are

estopped from denying that the Smith instrument was insufficient to pass title; for under a familiar rule of law, already referred to, it was competent for the company to retain the beneficial results, and at the same time "deny that the instrument was legally executed." 1 Parsons on Contracts, (6th ed.) *139. But in this particular case there is not only no legal wrong, but nothing even morally reprehensible in the company, or it assignees, taking the only position consistent with both the law and facts, namely, that the instrument was insufficient to pass any title. For, as will be presently shown, Stromberg has never owned any equitable or beneficial title, even on a different construction of the instrument, but at most has only been a mere naked trustee for Smith, and those claiming under him; and all the title ever owned by Smith, equitable as well as legal, is now vested in appellant.

If it should be held, notwithstanding all this, that the instrument in question was properly executed, so as to make it a sufficient re-assignment from the pitching machine company, then we submit that, as Smith was a creditor of the company, and had also previously acquired the equitable title to all Comegys' interest in the capital stock, he was entitled to receive his interest in the patent. As already shown, Smith became the owner, equitably at least, of all Comegys' interest in the capital stock of the company, in 1873; such stock was then condemned or transferred to him by the attachment proceedings above mentioned. (Record, 27.) His position as a creditor will be explained presently.

It will be remembered that the second of the assignments to the company through which it received title, provided that whenever any re-assignment of the patent should be made, it should be "subject to the lawful rights of the creditors of said corporation." Now, this provision was evidently intended to have immediate effect, so as to protect the rights of creditors whenever a re-assignment should be made, and without waiting for a formal dissolution of the com-

pany. Otherwise it was meaningless, for, if the instrument had been silent on the subject, the law would have given exactly the same protection to creditors on a dissolution; for the statute under which the company was organized, expressly provided that "the directors or managers of the affairs of the corporation at the time of its dissolution, * * should divide among the stockholders the money and other property that should remain *after* the payment of the debts." Maryland Code Supplement, 1868, Art. 26, § 193.

In this view, the clause in question, that any re-assignment should be "subject to the lawful rights of the creditors," amounted to a clear declaration or agreement by all the parties, that, the patent being held in trust primarily for the creditors, their rights should not be effected by any re-assignment, but should then be determined and protected the same as on a dissolution of the company. The insertion of this agreement seems to have been the sole reason for executing the second assignment. The objects of the parties in making it evidently were, first, to provide a permanent security, which would be a matter of record, and on the faith of which the company could obtain credit; and, second, to give the same protection to parties interested in case of a re-assignment as the law would give them in case of a dissolution. And the effect of the agreement was to provide for a distribution of assets, as follows: First, all claims of parties who had given credit to the company were to be satisfied in full; second, the patents, if not taken by creditors, were to be re-assigned to Smith, Comegys and Holbeck, *or parties succeeding to their interests in the capital stock;* and, third, all remaining assets were to be divided among the stockholders, according to their respective interests. In all respects, this rule of distribution was exactly the same as that provided by law in case of a dissolution, except that, in the absence of outside creditors,

it gave a special preference to the stock of the above named parties.

The case, then, should be considered the same as if there had been an actual dissolution of the company, but no claims presented by outside parties; and also as if Comegys had previously parted with his interest in the company, for, in effect, the judgment of condemnation in the attachment suit may be considered the same as a sale of all his interest in the capital stock. Thus considered, it is clear that, at the time of the re-assignment, Comegys had no interest in the company that entitled him to claim any part of the patent; as the owner of his stock, Smith was entitled to receive the interest that otherwise should have been re-assigned to him.

The other ground on which Smith was entitled to receive Comegys' part of the patent, whenever re-assigned, was that he was a creditor of the company.

The re-assignment was to be made subject to the lawful "rights of the creditors;" and, looking at substance rather than form, stockholders and persons to whom stock has been pledged are creditors of a corporation. If there be any doubt on this question, we suggest that the above statute, giving stockholders a right to participate at a distribution of assets, had the effect of declaring them to be creditors, subject only to the rights of third parties to whom the company was indebted. It is true the statute did not call them "creditors," but it gave them as full a right to participate in the distribution of assets, after the payment of preferred claims, as if they had loaned money or furnished supplies to the corporation. Although called stockholders, their position was exactly the same as that of an unsecured creditor in a case of bankruptcy, or of a creditor of the second or any inferior class in a case of administration; they were entitled to payment after satisfaction of preferred claims. And this view is in harmony with the general rule of law in such cases; for, as Justice Story has said, "on a dissolution of the corporation,

the bill-holders and the stockholders have each equitable claims, but those of the bill-holders possess, as I conceive, a prior exclusive equity." *Wood* v. *Dummer*, 3 Mason, 312.

But in addition to his being the largest stockholder, Smith was clearly entitled to be protected as a creditor of the company, on the ground that a large part of the debt which Comegys owed him, and on which the attachment suit was based, was for money advanced and used in the company's business, so that, as to this part, the company really received all the benefit. As it does not appear that any credit was being obtained from outside parties, it cannot be doubted that *it was to secure this indebtedness* that all the parties agreed, in the second assignment, that the patent should never be re-assigned to the prejudice of creditors. But without regard to this agreement, the case, in this respect, is analogous to that of a partnership in which one partner advances more than his share in the firm business. In this case such partner would have a "specific lien on the present and future property of the partnership, * * for all moneys advanced by him for the use of the firm." Story on Partnership, (6th ed.) § 97.

It is submitted, then, that at the time of the re-assignment, Smith was entitled to receive the interest in the patent that should otherwise have been re-assigned to Comegys, on two grounds; first, as a purchaser, through the attachment proceedings, of all Comegys' interest in the capital stock; and, second, as a creditor of the company.

It cannot be said, in opposition to these views, that the right to a re-assignment was absolute in itself and not in any way dependent upon Comegys retaining an unincumbered interest in the stock of the company. This will appear from the following considerations.

It was evidently the understanding and intention of all the parties, in organizing the company, that matters should be so arranged as to give a special value to the stock of Smith,

Comegys and Holbeck; and for this purpose, it was agreed, in effect, that a right to receive an interest in the patent, whenever assigned, should always accompany their stock. These parties having a controlling interest in the company, it will be readily seen that, with proper management, their stock, being thus preferred, would always remain very valuable and easy of sale, and especially so if any considerable value could ever be infused into the patent. But if the right reserved would not pass as an incident whenever a sale of stock was made, the arrangement, instead of increasing the value of their stock would actually diminish it; for, as the patents would be first taken out by parties who might have no interest in the company, namely, Smith, Comegys and Holbeck, purchasers of their stock would really receive less in case of a dissolution than if all the stock had been common. In fact all the preferred stock would become common as soon as sold; but, as just said, it would then be of less value than if it had never been preferred, because, on a dissolution, the patents could not be divided as assets of the company. In this view, it cannot be doubted that the arrangement contemplated that the preferred stock should be made immediately and permanently valuable by an inseparable connection with the right to receive an interest in the patent, in case of a re-assignment, rather than that it should be kept worthless or of little value by the parties having a remote personal right, which could not be sold by itself, and which would probably never amount to anything.

Nor do we think it was in the power of the parties, by any mere agreement to put the patent beyond the reach of their creditors, even if they had so desired; but certainly when we find them providing specially for the protection of the company's creditors, we cannot impute any such dishonest motives to their conduct. But putting the patent beyond the reach of creditors was exactly what they were attempting to do, and in fact what they actually accomplished, if

the right reserved was not inseparably connected with their stock, so as to pass, as an incident, whenever a sale of stock was made. For, as this right was a mere contingent possibility which could not be sold, there was no way of reaching or passing it except by an attachment or sale of stock.

In view of these considerations, it is submitted that Comegys was not entitled to receive any part of the patent at the time of the re-assignment, but that the interest, if any, which then became vested in him was received and afterwards held in trust for Smith, who in addition to being a creditor, had virtually succeeded to his interest in the stock of the company. As Strombrg merely succeeded to the interest of Comegys, whatever that may have been, of course he received such interest in trust for Smith, or his assignee, and afterwards continued to hold it subject to such trust.

If it be claimed that Stromberg was an innocent purchaser, without notice, we answer that he cannot occupy this position because the records of ths Patent Office showed that no re-assignment could ever be made that would not be subject to the lawful rights of creditors of the corporation. Having notice of this fact, he must be charged with notice of all its consequences. He was therefore put upon inquiry, and should have known whether Comegys had any interest in the company at the time of the re-assignment, or whether he afterwards merely held the patent in trust for others. To say nothing of the company's books, an examination of the records of the Superior Court of Baltimore City would have informed him of the true condition of matters.

3. *Assignment from pitching machine company of February 24, 1879, not confirmatory of Smith instrument.*

Our third and fourth assignments of error will be considered together. The third is that the Court erred in holding

that the assignment from the pitching machine company of February 24, 1879, was intended as a confirmation of the attempted assignment by Smith of December 11, 1875, and to cure defects in the execution thereof; and the fourth is that the Court erred in not holding that such 1879 assignment operated to vest in Smith, Comegys and Holbeck an entirely new title.

We think it has been conclusively shown that Stromberg acquired no title by either the Holbeck or Comegys instruments. Judge Dyer, in fact, concedes this, but places his decision that Stromberg acquired a "valid title" on other grounds. He says that "after the first assignment was made, * * it was understood by the parties that the title had passed," that they acted "upon that supposition," and therefore "that it has seemed to him that the second assignment from the Barrel Pitching Machine Company must be held to have been executed rather to correct what was understood at the time to be a technical defect in the execution of the first conveyance from the Barrel Pitching Machine Company, than otherwise." (Record, 35.)

In support of his view that the parties supposed the title had passed, and acted "upon that supposition," the learned Judge says that "Smith at once made an assignment of his supposed interest to Gottfried and Holbeck, and Comegys assigned to Stromberg; and then Gottfried, Holbeck and Stromberg entered into an agreement by which they declared that they were jointly interested in the patent, and agreed upon certain matters, in which they declared themselves mutually interested, as fully stated in the agreement." (Record, 35.)

The learned Judge has here fallen into one or two serious mistakes. In the first place, *it is a mistake to say that appellant was a party to the Smith assignment*, or, in the words of the Court, that "Smith at once made an assignment of his supposed interest to Gottfried and Holbeck."

It will be noticed that the learned Judge attaches great importance to the theory here suggested, that appellant was a party to this Smith assignment; through it he reaches the conclusion that the source of appellant's title is to be found in "the assignment which Stromberg executed to him in 1879," and therefore that appellant is in the position of "privy to Stromberg's previous grant." He says:

"It is a significant fact that if it be held that Stromberg acquired no interest from Comegys after the execution of the first assignment from the Barrel Pitching Machine Company, *it seems to follow* that Gottfried also acquired no interest at that time. *Then the question arises*, where must we look for the source of Gottfried's title; and in considering that question I have been unable to escape the conclusion that we must look for the source of his title, as he is now seeking to enforce rights against Miller, to the assignment which Stromberg executed to him in 1879; for if Stromberg took nothing from Comegys by the latter's assignment, executed June 7, 1876, *then* Gottfried took nothing from Smith by virtue of his assignment, executed December 11, 1875, both of which assignments were based on the first transfer from the Pitching Machine Company to Smith, Holbeck and Comegys; and if all this be so, *then* the inquiry follows, must not Gottfried, as Stromberg's grantee, be held privy to Stromberg's previous grant?" (Record, 35.)

Now, we submit that this part of the decision is not only without foundation, but is directly opposed to the actual facts. The assignment from Smith was not to Holbeck and appellant, *but to Holbeck alone*. (Record, 17.)

This being the case, of course appellant "acquired no interest at that time." The only interest he then had, or ever had before the assignment to him of 1879 or 1880, was the original title which he received from the government, and which, as already shown, was restored by the

revocation above mentioned. The Court was therefore right in saying that appellant "took nothing from Smith by virtue of his assignment, executed December 11, 1875;" but he was clearly wrong in considering that appellant was a party to this instrument, or that, because he "took nothing from Smith," we must therefore look for the source of his title "to the assignment which Stromberg executed to him in 1879."

The second mistake made by the learned Judge, is, in the statement that "Gottfried, Holbeck and Stromberg entered into an agreement by which they declared that they were jointly interested in the patent, and agreed upon certain matters, in which they declared themselves mutually interested, as fully stated in the agreement."

We suppose the learned Judge here refers to the power of attorney to Latrobe, for certainly the record fails to show any *agreement* answering his description. It has been already shown that, in joining in this power of attorney, *appellant was acting under his own original title;* and, judging from the reckless manner in which the other parties had been making and receiving instruments, worthless in character, and insufficient to pass any title, it would seem to be straining a point to say that they acted "upon the supposition" that title had passed from the pitching machine company. As shown by the agreement between Holbeck and Stromberg, of October, 1875, they acted without any "supposition," and, we might almost say, without any judgment or reason.

As appellant acted only under his own title, and in reference to his own interest, it seems most unreasonable to say, because he signed a simple power of attorney, reciting that the parties were "jointly interested," that therefore he acted "upon the supposition" that Holbeck and Stromberg had received title from the pitching machine company. He knew that he was the owner of his original half of the patent, but was under no obligations to determine the effect,

on the other half, of previous transactions to which he was not a party. Add to this the fact that the power of attorney was written by Stromberg's own counsel (Latrobe was Stromberg's private attorney), and we submit that appellant's title ought not to be affected by recitals relating to the other half of the patent in which he had no interest.

As already suggested, it seems very doubtful whether even Holbeck and Stromberg, in making the power of attorney in question, really acted "upon the supposition" that title had passed from the pitching machine company; only a year before they had "acted" in a similar way when there was no possible ground for such a "supposition." But no matter what supposition they may have acted upon, we do not see how any of their acts can affect appellant's title; for appellant is not claiming through any title then owned or claimed by either of them.

It then appears that the Court was mistaken in saying that appellant was a party to the Smith assignment, and that, in joining in the power of attorney to Latrobe, he acted "upon the supposition" that any title had passed from the pitching machine company. He had no connection whatever with the first instrument, and has never claimed anything under it; and as to the second, he was acting under and in reference to his own original title.

We have deemed a correction of these mistakes important, because it is mainly on the theory that appellant acted on the supposition that title had passed, that the decison of the Court below is based. If the Court was mistaken in the only matters referred to in support of his decision, or that could have been referred to for such purpose, it seems reasonable to conclude that he was also mistaken in the decision itself, or, in other words, if the premises on which he based his conclusion that the assignment of February 24, 1879, was intended to correct a "technical defect in the execution of the first conveyance," be wrong, it would seem to follow that the conclusion itself is wrong.

Passing these considerations, and looking only to the instrument itself, and to the subsequent conduct of the parties, we now proceed to consider whether the assignment from the pitching machine company, of February 24, 1879, was intended as a confirmation of the attempted assignment by Smith, of December 11, 1875. Our contention is that it was not confirmatory of the first instrument, or merely to cure defects in the execution thereof, but, on the contrary, that it operated to vest in Smith, Comegys and Holbeck an entirely new title.

As shown in stating the case, this instrument recited the resolutions directing Smith to execute an assignment on behalf of the company, and that he afterwards executed "a certain instrument in writing" which "failed to meet the purposes and carry out the objects of said resolutions." It then proceeds, *as if still an owner of the patent*, to "sell and assign unto the said Charles F. Smith, Henry C. Comegys and John F. T. Holbeck, all the right, title and interest of said company," therein, "and in and to all claims of every kind for the past infringement of said letters patent, and all rights of action whatever arising out of or connected with said infringements".

As will be seen, this instrument was executed to the parties from whom the company originally received the patent and to whom, as agreed, it was to be reassigned, subject to the lawful rights of creditors, whenever it should cease to do business. Two of these parties, Smith and Comegys, immediately assigned to the other, Holbeck, and Holbeck subsequently assigned to appellant. Now, as Stromberg was not a party to any of these instruments, it is clear that appellant derived title directly from the pitching machine company, through Smith, Comegys and Holbeck, and not from the pitching machine company through Stromberg. It is equally clear that the company's assignment did not vest any title in Stromberg, directly or indirectly, unless it was intended to operate retroactively and merely to correct

"a technical defect in the execution of the first conveyance."

That it was not intended to operate retroactively, and as a confirmation of the first instrument, is shown, first, by its own language; second, by the fact that it assigned a distinct subject of property, not mentioned in the first instrument—the infringement claims; and, third, by "all that subsequently occurred," or, in other words, the subsequent conduct of the parties.

First, the language of the instrument is very significant in this, that it does not contain one word about confirming the first instrument or curing defects in the execution thereof. The only reference to that instrument is in one of the recitals, and was intended to show, and does show that the company then considered that it was still the owner of the patent, or rather that half of the patent not vested in appellant. The recital is that the first instrument "failed to meet the purposes and carry out the objects of said resolutions;" in other words, that it failed to pass title.

In effect, this amounted to a declaration that the title, having never been assigned, was still in the company, and therefore that the company then had full right and power to assign it, the same as if no previous instrument had ever been made. It was eminently proper that the company should make this declaration, not only to show that it still considered itself an owner of the patent, but to warn the public against dealing with any party claiming title under previous instruments.

In the second place, the instrument in question assigns, in addition to the patent, an entirely distinct subject of property, namely, "all claims of every kind for the past infringement of said letters patent, and all rights of action whatever arising out of or connected with said infringements." These infringement claims were not mentioned or in any way referred to in the instrument executed by Smith, December 11, 1875, or in any instrument through

which Stromberg is claimed to have acquired an interest. Hence, even if such instruments had been sufficient as mere assignments of the patent, they could not operate to transfer the infringement claims.

This is familiar law, and is thus tersely stated in *Moore* v. *Marsh*, 7 Wall. 522: "It is a great mistake to suppose that the assignment of a patent carries with it a transfer of the right to damages for an infringement committed before such assignment."

In this view, it seems to us that this very act—the assignment of the infringement claims, a property not previously parted with, and in which neither the assignees nor Stromberg could possibly claim any interest—manifests a clear intention on the part of the company to execute an assignment which, in and of itself, and without reference to previous transactions, would be sufficient to convey all its interests. If it was merely intended to correct "a technical defect in the execution of the first conveyance," why was it necessary to include the infringement claims, or even to mention them?

Our third reason for considering that the assignment in question was not intended to operate retroactively, and as a mere confirmation of the Smith instrument, is, that "all that subsequently occurred" shows a contrary intention. Instead of assigning to Stromberg a part of the interests acquired by this assignment, and thus confirming his title, Smith and Comegys, as already stated, immediately assigned to Holbeck, and Holbeck subsequently assigned to appellant. Thus by their subsequent acts all the parties, except Stromberg, clearly and unmistakably asserted an intention utterly inconsistent with the view that the assignment operated to confirm the title in the parties claiming under, or through the previous instrument executed by Smith, and Stromberg himself acquiesced in this assertion. He never claimed any title under the assignment or took any measures

to compel Holbeck or Comegys to make a new assignment to him.

It is therefore submitted that the assignment of February 24, 1879, was not intended as a confirmation of the Smith instrument, executed December 11, 1875; but, instead thereof, that it operated to vest in Smith, Comegys and Holbeck an entirely new title, which new title is now vested in appellant.

It may be proper to observe, in this connection, tnat appelee's title, or right to use the machine in question, cannot be affected by recitals in any other of the instruments mentioned in the record. These recitals were all made several years *after* the machine was purchased, and appellee, not being a party to them, of course could not be affected by them. This seems too plain for argument; but as the recitals were referred to in the Court below as in some way giving aid or strength to appellee's title, it will be proper to suggest one or two reasons why they cannot have any bearing on the case.

In the first place, it is a familiar principle that all the facts may be shown as between parties; and therefore appellant is not estopped from showing the true condition of the title. The rule might be different if appellee, *relying* on these recitals, had purchased the machine in the belief that Stromberg was actually a part owner of the patent, for then the doctrine of estoppel might possibly have some application; but this is not our case.

In the second place, the machine having been purchased long before the date of the reciting instruments, appellee is not bound by the recitals; for such recitals do not bind "persons claiming from the parties by title *anterior to the date of the reciting deed.*" *Carver* v. *Jackson*, 4 Peters, 82. But, as estoppels must be mutual, it of course follows that if appellee is not bound by the recitals, appellant is not.

4. *Appellant's title not derived through Stromberg, and appellant not privy to Stromberg's prior grant.*

Our fifth and sixth assignments of error will also be considered together. They are that the Court erred in holding that any part of appellant's present title was derived from or through Stromberg, and in holding that appellant is in the position of privy to Stromberg's prior grant.

It has been shown that Stromberg never had any interest in the patent, and that appellant's present title was derived, one half from the government, (restored by the revocation often mentioned,) and one half from the pitching machine company, through assignments from Smith, Comegys and Holbeck, executed in 1879. (Record, 20.) If our position in reference to Stromberg's title be correct, it follows as a matter of course that the Circuit Court was mistaken in holding that appellant's "present title has its source in the grant which Stromberg made to him in 1879."

But it may be said that the Court has attached great importance to this quit-claim from Stromberg to appellant, executed December 15, 1879. As already stated, the object of this quit claim was to avoid trouble on account of existing differences; these differences date back to June, 1878, at which time the power of attorney to Latrobe was revoked. (Record, 18.) That this was it object is apparent from the instrument itself; about three-fourths of it relates to other matters than the title, namely, Stromberg's operations while claiming to be a part owner of the patent.

It may be observed here that, no agreement being made in reference to Stromberg's infringements by the manufacture and sale of machines, it was understood and agreed, tacitly at least, that this matter should not be included in the arrangement then agreed upon in reference to other matters; but that, as to it, each party should continue to stand on his own rights.

The bill alleges, and it appears from the report of the opinion in the Official Gazette, that on the first day of

December, 1879, (two weeks before the date of the quit-claim,) a very important decision was rendered by the Court from which this suit is appealed, sustaining the patent. The immediate effect of this decision was to render the patent very valuable, so that it became necessary to settle existing differences at once, so far as they related to matters affecting the title, or to take prompt action to enjoin Stromberg from further complicating matters by attempting to grant licenses or settle infringement claims. Appellant preferred the former course. Desiring to avoid the litigation incident to obtaining an injunction, and without any thought of deriving title from Stromberg, (for it was not then believed and is not now believed that he ever had any title,) appellant procured the quit-claim in question.

It was certainly competent for him to do this, and in doing it we submit that he did not waive or relinquish any rights, except those specifically mentioned, under his previous title. If he had a good title before, as we insist he did, it is a great mistake to say that the same title was not good afterwards, and of course, in this view, it was a great mistake to say appellant's present title was derived through the Stromberg quit-claim, or in the words of the Court, that it "has its source in the grant which Stromberg made to him in 1879." If these views be correct, it also follows that the Court was wrong in considering that, as to any part of the patent or rights under it, appellant is "in the position of privy to Stromberg's prior grant."

However all this may be as to the future of the patent, after Stromberg acquired his supposed interest, it is certainly clear that, as to the claims for damages arising out of the infringements committed prior thereto, the source of appellant's title is not to be found in the quit-claim referred to; for in no possible view has Stromberg ever had any interest in such infringement claims.

5. *Appellant never ratified Stromberg's sale of machines, or any other acts not specifically mentioned.*

The seventh assignment of error is, the court erred in holding that appellant ever in any way ratified Stromberg's sale of machines, or any other acts on his part except those specifically mentioned in the instrument to appellant, executed December 15, 1879.

Judge Dyer says that by the instrument of December 15, 1879, appellant "ratified and confirmed all licenses which Stromberg had previously granted to use the machine, and all acts of Stromberg." He styles this instrument "a second agreement;" but we have been unable to find the first, unless it be, as already suggested, the power of attorney to Latrobe.

Our position on this question will be sufficiently presented by the pointing out of one or two serious mistakes into which the learned Judge has here fallen. His entire decision is based largely on the theory or supposition expressed in the above quotation, namely, that by the instrument mentioned appellant "ratified and confirmed *all* licenses which Stromberg had previously granted to use the machine, and *all* acts of Stromberg." This supposition involves two mistakes of fact—first, that Stromberg ever granted any license to use the machine in controversy, and, second, that appellant ever ratified *all* his acts.

The instrument referred to recites that "the said John H. Stromberg has heretofore disposed of rights and licenses *under the said letters patent, as a part owner under mesne assignments of the same*, and has caused suits to be instituted against infringers in the city of New York and the city of Baltimore, and has made sundry *collections on account thereof*, and has employed counsel in both of said cities for that purpose, to-wit, General Samuel A. Duncan in the city of New York, and John H. B. Latrobe in the city of Baltimore;" and that "it is a part of the consideration of the pres-

ent assignment that the said John H. Stromberg shall be released from all claims which the said Matthew Gottfried or the said John F. T. Holbeck * * might or could have against him, * * *for or by reason of any collections* heretofore made by the said Stromberg, or the said Duncan or Latrobe, or against any person or persons to whom the said Stromberg or the said Latrobe may have granted licenses to use the said patented improvement." It then proceeds as follows: "Now, therefore, the said Matthew Gottfried and the said John F. T. Holbeck * * have released, and by these presents do hereby release, the said John H. Stromberg from all claim that they or either of them might or could have against the said Stromberg *for or by reason of any collection he may have made from parties to whom he or his attorneys, the said Duncan and Latrobe, may have granted licenses* to use the said patented improvement; hereby ratifying and confirming all *such* licenses, and all the acts of the said Stromberg and his attorneys *in the premises.*" (Record, 21.)

As will be seen from this, the ratification did not extend to *all* acts or licenses of Stromberg, but was expressly limited to those mentioned "in the premises." Looking to the premises, as contained in the recitals above quoted, and we find that the licenses intended to be ratified or confirmed were those which Stromberg had granted while claiming and acting "*as* a part owner" of the patent, "*under* mesne assignments of the same."

So far as regards this question, it is immaterial whether Stromberg ever actually had any interest in the patent or not; he assumed to act "as a part owner under mesne assignments," and, claiming to be such, granted a number of licenses under the patent. It was these licenses, *and only these licenses*, that were ratified by the instrument referred to; and this fact clearly appears from the instrument itself. How can it be said that Stromberg acted "*as* a part owner" and as such granted licenses *under* the patent, several years

before he even so much as claimed an interest in it, or ever heard of it? and especially how can it be said that he then acted "as a part owner *under mesne assignments*?"

We do not see how it would be possible to find language that would more clearly express the actual intention of the parties, namely, that the ratification should be limited to the licenses granted by Stromberg during the period he was claiming to be a part owner of the patent, or, in other words, to the licenses granted by him after the execution of the Holbeck and Comegys instruments. And, as appellee does not claim to have any such a license as those mentioned, we submit that the Court was mistaken in considering that appellant ever ratified any license relating to "the machine" in controversy.

As already said, the questions in dispute, which this instrument was intended to settle, did not relate to or include any matter connected with Stromberg's manufacture and sale of machines. Appellant was simply seeking to get all matters which could possibly have any relation to the title in such shape as would prevent Stromberg's further imposing on the brewing public by claiming to be a part owner of the patent. The patent having suddenly become very valuable, and being nearly expired, appellant was naturally anxious that the great mass of his claims should be presented to the brewers at once, and then pushed as rapidly as possible; and, in this view, he was willing to defer consideration of all questions relating to machines manufactured by Stromberg personally. On his part, Stromberg was naturally anxious to see the result of other litigation before settling his own liability; for if the patent should be held void in other suits, this would of course operate to relieve him, and the users of his machines, from any further claim.

Holding these views, respectively, the parties agreed, tacitly at least, that no matter relating to Stromberg's oper-

ations before he acquired his supposed interest, should be included, or even referred to, in the arrangement. Hence we find nothing about any of these matters; but, on the contrary, clear and unambiguous language is used to express the fact that the release should be limited to Stromberg's liability "for or by reason of any *collection* he may have made *from parties to whom he* or his attorneys, the said Duncan and Latrobe, *may have granted licenses to use the said patented improvement.*" In other words, Stromberg was only released from liability to pay over the money received from the granting of such licenses; all questions touching his own liability for infringement were deferred for future consideration.

It appears, then, that both the ratification and release are expressly limited, by the instrument itself, to the matters specifically mentioned as having occurred after Stromberg acquired his supposed interest; and the acts of Stromberg which it was intended to ratify are expressly stated to be those done "in the premises." In this view, it is submitted that the Court was mistaken in considering that appellant ever ratified "all acts of Stromberg;" on the contrary, he only ratified those which were done after Stromberg acquired his supposed interest, and which related directly to the matters above mentioned.

To our mind this whole subject seems very clear, but, considering the views taken by the Court below, it will be proper to refer to a few authorities in concluding its consideration. This cannot be done better than in the language of Chief Justice Shaw, in *Rich* v. *Lord*, 18 Pick. 325, as follows:

"It is now a general rule in construing releases, especially where the same instrument is to be executed by various persons, standing in various relations,and having various kinds of claims and demands against the releasee, that general words, though the most broad and comprehensive, are

to be limited to particular demands, where it manifestly appears, by the consideration, by the recital, by the nature and circumstances of the several demands, to one or more of which it is proposed to apply the release, that it was so intended to be limited by the parties. And for the purpose of ascertaining that intent, every part of th e instrument is to be considered.

"As where general words of release are immediately connected with a proviso, restraining their operation, *Solly* v. *Forbes*, 2 Brod. & Bing. 38. So a release of all demands, then existing, or which should thereafter arise, was held not to extend to a particular bond, which was considered not to be within the recital and consideration of the assignment, and not within the intent of the parties. *Payler* v. *Homersham*, 4 Maule & Selw. 423. So where it is recited that various controversies are subsisting between the parties, and actions pending, and that it has been agreed, that one should pay the other a certain sum of money, and that they should mutually release all actions and causes of action, and thereupon such releases were executed, it was held, that though general in terms, the releases were qualified by the recital and limited to actions pending. *Simons* v. *Johnson*, 3 Barn. & Adolph. 175; *Jackson* v. *Stackhouse*, 1 Cowen, 126."

In view of all these considerations, it is submitted that the Circuit Court was mistaken in considering that the instrument in question operated as a release or ratification of anything not specifically mentioned, or of anything that took place before Stromberg acquired his supposed interest in the patent.

Before leaving this question, it will be proper to consider the decision in *Eunson* v. *Dodge*, 18 Wall. 414. In the Court below this decision was referred to as an authority for the position, that if Stromberg ever acquired an interest in the patent, this amounted to a full settlement of all previous matters.

The facts and questions presented in that case were very

different from those now before the Court—so different, in fact, that the decision cannot possibly have any application. It appears from the opinion, that the defendants' predecessors purchased the machine involved in that case from an infringing manufacturer, and that shortly afterwards they also purchased a territorial interest—Hudson county, New Jersey—in the original term of the patent. Some years later, and after it had been long used under the patent, the machine passed into defendants' hands. Under these circumstances it was not questioned that defendants had a right to use it until the expiration of the original patent; but, the patent having been extended, the question was whether they had any right, under the provisions of the statute, to use it during the extended term. This Court held, that "by the purchase of the right for Hudson county, *and from the moment of that purchase*, the defendants held and used the machine by a lawful title, as perfect and complete against the patentees as if the original purchase had been from them;" and hence that, under the statute, they were entitled to use the machine during the extended term of the patent.

It will thus be seen that the question was very different from that now presented, and of course the language of the Court must be considered with reference to this fact. If the machine involved in this suit had been purchased *after* Stromberg became an owner of the patent, then the decision might have some weight as an authority for appellee; but, as the case stands, it cannot possibly have any application, especially as to infringements committed previous to Stromberg's acquiring an interest.

6. *Stromberg never had any interest in claims for damages arising out of past infringements.*

The eighth assignment of error is, that, even if right in holding that Stromberg should be considered as at one time a part owner of the patent, the Court erred in

holding substantially that he was ever in any way interested in claims for damages arising out of past infringements thereof; that is to say, out of infringements committed previous to his becoming such part owner.

It has been already suggested that neither of the instruments through which Stromberg is claimed to have acquired title contains the least reference to claims for infringements previously committed (Record, 16, 17); hence it cannot possibly be said that Stromberg ever had any interest in such claims. The law on this subject is familiar, and has been thus stated by this Court:

"Undoubtedly the assignee *thereafter* stands in the place of the patentee, both as to right under the patent and future responsibility; but it is a great mistake to suppose that the assignment of a patent carries with it a transfer of the right to damages for an infringement committed before such assignment. * * The right of action is given to the person or persons owning the exclusive right at the time the infringement is committed. Subsequent sale and transfer of the exclusive right are no bar to an action to recover damages for an infringement committed before such sale and transfer. The reason for the rule is, that the assignee or grantee is not interested in the damages for any infringement committed before the sale and transfer of the patent." *Moore* v. *Marsh*, 7 Wall. 522.

The answer admits that appellee purchased the machine in controversy on the 25th of November, 1872, and appellee testifies that he used it for six or seven years thereafter (Record, 7, 9); the record shows that the first instrument to Stromberg was executed on the 27th of October, 1875, and the second on the 7th of June, 1876 (Record, 16, 17). These being the facts, it is clear that a claim for damages for at least three or four years of the infringement complained of, exists in favor of some one other than Stromberg, namely, appellant.

Whatever may be the condition of the claims for infringe-

ments committed subsequent to Stromberg's first connection with the patent, we do not think it possible that he could, directly or indirectly, release or wipe out the claims for previous infringements, in which he had no interest. Suppose the machine in controversy had been purchased from some other manufacturer, and that Stromberg upon becoming connected with the patent, had attempted to directly release appellee from liability for the infringements previously committed. Having no interest in the claim for such previous infringement, of course he could not execute any direct release that would have the least effect against the owner of such claim ; and it is hardly necessary to suggest that if he could not do this directly he could not do it indirectly. But, so far as regards appellant's rights, it is immaterial whether the machine was purchased from some other manufacturer or from Stromberg himself; if Stromberg could not give a good release in the former case, he could not in the latter.

It is certainly clear, then, that Stromberg never had any interest in a large part of the claim arising out of the infringement complained of, and hence that he could not do anything, directly or indirectly, that would in any way affect appellant's right to maintain a suit for such part. On this ground alone, and without reference to other questions, we confidently ask a reversal of the Circuit Court's decision.

7. *If he ever owned any title, Stromberg could maintain suit against appellee for infringement by use of machine in controversy.*

The ninth assignment of error is, the Court erred in holding that if Stromberg acquired an interest in the patent, after his sale of the machine in controversy to appellee, he could not maintain any suit againt appellee for infringements committed by the use of such machine.

In considering this question, it should be borne in mind that appellee's machine was not purchased from the owner

of the patent, or any party having a right to sell it. Hence the usual rule that when the owner of a patent sells a machine he parts with his exclusive rights to the extent necessary for its use, has no application.

In selling the machine to appellee, it was of course competent for Stromberg to agree that he would never claim anything on account of its use, under patents that he might subsequently acquire. But, in the absence of such agreement, does the mere fact that he sold the machine to appellee place Stromberg in such position that he could not afterwards acquire the patent, and all rights under it, the same as any other stranger?

To determine this question, it may be proper to consider whether the ordinary warranty of title that usually accompanies a sale of personal property, extends to patents; or, in other words, whether such sale carries with it an implied agreement that the purchaser shall be protected in the use of the thing bought, as against claims under patents. If the warranty implied by law extends to the right to use a machine, as against patents, as well as to the machine itself, then of course the seller would be estopped from asserting any claim against the purchaser under subsequently acquired patents; but if the implied warranty does not thus extend to the right of use, then it would seem that the seller, subsequently buying patents, may assert title or claims adverse to such right, the same as any other person. His position in this case would be analogous to that of the grantor in a *quit-claim* deed to real estate.

The argument here suggested assumes a distinction between the machine itself, and the right to use it, as against patents. It is not believed, however, that any question can be made as to the actual existence of such distinction. In ordinary business it is constantly recognized, for it is a common thing to see a machine purchased from one party and a license to use it from another. In fact, it may be

very much to the interest of a puchaser to proceed in this way. For instance, in sharp competition with other manufacturers, Stromberg may have been selling machines at greatly reduced prices; and so, in the purchase of the machine in question, appellee may have actually saved more than enough to have bought a license from the pitching machine company. In such case, it is clear that the subject of the sale was merely the machine, and not the right of using it.

This distinction between a machine and the right of using it, as against patents, has been often recognized by this Court. Thus, it was said in *Patterson* v. *Kentucky*, 97 U. S. 506, that, "the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself." See also *Webber* v. *Virginia*, 103 U. S. 348; *Sawin* v. *Guild*, 1 Gallis. 485, and *Detweiler* v. *Voege*, 8 Fed. Rep. 604.

If this distinction be well founded, it of course follows that a right of use, as against patents, is not necessarily included in every sale of a macnine. As already suggested, it is not an uncommon thing to see a machine purchased from one person and a right to use it from another.

Now, assuming the existence of this distinction between the machine and the right of using it, and that such right of use does not necessarily pass, as an incident, with a sale of the machine, we submit that in this case there was no agreement or warranty of title connected with the sale of the machine in question that would extend to or include such right. It is not pretended that Stromberg expressly guaranteed any such right of use; hence, if there was any agreement on this subject, it must be found in the ordinary warranty of title implied by law. Appellant insists that this ordinary implied warranty did not extend to the right of use, for substantially the reasons suggested in

considering the Holbeck instrument, namely: First, the title of the patent being matter of record, appellee was put upon notice, and, if he desired protection in the use of the machine, should have provided for it by agreement. As said in Sugden on Vendors, already cited, "he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself." Second, even if it was intended to include the right of use in the sale, such right being a distinct and separate property, not necessarily connected with the machine itself, the records of the Patent Office showed that, as to it, "the goods sold were in possession of a third party at the time of the sale;" and, therefore, as shown by authorities already cited, there was no implied warranty of title as to such right. Third, so far as regards any rights under the patent, the sale at most only covered Stromberg's "mere naked interest," which at that time was nothing; "and in such cases no warranty of title is implied."

As bearing on this question, it may be suggested further that, according to the rule of *Bell* v. *Bouney*, 7 La. Ann. 170, Stromberg was not bound to protect appellee in the use of the machine in question, as against patents. But this could not be so if the implied warranty of title, which accompanied the sale of the machine, also extended to the right of using it; therefore, this decision is an authority for our proposition that such implied warranty did not extend to such right of use.

But it may be said that if Stromberg ever acquired an interest in the patent, this operated as a release or merger of all claims for infringements arising out of his previous manufacture and sale of machines. Our answer to this is, that, not being included in any transfer to him, Stromberg never had any interest in such infringement claims, directly or indirectly; and so of course there could never have been any merger or extinguishment thereof in his favor. If the

subject was ever considered at all, it was undoubtedly the understanding and agreement of all the parties that he should only have an interest in the future of the patent, and that the arrangements should in no manner affect the rights or position of any of the parties on account of previous matters; the record fails to show any other agreement. This being the clear intention of all the parties, how can it be said that the agreements operated, retroactively, as a release or extinguishment of the infringement claims mentioned?

As said by this Court, in *Moore* v. *Marsh*, "subsequent sale and transfer of the exclusive right are no bar to an action to recover damages for an infringement committed before such sale and transfer;" and no reason is perceived why this rule is not applicable to a case where the sale of the exclusive right, or future of the patent, is to a party who has himself been guilty of infringement. It is certainly competent for such a party to buy an interest for the future of the patent, and at the same time take his risk as to the past.

For the sake of clearness, we beg to restate our proposition in concluding the consideration of this question. As repeatedly said, Stromberg could not sue for damages arising out of infringements committed before the acquiring of his supposed title, for he never had any interest in the claims for damages; but if, as we insist, his sale was not accompanied with any warranty or agreement as to the right of use, then it was competent for him to purchase the patent, and enforce all subsequently accruing rights or claims for infringements, even as against appellee. Nothing being shown to the contrary, it must be presumed that, when purchasing the machine, appellee intended to buy a license under the patent from the proper parties; it cannot be presumed that he intended to commit an unlawful act by using the machine. Now, if it was understood that he was to purchase his own license, or otherwise take care of himself

as against the patent, we submit that, so far as regards the question under consideration, Stromberg's position was the same as that of any stranger; he could buy the patent, and then call on appellee to pay for his license as originally intended. Appellee failing to do this, Stromberg, acquiring title, could sue him as for an infringement of the patent.

We have thus considered this question at some length, because we deem it proper to present every argument that may possibly aid the Court in reaching a right decision. But our own judgment is that it is not a material question, and that it will not be necessary for the Court to give it special consideration; as often said, we do not think that Stromberg ever had any interest in the patent, and of course if this be true it is unnecessary to consider what he might be able to do or not do in an hypothetical case.

8. *Appellant can sue appellee for damages arising out of infringements committed by use of machine in controversy; and question of infringement considered.*

The tenth and eleventh assignments of error will also be considered together. The tenth is, that, even if right in holding that Stromberg's position is such that he could not maintain any suit against appellee, the Court erred in holding that appellant is also in such position that he cannot sue appellee for infringements committed by the use of the machine in question, and especially for infringements committed by the use of such machine previous to Stromberg's connection with the patent; and the eleventh is that the Court erred in holding that appellee was not liable for infringement, and in dismissing appellant's bill.

It has been already shown that appellant's title was derived, one half from the government, and one half through mesne assignments from the pitching machine company; and hence that the Court below was mistaken in considering that any part of it "has its source in the grant which Stromberg made to him in 1879." Thus considered, it is wholly

immaterial whether if Stromberg ever owned an interest in the patent he could maintain suit against appellee or not; for in this case appellant's rights are not to be determined or even affected by his position. But even if it be conceded that the Court was right in considering that Stromberg was at one time a part owner of the patent, and that he could not sue appellee personally, it by no means follows that appellant could not maintain suit against appellee for the infringements complained of.

Taking everything most strongly against appellant, and we do not think it possible for the Court to hold that Stromberg ever owned more than one sixth of the patent, or, to be more explicit, that he ever owned any interest except that sought to be acquired from Comegys; and of course, as often said, he never owned any interest in claims for damages arising out of infringements committed before the execution of the Comegys instrument. It follows, then, that at most, Stromberg only owned a sixth of the patent from the 7th of June, 1876, until the 15th of December, 1879. As often said, our own judgment is that he never owned any part of the patent, and the above statement, showing the strongest view that can possibly be taken against appellant, is made simply for the purposes of argument.

Taking this interest out in favor of Stromberg, namely, one sixth for the time mentioned, and still we find appellant vested with title to all the remainder of the patent, for its entire term—such title, too, being derived from independent sources, and not in any way through Stromberg, namely, one half from the government, one sixth from Holbeck and one sixth from Smith. In addition to this, we find him also the sole owner of *all* claims for damages arising out of infringements committed before June 7th, 1876—his title to such claims being derived as above, with the addition of one sixth from Comegys. (Record, 20.)

These being the facts, it is unnecessary to consider what

might have been the effect if Stromberg had purchased the whole patent after his sale of the machine to appellee. Instead of this, the question now is, whether if he owned a small part of the patent, for a short time, this would operate *per se* to wipe out infringement claims in which he never had any interest, that is to say, infringement claims that accrued before the 7th of June, 1876, and five sixths of all that accrued after that date. Our contention is, that it would not have this effect, first, becase Stromberg, having no interest in the claims that accrued before the date mentioned, could not, directly or indirectly, release appellee from liability therefor; and, second, even admitting Stromberg's interest, appellant could sue him, and of course persons using his machines, for infringements committed during the time they were joint owners of the patent.

First, as Stromberg never owned any interest in the claims for damages arising out of infringements committed before the acquiring of his supposed interest, of course he could not do anything, directly or indirectly, that would prejudice the rights of appellant in such claims. No interest in these claims being transferred to him, and he never being released from liability therefor, we think it too clear for argument that the mere assignment to him of an interest in the future of the patent, would not operate as a merger or extinguishment thereof in his favor. In this view, it is not doubted that appellant could sue Stromberg personally for all damages arising out of infringements committed by him before the 7th of June, 1876, and if he could thus sue him it of course follows that he can now sue appellee for infringements committed by the use of one of his machines purchased before that time.

In this connection, it may be proper to notice a point suggested by the learned Judge, but which we consider unsound, as follows: "The point appears to be well made by counsel for defendant that in a suit for infringement the whole interest in the patent must be represented by the

complainants in such suit; so that if Stromberg had been in fact a part owner of this patent at the time the present suit against Miller was brought, he would have been a necessary party to the suit," etc. (Record, 35.)

As a general rule, it is no doubt correct to say that the whole interest in a patent should be represented by the complainants in an infringement suit; but this rule is subject to two exceptions, both of which apply to this case. One of these exceptions will be noticed presently; the other is that in a suit for infringements committed before the assignment of a patent, the assignee, although owner of the whole patent, is not a necessary or proper party, unless the assignment also include the infringement claims. As said in *Moore* v. *Marsh*, "it is too plain for argument that a subsequent assignee or grantee can neither maintain an action in his own name, or be joined with the patentee in maintaining it, for any infringement of the exclusive right committed before he became interested in the patent. * * The right of action is given to the person or persons owning the exclusive right at the time the infringement is committed."

In this view, it is clear that Stromberg was never a necessary or proper party in any suit against appellee for infringements committed before the former acquired his supposed interest in the patent. Hence, the learned Judge was mistaken as to the rule applicable to this case; and his conclusion, that because Stromberg could not be joined in a suit against appellee therefore appellant cannot maintain such a suit alone, is also erroneous.

Our second reason for saying that if Stromberg at one time owned a fractional interest in the patent, this would not operate to extinguish the infringement claims sued for, is, that in such case appellant could sue him personally for infringements committed even during the time of their joint ownership. It seems that this question has never been considered by this Court, but we have very high authority in

Circuit Court decisions, for saying that one part owner of a patent may sue his co-owner for infringement, and recover as damages "a proportionate share of the value of the property appropriated."

This question was directly considered by Judge Hall, in *Pitts* v. *Hall*, 3 Blatchf. 206. After saying that "the plaintiffs would be entitled to judgment even if the undivided one fourth interest in the extended patent had actually vested in the defendant," and considering the question at some length, the learned Judge says:

"The grant of the exclusive right to make, use, and vend to others to be used, is to the patentees jointly and not to either severally. The right, the property secured by the patent, may be granted to others by license or assignment, or by the sale of machines by the patentees jointly; and a license or assignment or sale of a machine by them is a transfer, *pro tanto*, of the property secured by the patent. One joint owner can legally grant, assign, license or sell only in respect to his own share or right. He cannot sell and give a good title to his co-owner's right, for the same reason that one joint owner of a chattel cannot transfer the share of his co-proprietor. And, if he appropriates any portion of the exclusive right or common property to his separate use or benefit, by either the use or the sale of the patented machine, he does what is in principle the same as the conversion, by destruction or sale, of the joint property by a tenant in common, which authorizes his co-tenant to maintain trover.

"I can see no objection in principle to the doctrine, that the joint owner of a patent can sustain his action for an infringement against his co-owner, in which he can recover his actual damages, according to his interest in the patent. His rights are invaded by the act of his co-proprietor, and he is entitled to his legal remedy. This invasion is tortious, and no action founded upon a contract can be sustained, unless this tort is waived, and the tortious act confirmed;

for no contract exists upon which such an action can be founded, without such waiver and confirmation. The injury is a violation of the exclusive right secured by the patent; and for this injury the action for an infringement is the appropriate remedy, and one which enables the Court, without the violation of legal principles, and in the most direct and convenient mode, to do justice between the parties. In such an action the plaintiff may recover, as he should, his actual and proper damages, proportioned to the value and extent of his undivided interest in the exclusive right, without regard to the amount which his co-proprietor has received by means of the infringement. And there is certainly nothing in the language of the statute which authorizes this form of action—or rather recognizes it, for this form of action was given by the common law,—(Curtis on Patents, §§ 257, 258), to prevent the action from being sustained in such a case; for, the action on the case, under the fourteenth section of the act of 1836, may be brought in the name or names of the person or persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States. Indeed, no satisfactory reason is perceived for holding that the part owner of a patent right cannot, like the part owner of a chattel, have his remedy, by an action on the case, against his co-proprietor, for the exclusive appropriation of the joint property, in the same form as though the plaintiff were the sole owner, and the defendant a stranger; the reduction of the amount of damages to be recovered to a proportionate share of the value of the property appropriated, being, in both cases, the natural and necessary consequence of the partial ownership by the wrong-doer.

"In the case of the joint owners of a patent right, the ordinary action for an infringement is, it appears to me, the most appropriate and simple remedy, even if an action of account could be sustained."

It is true, the doctrine of this case has been somewhat

severely criticized in Curtis on Patents; but, so far as we have been able to find, no Court has ever yet questioned its soundness.

The same question was considered by Judges Dillon and Treat in the recent case of *Herring* v. *Gas Consumers' Association*, 13 Off. Gaz., 637, the only difference being that, in addition to owning a part of the patent sued on in this latter case, the defendant was also operating under another patent. But we cannot see that this difference operates to distinguish the case from ours; for if a part owner is liable for infringement when operating under another patent, it seems absurd to say that he is not equally liable when operating without any patent. It may be proper to say, however, that Stromberg's machines were manufactured under other patents, namely, those issued to Louis Schultz, in 1870; but, as this fact does not appear in the record, we do not ask that it be considered in appellant's favor. In fact, we do not consider it at all material, for, as already suggested, if Stromberg would be liable for infringement when manufacturing under other patents, he would certainly be liable when manufacturing without any patent. In the case above cited, Judges Dillon and Treat say:

"The plaintiff avers substantially that he is owner of an undivided two-thirds interest in the patent described, and that the defendant is using a device which is an infringement upon their common patent, and that he is so doing under cover of their common patent. Hence the claim for damages for said infringement; not for the entire amount thereof, but for the plaintiff's proportion, to wit, two thirds.

"The direct question presented is whether an infringer of a patent can escape liability for his infringement because he is a joint owner of the original patent upon which the infringement occurs. The cases cited do not reach the precise point raised by this bill. It is evident that if a stranger was guilty of the infringement he would be compelled to

respond in damages. Can a part owner infringe the common patent and escape all liability? If he can, it is obvious that however small his aliquot part he can make the enjoyment of the patent valueless to his joint owners. He has, by virtue of the joint ownership, a right to use the patent, but he has no right more than a stranger to infringe the same. If there is an infringement the right of recovery is in the party wronged. All the joint owners should ordinarily be parties plaintiff, but if the wrong-doer is one who is guilty to the damage of the other joint owners the latter should not be left remediless. As to such infringement they are strangers. All the joint owners are on the record, and the amount of the recovery determines their respective interests. The infringer cannot escape the consequences of his wrong to his joint owners by averring that he was by his infringement injuring not his joint owners alone, but himself also. In other words, he cannot, under cover of his interest in the common patent, shield every wrong-doer who may infringe the patent. He can as to the other part owners, by infringing, become liable to them for the wrong done. The amount of the recovery will be in proportion to their respective interests. Were this so, the door would be open to the grossest frauds by one joint owner against all the other joint owners."

This case of *Herring* v. *Gas Consumers' Association*, holding that one of several joint owners of a patent, being a wrong-doer, may be sued by his co-owners, furnishes an illustration of the second exception, above suggested, to the general rule that in an infringement suit the whole interest in a patent should be represented by the parties complainant. As the Court puts it, "all the joint owners should ordinarily be parties plaintiff, but if the wrong-doer is one who is guilty to the damage of the other joint owners, the latter should not be left remediless." This second exception shows that the learned Judge was mistaken in considering that if Stromberg had been a part owner of the patent

"at the time the present suit against Miller was brought, he would have been a necessary party to the suit."

But our object in referring to this decision in *Herring* v. *Gas Consumers' Association*, is not merely to show that the learned Judge overlooked an important exception to the general rule in reference to parties; it is principally to show that one of several joint owners of a patent may be sued by his co-owners for infringement. The decision certainly announces this doctrine, and sustains our proposition that, even admitting Stromberg's title, appellant could sue him for infringements committed during the time they were joint owners of the patent. The reasons for the rule here invoked are so manifest, and so clearly and ably presented in the two decisions referred to, that we forbear discussing them.

In view of all these considerations, the conclusion seems irresistible that appellant can now maintain suit against appellee for all damages arising out of his infringements committed before June 7, 1876, and for at least five-sixths of all damages arising out of such infringements committed after that date. It is perhaps unnecessary to discuss the question, but our own view is that if Stromberg at one time owned a sixth interest in the patent, this would not, even to that extent, authorize appellee to afterwards use the machine, because, as already shown, there was no sufficient warranty, or agreement in reference to the right of use, connected with Stromberg's sale of the machine, as would entitle appellee to claim that title subsequently acquired by him would enure to his benefit. In this view, we consider that appellee is liable for *all* damages arising out of his infringements, as well after as before Stromberg acquired his supposed interest in the patent.

It is therefore insisted that, even if right in holding that Stromberg could not maintain any suit against appellee, the Court erred in holding that appellant cannot sue for in-

fringements committed by the use of the machine in question; and also in holding that appellee is not liable for infringement of the patent.

In conclusion it is proper to say, that, although our argument has extended far beyond the limits originally intended, we still do not regard the case as a very difficult or complicated one. As we look at it, the main question is whether Stromberg ever had any interest in the patent. If it be held that he did not, then all other questions would seem to be very simple; if it be held that he did, then the question last considered would seem to be next in importance, namely, first, whether in such case his merely only owning a small part of the patent, for a short time, would operate to wipe out all claims for damages arising out of infringements committed before the acquiring of such part, and in which he never had any interest; and, second, whether his merely owning a small part would put his co-owner in such position that he could not sue him, or others using his machines, for infringing on his larger part during the time of their joint ownership.

In view of all the foregoing, appellant respectfully submits that the Circuit Court erred in holding that appellee is not liable for infringement, and in dismissing the bill; and he therefore respectfully asks that the decree be reversed and the cause remanded.

EPHRAIM BANNING,
THOMAS A. BANNING,
Counsel for Appellant.

Supreme Court of the United States.

MATTHEW GOTTFRIED,

vs.

FREDERICK MILLER.

ARGUMENT OF DEFENDANT.

E. H. ABBOT,
Counsel for Defendant.

BURDICK & ARMITAGE, Printers, Milwaukee.

Supreme Court of the United States.

MATTHEW GOTTFRIED,

vs.

FREDERICK MILLER.

ARGUMENT OF DEFENDANT.

This is an appeal from the Circuit Court of the United States, for the Eastern District of Wisconsin, submitted by agreement of the parties upon printed arguments.

The complainant in this cause seeks, by his bill in equity, to recover a decree for damages and profits against the defendant, on account of the alleged infringement by the defendant of letters patent, No. 42,580, dated May 3d, 1864, and issued to Matthew Gottfried and John F. T. Holbeck. The cause was heard upon bill, answer and proofs, and a decree rendered by the court below, dismissing the bill for want of equity, from which judgment of the court complainant has appealed.

The questions involved in the case, are connected solely with the title of the patent and the right of complainant to bring and maintain this action; the defendant practically

admitting the issuance and validity of the patent, and the similarity of the machine used by him, to that secured by the patent.

STATEMENT OF THE CASE.

The patent sued upon was issued to the complainant, Matthew Gottfried, and John F. T. Holbeck, jointly, May 3d, 1864 (Record, folio 22).

On the 19th day of December, 1870, Gottfried assigned his entire interest in the letters patent to Holbeck, reserving to himself a royalty, however, on each machine made, and the right to revoke the assignment if the royalty were not paid (Record, folio 30). Holbeck then, on the 3d day of January, 1871, assigns two-thirds of said patent, undivided, to Charles F. Smith and Henry C. Comegys, of Baltimore (Record,). On January 25th, 1871, John F. T. Holbeck, Charles F. Smith and Henry C. Comegys, assigned said patent to the Barrel Pitching Machine Company, of Baltimore, and again, on the 1st day of June, 1871, execute a second instrument of assignment to the same company, for the expressed purpose of carrying out the objects of the former assignment (Record, folios 30 and 31). These two latter assignments contain the condition, that in case the affairs of the company to whom the assignment was made, shall be wound up and the corporation be dissolved, the patent shall be reassigned to the assignors, thus providing against any alienation of the patents to third parties by the company (Record, folios 32 and 34.)

Upon the 25th day of March, 1875, the complainant, Matthew Gottfried, by an instrument in writing recorded in the patent office, attempted to revoke the assignment which he had formerly made to his co-patentee Holbeck, of his

(Gottfried's) interest in the letters patent referred to (Record, folio 35). On the 27th day of October, 1875, John F. T. Holbeck assigned one-half of his interest in the letters patent referred to, to John H. Stromberg, of Baltimore, and the two agreed to the formation of a partnership to manufacture the pitching machines described in said letters patent (Record, folios 35 and 36). Thereafter, on the 9th day of December, 1875, the Barrel Pitching Machine Company re-assigned the patent in question to Holbeck, Smith & Comegys, its original grantors (Record, folio 37). Immediately after this revesting of the patent in Smith, Holbeck & Comegys, Smith assigned his interest in the same to Gottfried and Holbeck, and Comegys assigned his interest therein to Stromberg, within a few months; the former assignment, bearing date the 11th day of December, 1875, and the latter, June 7th, 1876 (Record, folios 37 and 38). It will thus be seen that Stromberg obtained an undivided interest in the letters patent in suit on the latter date, June 7th, 1876, through the following chain of title: Gottfried and Holbeck are the patentees; Gottfried conveys all his interest in the patent to Holbeck; Holbeck then conveys two-thirds to Smith and Comegys; Holbeck, Smith and Comegys then, each owning one-third of the patent, convey the whole to the Barrel Pitching Machine Company. The Barrel Pitching Machine Company reconveys its interest in the patent to its assignors, Holbeck, Smith & Comegys, and Comegys then conveys his interest to Stromberg, while Smith conveys his interest to Gottfried and Holbeck. The question of whether the attempted revocation of his assignment to Holbeck by Gottfried was in law effectual to that end, can only be essential in determining the quantity of Stromberg's interest in the patent, and cannot, in any possible solution which can be given, deprive Stromberg of an undivided interest in the patent, obtained at the time stated. Since Holbeck was a half owner in the original patent, the assignment by

him to Smith and Comegys, and all the subsequent assignments, would at least convey the interest of Holbeck in the same, or one-half thereof, and the result would simply be that if the revocation were ineffectual, Stromberg would, on the 7th of June, 1876, have become vested with one-third interest in the patent, while, if the same were effectual, the interest then vested in Stromberg would be an undivided one-sixth, and in the view taken and theory adopted by the defendant, this question has little weight. The patent was then the joint property of Gottfried, Holbeck & Stromberg, provided the several instruments of assignment were regular and valid.

On the 9th day of October, 1876, these three last named parties unite in a joint power of attorney, under their several hands and seals, wherein, after reciting their joint interest in the letters patent, they appoint John H. B. Latrobe, of Baltimore, their attorney to prosecute suits for the infringement of said letters patent (Record, folios 38 and 39).

This is followed on the 25th day of June, 1878, by a revocation of that power of attorney, on the part of Gottfried and Holbeck, under their several hands and seals (Record, folio 39).

Next, on the 24th day of February, 1879, another assignment of these letters patent is made, by the Barrel Pitching Machine Company, to the same parties as the previous assignment by it (Record, folios 40 and 41), and then the the assignees, Comegys first and Smith subsequently, assign their several interests in the patent to Gottfried and Holbeck jointly (Record, folios 42 and 43). Subsequent to the latter assignment, and on the 15th day of December, 1879, John H. Stromberg assigned his interest in the patent, under seal, to Gottfried and Holbeck, and by the same instrument (which was an indenture, the three being parties to it), Gottfried and Holbeck release Stromberg from all claims against him, and confirm the licenses which he had previously granted,

the agreement reciting: "And, whereas, the said John H. Stromberg has heretofore disposed of rights and licenses under the said letters patent, as part owner under the mesne assignments of the same; * * * * and, whereas, it is a part of the consideration of the present assignment, that the said John H. Stromberg shall be released from all claims which the said Matthew Gottfried or the said John F. T. Holbeck, or either of them * * * * might or could have against him, the said John H. Stromberg, or his counsel aforesaid, or against the said John H. B. Latrobe, attorney for the parties interested in said letters patent, for or by reason of any collections heretofore made by the said Stromberg, or the said Duncan, or Latrobe, or against any person or persons to whom the said Stromberg or the said Latrobe may have granted licenses to use the said patented improvement."

They further "release the said John H. Stromberg from all claims that they may have" * * * * "ratifying and confirming all such licenses, and all the acts of the said Stromberg in the premises." This instrument was dated December 15th, 1879.

To complete the statement of the facts, as disclosed by the record, it is only necessary to add that a suit was commenced in May, 1873, by Charles F. Smith against H. C. Comegys, in the city of Baltimore, and in the same a writ of attachment was issued, and the stock of Comegys, in the Barrel Pitching Machine Company, was condemned, in satisfaction of the debt that formed the foundation of the suit, according to the practice in the State of Maryland (Record, folios 46 to 56).

It should, however, be added to the above statement, that suits were repeatedly brought upon the patent in question, by Gottfried, Stromberg and Holbeck, as joint complainants, both in the court below and other districts, and that in the verified bills filed therein, the complainants were set forth as joint owners of the patent (Record, folio 26).

The machine alleged to be an infringement, and which the defendant had been employing, was made and sold to him by Stromberg, in 1872. At the time at which it was so made and sold, Stromberg had no interest in the patent, and so far as it appears, no license under it, and it may be admitted that Stromberg was an infringer in so doing.

The complainant rests his claim to recovery in this cause, upon the two general propositions: First, that Stromberg never owned any portion of the patent in suit; and, second, that if he did own at any time any portion of the patent, his ownership cannot in any way inure to the benefit of the defendant. As to the first proposition, it may be sufficient to point out that the title of complainant to the exclusive ownership of the patent, and the title of Stromberg, depend from the same link in the chain of title. It is so fundamental that no authorities need be cited to prove its truth, that the complainant in a suit upon a patent must represent the entire interest therein, either as to the whole United States or as to a certain portion thereof, and no owner of an undivided interest therein can sustain his suit. It is also well settled that joint owners in patents, as in other personal property, can use the patented invention without liability to contribute to their co-owners. It would appear, therefore, that the quantity of interest owned by Stromberg, can make no difference in respect to the questions involved in this cause.

It is claimed by the complainant that the Barrel Pitching Machine Company did not, by their first re-assignment to Smith, Comegys and Holbeck, convey any interest in the patent to the assignees, because of a defective execution of the assignment. That therefore no interest passed to Comegys by virtue of the first re-assignment by the company, and hence that Comegys' assignment to Stromberg conveyed nothing.

Further, that Holbeck's previous assignment to Strom-

berg conveyed nothing, because the assignment, by its terms, covered, simply, Holbeck's present interest, and the ownership of Holbeck's interest in the patent had already passed to the Barrel Pitching Machine Company.

Now, if this be so, then the Barrel Pitching Machine Company remained the owner of the patent (of the whole interest, if Gottfried's assignment to Holbeck were not annulled in law, and of an undivided one-half thereof, if Gottfried had succeeded in annulling his assignment to Holbeck) until the second re-assignment by the Barrel Pitching Machine Company to Smith, Comegys and Holbeck, when, according to complainant, a valid transfer was made, and this transfer being followed by conveyances by Smith and Comegys to Holbeck, and by Holbeck to Gottfried, perfects the title in the latter.

Their whole argument rests upon the question, whether the first re-assignment by the Barrel Pitching Machine Company was effectual. It is not, on account of its defective execution, the complainant claims. The resolutions by the directors of the company (Record, folio 36) appears to be full and ample. The assignment does not purport to be under seal, and an assignment of a patent is not required to be under seal (U. S. Rev. Sts., § 4,898), an instrument in writing, merely, being sufficient. It is executed by the president of the company, in precise accordance with the resolution of the directors, by which he was empowered to make it.

It is true, that anciently a corporation was required to act by its seal, and no writing could be executed by it without its seal; but this rule has been relaxed for many years.

The reasoning on this ground, strongly urged in the court below, would, if effectual in this case, serve to invalidate every bank note issuedby our national banks, and almost all the insurance policies issued by corporations in the United States. It is of daily occurrence for corporations to make the most solemn agreements in writing (not under seal), without using

their seal, and to say that the assignment in question, executed by its president, authorized thereto by the directors in its behalf, was not the valid transfer by the corporation of its interest in the patent, seems, to the defendant at least, utterly preposterous. It never was imagined, even by the complainant, until he conceived the possibility of maintaining this action. At the time of the first transfer by the Barrel Pitching Machine Company, the parties accepted it and immediately proceeded to act under it. Gottfried, Holbeck and Stromberg all join in a power of attorney, under seal, to J. H. B. Latrobe, wherein they recite that they are jointly interested in the patent. The three jointly file bills, in which they allege that they are joint owners of the patent, and these bills are verified by one complainant in behalf of all (Record, folios). Furthermore, the second assignment from the Barrel Pitching Machine Company recites that it is made in aid of and to cure defects in the first. It must in law, therefore, be taken to be part and parcel of the first, and hence enforces and ratifies the first.

It appearing sufficiently that Stromberg was a part owner of the patent, we have yet to see what effect that would have upon the rights of this defendant. The manufacture and sale of a machine by a party to another, obviously confers the right to use the same, so far as the seller can confer it. It is really a strong form of granting a license. Now, in the assignment from Stromberg to Gottfried (Record, folios 44 and 45), this complainant releases Stromberg, and ratifies his previously granted licenses in the strongest terms. This defendant, under that agreement with Stromberg, his vendor, claims the protection of an express release from complainant.

The release executed to Stromberg is in the broadest and most general terms. It covers, expressly, all past transactions in regard to the patent, by him or his attorneys. It is an act of the grossest bad faith for the complainant now to

attempt to nullify his own release, given for a large consideration. Even if they were doubtful (which they can by no means be said to be), the terms of this release must be taken most strongly against the complainant, according to the most common rules of interpretation.

Again, it cannot be for a moment seriously maintained that Stromberg could maintain an action against one of his own vendees for an infringement of the patent. Such a proceeding would be monstrous, and shocks all ideas of equity. It would be a flagrant taking advantage by a party of his own wrong. Now, if Stromberg himself occupied this position (he was in a similar position if he was a joint owner with Holbeck), and complainant and filed the bills set out in the record in other causes in the court below, how, then, can his assignee the complainant take a greater interest and right by the assignment of Stromberg than Stromberg had to give, and be able to maintain this cause, when Stromberg, his assignor, could not do it? Is not the complainant estopped, on the plainest principles of equity, from maintaining this action against defendant?

The case presents a somewhat complicated state of facts and chain of title. No nice or intricate legal questions, however, appear in it. It is a case for an analysis of the facts and resulting relations of the parties, and the application of the plainest and most general and obvious principles.

We are confident that this court will see the propriety and necessity of sustaining the view of the learned district judge who rendered the opinion in the court below.

E. H. ABBOT,

Counsel for Defendant.

Rec'd 5-30

Filed.

Dec. 19. 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~310.~~ 66

BENJAMIN H. MICOU, HENRY C. SEMPLE, FRANK S. BOYKIN, CLARA E. BOYKIN, AND LUCY B. MICOU, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED OCTOBER 22, 1878.



SUPREME COURT OF THE UNITED STATES.

No. 310.

BENJAMIN H. MICOU, HENRY C. SEMPLE, FRANK S. BOYKIN, CLARA E. BOYKIN, AND LUCY B. MICOU, APPELLANTS,

VS.

THE FIRST NATIONAL BANK OF MONTGOMERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

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1 May term, A. D. 1878.

At a circuit court of the United States for the fifth judicial circuit and middle district of Alabama, begun and holden at Montgomery, Alabama, on the sixth day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Present and presiding, the honorable John Bruce, judge of the district courts of the United States for the State of Alabama, sitting as circuit judge, Tuesday, July 30, 1878, a day of said term, the following proceedings were had:

* * * * * * *

Original bill.

UNITED STATES OF AMERICA:

Circuit court for 5th judicial circuit, at Montgomery, Alabama. In equity.

To the judges of the circuit court of the United States for the middle district of Alabama, sitting at Montgomery, Alabama.

The First National Bank of Montgomery, which is a banking corporation established in said middle district, and doing business therein, and which is a corporation created under and by virtue
2 of an act of the Congress of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and of the acts amendatory thereof, and which is located at Montgomery, Alabama, brings this its bill of complaint against Benjamin H. Micou, a citizen of the State of Alabama, and residing in the county of Montgomery therein, this suit being against said Benjamin H. Micou as trustee, and also against him individually; Henry C. Semple, as trustee for Lucy B. Micou and Clara E. Boykin, as well as also against the said Lucy B. Micou, Clara E. Boykin and Frank S. Boykin, her husband, the said Henry C. Semple and Lucy B. Micou being resident citizens of the county of Montgomery and State of Alabama, and the said Clara E. Boykin and Frank S. Boykin, her husband, being resident citizens of Macon County, in the State of Alabama. And thereupon your orator complains and says that—

1. Orator obtained on the first day of June, 1877, in the circuit
3 court of the State of Alabama, holden in and for the county of Montgomery, Alabama, a judgment against said Benjamin H. Micou, Thomas M. Barnett and Nicholas D. Barnett, for the sum of sixteen thousand one hundred and fourteen $\frac{69}{100}$ dollars, besides the further sum of twenty-seven $\frac{70}{100}$ dollars costs. The said judgment was rendered upon bills of exchange made, to wit, November 6th, 18, and 24, and December 1st, 1873, and all of said bills were given in extension of an indebtedness contracted by said Micou and Barnetts prior to the date thereof. On the 13th day of July, 1877, execution duly issued on said judgment, and was on, to wit, the 14th day of July, 1877, placed in the hands of the sheriff of Montgomery County, Alabama, for execution according to the mandate thereof, and was by the said sheriff duly returned into the office of the clerk of said circuit court of Montgomery County, Alabama, to wit, on the 16th day of July, 1877, "no property found."

Said judgment is still the property of orator, and is with the interest thereon wholly unpaid.

2. And orator charges that the said Benjamin H. Micou has heretofore, and in the manner hereinafter shown, fraudulently caused, procured, and suffered to be apparently conveyed from himself a large amount of real property, situate in the counties of Montgomery, Elmore, and Macon, in the State of Alabama, said property being of value, altogether, more than sufficient to pay orator's said claim, that is to say, the said Benjamin H. Micou, being at the time of the pretended settlements hereinafter mentioned guardian in the probate court of Tallapoosa County, Alabama, of his daughters Clara E. Boykin and Lucy B. Micou, who are also defendants in this suit, confederated and colluded with his said daughters, and with Frank S. Boykin, the husband of said Clara E., to procure judgments and decrees to be entered up against himself by said probate court of Tallapoosa County in the matter of said guardianships, and to have all of his, said Benjamin H. Micou's, property liable to sale under legal process, except such personal property as they might aid him to fraudulently convert to his own use, and excepting also some property shown hereafter to have been bought by one Pittman, sold and transferred to his said daughters with the intent on the part of all of said parties in this paragragh mentioned thereby to hinder, delay, or defraud all the creditors of the said Benjaman H., and particularly your orator. And said parties confederating as aforesaid, carried out and perpetrated such their contemplated fraud upon orator and other creditors in manner as is hereinafter shown.

3. Said Benjamin H. Micou was, in the fall of 1873, and had been for several years then last past, president and managing agent of Tallassee Manufacturing Co. No. 1, a manufacturing company and body corporate, then and for more than ten years theretofore doing a large business at that portion of Elmore County which was formerly a part of the county of Tallapoosa County in said State, and having an office, then in the fall of 1873, in the city of Montgomery, Alabama. He was also at that time and had been for several years prior thereto the active and managing partner of the firm of Barnett, Micou and Co., composed of said Benjamin H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, all the members of which firm were large stockholders in said Tallassee Manufacturing Company No. 1, each of said members, Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, owning, largely, more stock in said Tallassee Manufacturing Co. No. 1 than any persons outside of said firm of Barnett, Micou and Co. Said firm of Barnett, Micou and Co., the members thereof being each reputed to be wealthy, lent its credit to, and drew, and endorsed or accepted, as occasion required, paper for the accommodation of said Tallassee Manufacturing Co. No. 1, from time to time, and became and were, in the fall of 1873, liable on account of suretyship for said Tallassee Manufacturing Co. in a very large amount, to wit, the sum of three hundred thousand dollars, and the said Tallassee Manufacturing Co. was then, in the fall of 1873, financially embarrassed, and unable to pay its indebtedness as the same might mature.

In December, 1873, said Tallassee Manufacturing Company suspended payment, and called a meeting of its stockholders and creditors, which meeting assembled at Montgomery, Alabama, in January, 1874. Said meeting was largely attended by persons from various quarters of the State of Alabama, and from other States. An exhibit of the condition of said Tallassee Manufacturing Company was made, and

it then became notoriously known, and especially was then known to all the parties to this bill, that said Tallassee Manufacturing Company had suspended payment and was unable to meet its indebtedness as the same became due, and that said firm of Barnett, Micou & Co., and each member of said firm, was in immediate danger of insolvency, as this complainant now avers they each then were.

Said Nicholas D. Barnett, Thomas M. Barnett, and Benjamin H. Micou each had and owned, in the fall of 1873 and winter of 1873-'4, no other real property subject to sale, under legal process, than that hereinafter shown to have been bought in for the said daughters of the said Benjamin, who were also the nieces of the two said Barnetts, they being brothers of the first wife of said Benjamin H. Micou, except the land shown herein to have been bought by Pittman.

8 4. All the property then belonging to said Barnetts and Micou, subject to levy and sale under legal process, was not then worth more than one hundred and seventy-five thousand dollars, and the said members of said firm were then each individually indebted to various parties, not known to orator, in a sum, as orator charges on information and belief, not less than two hundred thousand dollars, exclusive of their liability for said Tallassee Manufacturing Company, and said firm was also, at that time, indebted to various parties, unknown to orator, in a sum, as orator charges on information and belief, of not less than three hundred thousand dollars, and said Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett were, each of them, at that time, in truth and in fact, insolvent. All of which was well known, not only to said Benjamin H. Micou, but also, immediately after the meeting of the the Tallassee creditors as aforesaid, to all the parties defendant to this bill.

5. Soon after it became notoriously and publicly known, and known to said parties defendant, that said Tallassee Co. had suspended pay-

9 ment. and that said Barnett, Micou and Co., and the individual members thereof were insolvent, the said Benjamin H. Micou, and his said daughters, and Frank S. Boykin, the husband of said Clara E., conspired together to cause settlements and decrees to be made in the probate court of Tallapoosa County, Alabama, whereby it was falsely and fraudulently made to appear that on the 10th day of February, 1874, the said Benjamin H. Micou was indebted to the said Clara E. in the sum of eighty-eight thousand three hundred dollars, for which sum a decree was rendered in said court on said day in favor of said Clara E. and her said husband, and against said Benjamin H. Micou, as will appear by Exhibit A hereto attached and prayed to be taken as part of this bill, and that on the 24th day of February, 1874, said B. H. Micou was indebted to said Lucy B. in the sum of eighty-eight thousand and thirty-one and $\frac{77}{100}$ dollars, for which on said 24th day of February, 1874, a decree was rendered in said probate court, a copy of which is attached hereto marked Exhibit B, and prayed to be taken as part of this bill.

10 Said Exhibits A and B are full and complete transcripts from the records of said probate court and show all the proceedings leading to and connected with said pretended final settlement and decrees, so far as the same appear of record. At the time of the settlement with Lucy B. she was a minor over the age of nineteen years, but said B. H. Micou had caused her disabilities of nonage to be removed by decree of the chancery court of Elmore County, Alabama. A full and true copy of the proceedings in said chancery court is hereto attached as Exhibit C, and prayed to be taken as part o this bill.

6. Orator charges that, in making the said settlements, the said B. H.

Micou did not contend for or desire fair and proper settlements, and that there was no real effort on his part to introduce, as he had it in his power to do, or inform his attorney of evidence to show that he was not, as orator avers he was not, charg'able with the amounts and sums he permitted to be found against him by collusion as aforesaid with said Clara E. and her said husband and with the said Lucy B.

11 Orator is without any means of showing in this his bill the particular items and amounts improperly and collusively charged against said Benjamin H. Micou, and items for which he should have received credit in said settlements, further than is herein shown, the facts upon which said settlements ought to have been made being peculiarly within the knowledge of said B. H. Micou, and the other defendants hereto, and not of your orator; but orator charges that the item of ninety-one thousand six hundred forty-eight and $\frac{95}{100}$ dollars, with which the said Benjamin H. allowed his account to be surcharged on said settlement, was not, and was known to the said Benjamin H. and to the said Clara E., Frank S., and Lucy B. not to be legally and justly due from him; that each item of negro hire of which said sum is partly made up, was, if said Benjamin H. was rightly charg'able with any part thereof, charged at too high a rate, and that said sum of ninety-four thousand seven hundred ninety-nine and $\frac{95}{100}$ dollars was too much, by a large sum of, to wit, fifty thousand dollars, and that this could have been shown to the court by testimony, if he, the said Benjamin

12 H., had desired to make a fair and valid settlement.

Orator further charges that said Benjamin H. was not, and he and his said daughters then well knew that he was not, chargeable with the large sums or any part thereof shown in Exhibits A and B to have been charged against him for negro hire and land rent, for that, as orator charges, the said B. H. Micou was, by orders of said probate court, made as shown by the full and true copies thereof hereto attached and marked Exhibit D, and prayed to be taken as part of this bill of complaint, authorized to keep his said daughters' property together and he was only liable to account for the profits arising from the same, which were small.

7. Orator further charges, on information and belief, that the said Benjamin H. Micou after the marriage of his said daughter Clara E. with said Frank S. Boykin, which took place, to wit, on the 10th day of July, 1873, had, to wit, shortly after said marriage and before said settlement in said probate court with Clara E., paid to said Clara, as part of the moneys due by him as guardian aforesaid, to wit, thirty thousand dollars in the stock of the said

13 Tallassee Company, which she and her said husband had taken at par value or at some other valuation to your orator unknown as part of the amount due her as ward as aforesaid, and that he, the said B. H. Micou, had also after her said marriage and before said settlement, paid to said Clara E. in part payment of his indebtedness as guardian as aforesaid, other property of great value, the character and amount of which is to your orator unknown; and that said thirty thousand dollars or the agreed value of said stock and all other advancements and payments theretofore made to said Clara E., as ward as aforesaid, were collusively and fraudulently omitted from said settlement by the parties thereto.

8. Orator further charges that by the failure of said Tallassee Manufacturing Co. in fall of 1873 as aforesaid, all the stock thereof owned by the said Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, severally, amounting to, to wit, three hundred thousand dollars

each, became worthless, and that besides the said stock the prop-
14 erty owned by said B. H. Micou and Barnetts consisted entirely of houses and lots and plantations, with horses, mules, plantation tools, crops, and the proceeds of crops thereon, lying in the counties of Elmore, Montgomery, and Macon, in the State of Alabama, and orator charges on information and belief that each of said parties, Nicholas D. Barnett, Thomas M. Barnett, and Benjamin H. Micou, had and owned a large amount of corn and cotton and fodder then on their several plantations in said counties in February, March, and April, 1874, amounting in value, each, to sum of, to wit, three thousand dollars, and that each of said parties raised severally on their said plantations during the year 1874 a large amount of cotton, corn, and fodder, to wit, each of them as much as two hundred bales of cotton of the value of ten thousand dollars, and each of them as much as four thousand bushels of corn and fifty thousand pounds of fodder of the value altogether of four thousand dollars.

Orator further charges that each of said parties Barnetts & Micou had owned in said counties aforementioned during the year 1874, and particularly in the months of March, April, May, June, & July, a large number of mules & horses, to wit, each as many as twenty five head of the value of one hundred and twenty five dollars each. And orator charges that said Lucy B. Micou & Frank S. & Clara E. Boykin so fraudulently used the executions issued as hereinafter shown upon their said probate decrees as to protect all of said cotton, corn, fodder, & mules in this paragraph mentioned from the creditors of said Barnetts & B. H. Micou, and that said Barnetts & B. H. Micou did during said year 1874 and in 1875 dispose of and convert to their own use all of said personal property, whereby their creditors were, in furtherance of the fraudulent combination hereinbefore mentioned, hindered and defrauded.

9. On the said decree of Frank S. and Clara E. Boykin which was ren-
dered February 10th, 1874, execution was issued, to wit, Febru-
15 ary 24th, 1874, returnable, to wit, May 11th, 1874, and was received by the sheriff of Montgomery County, Alabama, on the 27th day of February, 1874, and no sale having been made said execution was returned by order of plaintiff's attorney therein for an alias, to wit, on the 5th of May, 1874. An alias execution was issued on said decree, to wit, on May 12th, 1874, and was received by the sheriff of said Montgomery County, to wit, May 13, 1874. The said probate decree in favor of said Lucy B. was rendered on the 24th day of February, 1874, and execution was issued thereon, to wit, March 3d, 1874, returnable, to wit, the 2nd Monday in June, 1874; was received by the sheriff of said Montgomery County, to wit, March 4th, 1874. No sale was had under said execution, but the same was, to wit, May 8th, 1874, returned by said sheriff for an alias, and an alias execution on said decree in favor of said Lucy B. was issued, to wit, May 12th, 1874. Under these executions and others then in his hands, the said other executions altogether calling for about thirteen thousand dollars, the said sheriff sold, to wit,
on the first Monday in August, 1874, all the real property in
16 said county of Montgomery belonging to said Barnetts and Micou, and Henry C. Semple, who was then the attorney in said matters of said Lucy B. and Clara E. and her husband Frank S., bid in all the said real property of the said parties defendant in said executions lying in said county of Montgomery, save and except one tract of land which was bought in by one Pittman, plaintiff in one of said other executions, and all the property so bid in by said Semple was by said sheriff

conveyed to him said Semple by a deed, a copy of which is hereto attached as part of this bill and marked Exhibit E.

10. Orator also attaches hereto a correct and complete transcript and copy from the docket kept by the sheriff of said Montgomery County, in the year 1874, showing what was done by said sheriff in the matter of the executions received by him, and issued upon the two said decrees in the probate court of Tallapoosa County, Alabama, marked Exhibit F, and orator avers that the said entries show truly the receipt and
17 return of, and the levies and the sales under the said executions. And orator further avers that the property therein shown to have been levied on as the property of B. H. Micou was then his, the said Benjamin H. Micou's property, and that he said Benjamin H. had been continuously since, to wit, January, 1873, a resident citizen of the said county of Montgomery, Alabama.

11. Orator further avers that the parties to said executions bargained and contracted with Paul Strobach, the said sheriff of said Montgomery County, before said execution sales took place, that the said Strobach should, no matter what sum the property of said Barnetts and Micou might be bid off for, charge as his sheriff's commissions only the sum of one thousand dollars. And the said parties caused entries on each of said executions to be made as if from said sales forty-nine thousand five hundred and forty $\frac{36}{100}$ ($49,540.36) had been received on the execution in favor of said Frank S. and Clara E. Boykin, and forty-nine thousand five hundred and forty $\frac{37}{100}$ ($49,540.37) had been received on the
18 execution in favor H. A. Garrett, as guardian ad litem of said Lucy B. Micou, but orator charges, however, that no money was paid on his said bids by the said Semple.

12. Besides said executions to said Montgomery County, orator avers that on, to wit, February 15, 1874, execution issued on said decree in Tallapoosa County, in favor of said Clara E. and her said husband, returnable May 11, 1874, and was sent to and received by J. A. Grimmett, sheriff of Macon County, Alabama, on, to wit, February 17, 1874. Said sheriff, to wit, May 5, 1874, returned said execution to said probate court of Tallapoosa County, making return that there were no bidders for the property levied on. No other execution on said decree was issued to said Macon County in which the said B. H. Micou then had a plantation and a large amount of personal property, besides a growing crop, until, to wit, December 16, 1874, when another execution on said decree was issued and sent to and received by C. H. Felts, sheriff of said Macon County, Alabama, to wit, December 20th, 1874. Said last named execution
19 was by said Felts levied upon the said Macon County plantation of the said B. H. Micou, which was sold pretendedly thereunder and under the other execution hereafter mentioned on the first Monday in February, 1875.

13. On, to wit, March 2nd, 1874, execution was issued on said decree of said probate court of Tallapoosa County, in favor of said H. A. Garrett, as guardian ad litem of said Lucy B., returnable, to wit, June 8th, 1874, and sent to and received by said J. A. Grimmett, sheriff of said Macon County, Alabama, on, to wit, March 7, 1874, and was by him returned to said probate court May 5, 1874, he returning thereon that there were no bidders on the property offered for sale by him thereunder, which was the Macon County plantation of said Benjamin H. Micou, and no other execution on said decree to said Macon County was issued until, to wit, December 16th, 1874, when an alias execution on said decree in favor of said Garrett, as guardian as aforesaid, was issued to and received by C. H. Felts, sheriff of said Macon County, who made,

under said execution, and the other in favor of said Clara E. and
20 Frank S., her husband, a pretended sale of said plantation on, to wit, the first Monday in February, 1875.

14. Orator charges that in March and April, 1874, while the executions aforesaid were, as charged by orator, in the hands of the sheriff of said Macon County, Alabama, the said B. H. Micou had and owned the said personal property then on said plantation in said Macon County, and orator charges, on information and belief, that the said sheriff was, while said executions were so in his hands, in March and April, 1875, induced and caused by promises, directions, and instructions, the exact tenor and purport of which to your orator is unknown, but which came from the plaintiffs in said executions or their agent, but which or what ones of them is to your orator unknown, not to levy the same upon said personal property, and during the time elapsing from May 5th, 1874, to December 16, 1874, the said Benjamin H. Micou sold or otherwise in some manner unknown to your orator disposed of all said personal
21 property, which was altogether of the value of, to wit, *of* ten thousand dollars, and a crop of cotton, corn, and grain, raised on said plantation in 1874, of value, to wit, five thousand dollars, and all the plantation tools on said plantation.

After all of said personal property had been so disposed of, said alias executions were sent down as aforesaid, and said Sheriff Felts on, to wit, the first Monday in February, 1875, offered for sale thereunder the following lands, to wit: All of section 21, T. 17, R. 21, lying south of the Tallapoosa River, about 388 acres; all of section 22, T. 17, R. 21, south of the Tallapoosa River and west of Calabee Creek, about 126 acres; all of section 3, T. 16, R. 21, north of the road to Tuskegee, about 140 acres; all of section 5, T. 16, R. 21, north and east of Cubahatchie Creek, about 300 acres, all lying in said Macon County, and known as the Macon County plantation of the said Benjamin H. Micou. Said lands were then and are now worth the sum of, to wit, six thousand dollars, and at said sale they were bid off by said Benjamin H. Micou, or by some one for him, at and for the price of twelve hundred and fifty dollars,
22 and the request of said Micou, the said sheriff Felts made a deed conveying to him as trustee the said lands, but orator is not informed as to whether the deed stated for whom the said Benjamin H. was to be or claimed to be trustee. Orator charges that said Benjamin H. did not pay any money for said lands, and that no money other than costs and commissions was paid by any person on account of said sale, and that said Benjamin H. paid such costs and commissions out of his own moneys.

15. On the said decree in Tallapoosa in favor of said Clara E. and her husband, Frank S., several executions issued to Elmore County, Alabama, the first on the 16th of February, 1874, made returnable May 11th, 1874, was returned by J. A. Lancaster, sheriff of said county, in May, 1874, "No property found." The second was issued on the 23rd day of September, 1874, made returnable December 24, 1874, was received by the sheriff of said Elmore County, to wit, 25th September, 1874, and was by him returned for an alias on the 5th day of December, 1874. The third was issued December 14, 1874, made returnable
23 10th May, 1875, and was received by the sheriff of said Elmore County, to wit, December 17th, 1874, and sales were had thereunder as hereinafter stated.

On said decree in favor of said H. A. Garrett, as guardian as aforesaid, there were likewise three executions issued to said Elmore County. The first issued March 2nd, 1874, returnable second Monday in June,

1874, was received by said sheriff, to wit, 5th March, 1874, and by him returned to said probate court of Tallapoosa County "No property," June 12th, 1874. The second issued 24th August, 1874, returnable 14th December, 1874, was received by said sheriff, to wit, August 27th, 1874, and by him returned for an alias 5th December, 1874. The third issued 14th December, 1874, returnable 10th March, 1875, and was received by the sheriff of said Elmore County, to wit, on the 28th day of December, 1874, and under said executions in favor of said Clara E., her said husband and said Garrett as guardian as aforesaid, the said sheriff sold on the first Monday in February, 1875, all the real properiy of the said Benjamin M. Micou and Thomas M. Barnett and Nicholas D. Barnett, then in said county of Elmore, to wit, property known as the residence
24 of N. D. Barnett for the sum of five hundred dollars; lot known as the residence of T. M. Barnett (old place) for two hundred and fifty dollars; property known as the residence of T. M. Barnett for five hundred dollars; the river plantation of T. M. Barnett, 225 acres, for the sum of six thousand dollars, and the house and lot in the town of Tallassee, known as the residence of B. H. Micou, designated in Gray's map of said town as block No. 2, for the sum of five hundred dollars. Also at the same time and under the same executions all the stock in the Tallassee Manufacturing Company of the said two Barnetts and Micou at and for the price of one hundred dollars. All of said property in this paragraph mentioned was at said sale bid off by and in the name of, and was by the said sheriff conveyed to, said Henry C. Semple in his individual name, and still upon the records of the probate court of said Elmore County, Alabama, stands in the name of the said Semple, as orator charges on information and belief. But orator charges that said Semple paid no money on his said bids other than the costs and commissions.

25 16. Orator avers, on information and belief, that during the year 1874 the said Thomas M. Barnett, on his said river plantation, had a large amount of cotton and corn, mules, plantation tools, and other personal property, with which he was making a crop on said plantation, all of which said personal property was subject to levy and sale, and altogether of the value of, to wit, three thousand dollars; also, that said Thomas M. Barnett made on said plantation during the year 1874, to wit, one hundred bales of cotton, of value, to wit, six thousand dollars, and three thousand bushels of corn, worth one dollar per bushel; but that plaintiffs, in said executions mentioned, caused them not to be levied upon—said mules, cotton, corn, and other personal property of said Thomas M. Barnett, and wilfully suffered, aided, and permitted the said Thomas M. Barnett to convert to his own use, as he did, all of said property in this paragraph mentioned, in fraud of his creditors.

17. Orator charges, on information and belief, that said Henry C. Semple has not made any conveyance of any of said property so
26 far as the same appears of record, and that on the books and records it still appears that said Semple is the owner of all the property bid in by and conveyed to him in the counties of Elmore and Montgomery, as aforesaid; but orator further avers that said Semple does not, in fact, claim to be the beneficial owner of all or any of said property, but to hold the same in trust in some manner or other as may have been agreed upon, for the use of the said Lucy B. and Clara E. and her husband.

But orator does not know what unrecorded and secret agreement may have been made between the said Semple and the said parties to said exe-

cutions. Whatever such agreements, however, may have been made, orator charges that, in fact and in truth, there is and has been since, to wit, January 1st, 1874, an agreement and understanding by and between the said Clara E. Boykin, Frank S. Boykin, Lucy B. Micou, B. H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, that the decrees should be had and made as set forth in this bill; that none of the parties to said agreement, understanding, or arrangement
27 should offer anything more than pretended opposition to the rendition of said decrees, and that each and every act and thing done and performed, or suffered to be done and performed, as set forth in this bill, should be so done and performed in and to the pecuniary interest and profit of each and all of the said parties to said decrees, both plaintiffs and defendants, and to the prejudice, hindrance, and delay of other creditors of said Barnetts and Micou.

And orator further charges that since the rendition of said decrees there has been a complete understanding and agreement between the parties to said executions that the pl'ffs therein should so use said decrees and process to be issued thereunder as to enable the def'ts therein to hinder, defraud, and delay their several creditors, in that they were to be permitted and aided in converting property to their own use, as shown herein. And pl'ff avers that everything done by the parties pl'ff in said decrees, or suffered by them to be done as averred herein, was done and suffered to be done in pursuance of said understanding.

28 21. Orator further charges that since the said sales of real estate, as set forth and charged in this bill, the said Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett have each of them remained, and been suffered by all the parties defendant to this bill to remain, in possession and control of each and every part and parcel of their said real property sold as aforesaid, and to enjoy the use, profits, and benefits thereof, and that there has been no division of said property between said Clara E. and Lucy B.

Orator charges this on information and belief; but if it shall turn out that the said Benjamin H. Micou, Thomas M. Barnett and Nicholas D. Barnett, or either of them, have, in fact, paid, or obligated themselves to pay, in any manner, any sum or sums for the use of said property, yet orator charges that if such agreements to pay, or payments have, in fact, been made, yet they have been so made with the intent that said Benjamin H. Micou and said Barnetts should be allowed to profit pecuniarily by virtue of and in accordance with some pre-arranged plan, agreement, or understanding by and between them and the said Lucy B.
29 and Clara E. and her husband previously had, and entered into, the terms of which are unknown to your orator, but by which a secret use and benefit was reserved to the defendants in said executions or some of them. And orator avers that the effect of this agreement or secret understanding was that the said decrees were rendered each for a larger amount than was due, and that the process issued thereunder was so used by the said plaintiffs in execution as to benefit the said B. H. Micou and Barnetts, all of which was in furtherance of said secret understanding and agreement, and of an intent to hinder, delay or defraud the creditors of said B. H. Micou, Thomas M. Barnett and Nicholas D. Barnett.

Orator does not make the said Barnetts parties defendant in this case, and does not seek relief, except as against and from the condemnation of the following lands, which were sold as the property of said Benjamin H. Micou, to wit: The northeast quarter; the east half of the northwest quarter section eight (8), all of section seventeen; the

30 southeast quarter and the east half of the southwest quarter of section five (5), west half of northwest quarter, and west half of southwest quarter of section sixteen (16), all in township (15) fifteen, range twenty (20), which was bid off at the price of seven thousand ($7,000.00) dollars. Also lots one (1) and two (2) in square nine (9) in Hanrick's plat, in the city of Montgomery, Alabama. Also, a part of lot No. ten (10) in square number fourteen (14), being twenty-six and one half feet (26½) by one hundred and twenty (20) feet in the southeast corner of Bibb and Commerce streets, in the city of Montgomery, Alabama. Also lot No. (11) eleven, South Market street, and lot No. (11) eleven, North Washington street, in the city of Montgomery, Alabama, bid off at the sum of nine thousand dollars. All the above lands lie in said Montgomery County, and were bid off at said sale had by the sheriff of said Montgomery County as before averred, by said Henry C. Semple. Also, the house and lot in the town of Tallassee, in the county of Elmore, known as the residence of said B. H. Micou, and designated in Gray's map of said town as block No. 2, bid off at said sheriff's
31 sale in Elmore County, by said Henry C. Semple, at the price of five hundred dollars. Also, the following tract of land lying in Macon County, Alabama, to wit: All of section twenty-one, T. 17, R. 21, lying south of the Tallapoosa River, about 388 acres; all of section 22, T. 17, R. 21, south of the Tallapoosa River and west of Caleebee Creek, about one hundred and twenty-six acres. All of section 3, T. 16, R. 21, north of the road to Tuskegee, about 140 acres. All of section 5, T. 16, R. 21, north and east of Cubahatchie Creek, about three hundred acres; all of which lands so lying in said Macon County, Alabama, were bid off by said Benjamin H. Micou at and for the price of one thousand two hundred and fifty dollars, at the sale heretofore shown to have been had by the sheriff of said Macon County, Alabama.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according
32 to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, and direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written, they are respectively required to answer, that is to say:

1st. Whether the said Benjamin H. Micou did not make, as charged in this bill, the application to have the said Lucy B. Micou's disabilities of non-age removed, and whether the said disabilities were removed as charged, and whether the same was not made and done with their approbation, knowledge or consent, or of some one or more of them, and whom, and at what time, and in what manner, and by whom they each were first informed thereof.

Int. 2. Whether the said Benjamin H. Micou did not, in the year 1873, transfer to said Clara, or to said Clara and her husband, on the books of the Tallassee Manufacturing Co. No. 1, or otherwise and how, thirty thousand dollars or other sum, and if so, what sum of the stock of said company, and if so, what was the consideration of said transfer, and by
33 whose authority was said transfer made and when, whether it was not in consideration of said B. H. Micou's indebtedness to said Clara, whether such transfer was not made with the approbation, knowledge, or assent, either before or after the transfer, of said Clara or of her husband; at what time, how, and by whom said Clara and her husband were each informed that such transfer was made, at what price said stock was to be taken, whether any written agreement or receipt

or any other writing or writings whatever were had or made by or between said B. H. Micou and said Clara or Frank S., or both, and at what time or times, and what were the contents of each and all of said writings so made; and the said defendants are required to attach to their several answers hereto copies of all such writings or state why they cannot do so.

Int. 3. Whether, beside the stock enquired of above, said B. H. Micou made, or at any time or times during the years 1872, 1873, or 1874, any transfer, payment, conveyance, or assignment of any money or
34 other property to said Clara or Lucy B., which was at the time or afterwards agreed or understood to be on account of his guardianship of the said Clara or said Lucy B.; and if yea, what, stating and describing fully said property and the amount and value or values, in fact, and as agreed upon, and whether any writing or writings were made relating thereto, and what were the contents of said writings; and the defendants are required to attach copies thereof to their answers hereto or state why they cannot do so.

Int. 4. Whether the said Clara, Frank S., and Lucy B. each employed any attorney or attorneys to represent him or her in the matter of the settlements in the probate court of Tallapoosa and the subsequent proceedings thereunder; and if so, what attorney or attorneys and by whom personally and by whose authority said attorney or attorneys were selected and spoken to, and whether or not they informed said attorney or attorneys of the advancements, payment, or transfer or transfers of property hereinbefore spoken of, and also of the fact that said Lucy
35 B.'s disabilities of non age had been removed; and also particularly and fully what instructions and directions they and each of them gave to said attorney or attorneys at and before the time of the rendition of said decrees, and by whose authority, assent, or directions said instructions were given.

Int. 5. Whether the said Lucy B., Clara, and Frank S. did not at or immediately after the time thereof know or hear of the suspension of payment by said Talla'ssee Co., and of a meeting of its creditors in the city of Montgomery in the winter of 1873 & '4, and that said B. H. Micou and the said Thomas M. Barnett and Nicholas D. Barnett were each and all largely involved, and their solvency seriously endangered if not destroyed thereby; whether such was not common and public rumor, and whether they did not each hear said rumor or some such rumor at or about such time; where and with whom each was then living; whether said B. H. Micou did not tell them or each of them of such failure and of his insolvement and of his inability to pay what he was due as guardian, unless they should get decrees against him and his sureties as guardian, or something or other to that effect; and if so, what it was
36 he said and whether all this was not before any movement looking to settlement of said guardian matters was made in said probate court.

Int. 6. Whether or not there was any conversation or conversations by and between any of the parties defendant to this suit before any movement was made in the probate court of Tallapoosa for settlement of said guardianship matters, as to whether said settlements should be had, and why they should be had, or how they should be, or as to the necessity of their being had speedily, or any reason therefor, or reason why they should be had at all, and if any such conversations were had, then each party will state where, when, and by and between whom said conversations were had, and in whose presence, and relate as fully and particularly as possible the substance of each of said conversations;

whether or not in said conversations or any of them anything was said about B. H. Micou, T. M. Barnett, and N. D. Barnett, any one of all of them remaining in possession of their property, if it should be
37 sold under said probate court decrees to be obtained or about any advantage to them or either of them to follow from its being sold under such decrees, or whether indulgence was to be extended or profit or benefit to be derived by them or either of them under said decrees, or any inducement to them or either of them to permit said decrees to be made and property sold under them as was thereafter done; and if any such conversations were had then the defendant will answer what was the substance of each such conversation and by and between whom, and when and where; whether or not such defendant has answered as fully as possible all the questions in this interrogatory; and if not, why.

Int. 7. Whether or not they each had any conversation or conversations with Thomas M. Barnett and Nicholas D. Barnett, or either of them, before the rendition of said probate decrees, or afterwards, in relation to said decrees, or the property sold or to be sold thereunder; and if so, state fully what all such conversations were and when, where and in whose presence; whether, in any of such conversations, any-
38 thing was said, and if so, what and by whom, about any advantage or benefit to arise from said decrees or proceedings thereunder, to said Barnetts, or either of them, and if so, answer fully and particularly all said on said subject, and by and between whom, and when and in whose presence; whether said Barnetts or either of them were present at said settlements, or were to be, in person or by attorney, and if not, why.

Int. 8. Whether you were present at said settlements in Talapoosa probate court; whether at said settlements or before, you informed counsel, acting for you at the transfer made, if any, of Talla'ssee stock to Clara, before inquired, or of any other advancements or payments made; whether said matter was, at the settlement, called to the attention of said probate court, and if not, why; whether there was not an order, or orders, of the probate court of Tallapoosa, purporting to relate to B. H. Micou's keeping the estate of his wards Clara and Lucy B. together, and whether or not, at the settlement of either of said
39 ward's estates, the said order or orders were called to the attention of said probate court, and whether or not it was left to the said court to pass upon the effect of the same; whether the account of B. H. Micou was not originally made out charging himself for certain years to what was charged on his account as the profits of keeping his wards' estate together, and whether the account was not surcharged by charging said Micou during said years with rents of land and hire of negroes, thereby increasing his liability by many thousands of dollars; and whether the question of such increased liability was in reality presented to said court for decision; whether said court, in fact, passed upon said question, or whether the question was settled by concurrence of counsel appearing for the parties; who said counsel respectively were; and whether said orders relating to keeping the estate together were called to the attention of such counsel, and if so, when, where, and by whom; whether the amount charged in said accounts finally for negro hire and rent of lands, were passed upon, and found by the said probate
40 court, upon testimony offered, and if so, of what witnesses, or whether the same was not agreed upon by counsel, and furnished to the court for its decree, and if so, why this was done thus; whether the said B. H. Micou made, or instructed his counsel to make, any such

real contestation, as it appears of record upon the exhibit to this bill was made. of the question of his liability to account for rents of land and hire of negroes; whether he furnished his counsel with the names of witnesses to examine in relation to prices of negro hire and rents, and if so, whether said witnesses were examined, and who they were; whether said B. H. Micou and the said Barnetts were not entirely willing said decrees should be rendered against them as they were.

Int. 9. Whether the sheriff of Elmore County was instructed or given to understand in some manner when the first executions on said probate decrees were in his hands, that the pl'ffs therein would not require him to levy the same at once, or to sell under the same then, and if
41 so, by whom and by whose authority, instructions, or consent was said information or instruction given; whether or not by that of pl'ffs in said executions; whether any instructions were given to said sheriff in relation to said first executions in his hands, and if so, answer fully what said instructions were, and how and by whom said instructions were given, and if they were given by the attorney or pl'ffs; whether or not, in giving such instructions, he was following the directions or complying with the wishes of said pl'ffs in execution, and how and in what, by what words, message, or instruction were said wishes of pl'ffs in execution, make known to said attorney, and who then was acting as such attorney.

Int. 10. Whether or not, in March and April, 1874, either or both of said Barnetts, Thomas M. and Nicholas D., had any personal property in Elmore County, Alabama, and if yea, state fully what it was, and of what value and whether you knew at the time of or believed he had such property. And whether or not either or both of said Barnetts
42 made a crop in said Elmore County in 1874, and had mules in said county in 1874, and what became of said crop and mules, and of what did said crop consist; how many bales of cotton, how many bushels corn, and why were not said cotton, corn and mules, or some portion thereof sold under execution on said decree. Whether you had any information or belief at the time that said cotton and corn was being raised on said plantation in the year 1874, and what efforts, if any, you made to subject said crop to the satisfaction of said decrees. If no effort was made, why was this? Was it at the instance of the plaintiffs in execution or with their consent that no effort was made to sell said crop?

Int. 11. Whether or not said Benjamin H. Micou had any personal property on his Macon County, Ala., plantation in 1874, and whether he raised a crop thereon said year? Of what said property and crop consisted, giving each item, and the value thereof as far as practicable, and *and* stating whether there were any liens or mortgages thereon,
43 and, if so, what and for what amounts, and when and by whose directions or authority, as far as possible each mule, bale of cotton or other item of said Micou's personal property was removed from said plantation in the year 1874, and to whose use, and particularly whether to said B. H. Micou's, any, and if so, what amount of said personal property was converted? How long said B. H. Micou had carried on said plantation, whether said plaintiffs in execution knew or had information of his having such plantation and personal property thereon. Why said personal property including crop was not levied on to satisfy said decree. Whether instructions were given to the sheriff of Macon County when the first executions on said decrees were in his hands, as to whether he would levy the same on B. H. Micou's personal property or whether any intimations were given him that he would not be re-

quested to so levy said executions on personal property, or any intimations to that effect or to the effect that he would not be ruled for failing so to levy on personal property, and if any such intimations, or
44 if any instructions were given said sheriff of Macon as to said first executions in his hands, by whom, and whether or not with the knowledge or consent of said pl'ffs in execution, and how and in what manner was such knowledge or consent conveyed from pl'ffs or either of them?

Int. 12. Whether the statements of the bill are not true as to the time elapsing in the summer and fall of 1874, without any executions on said decrees being in the hands of the sheriff of Macon County, Ala.; and, if so, whether this was by the procurement, knowledge, or consent of said pl'ffs in execution, or either of them, and, if so, which and how, and in what way they, said pl'ffs, or either of them conveyed to their attorney such, their consent. Whether B. H. Micou gave any directions or instructions relating thereto, and, if so, what, when, in what way, and to whom, and how was it known to the person receiving such instructions that said B. H. Micou was authorized to give the same?

Int. 13. Whether any sum of money was paid at any time, either to the sheriff of Elmore or to the sheriff of Macon upon the under-
45 standing that they or either of them was not to levy the executions on said decrees in their hands in the spring or summer of 1874, upon personal property, or that no sale of real or personal property was then to be had, and whether any money or commissions were paid or agreed to be paid to either or both of said sheriffs, other than such as was shown on their returns upon said executions, or any understanding whatever.

Int. 14. Whether if any money was paid or agreed to be paid as inquired about in the last interrogatory above, it was so paid by or by the directions of any party to this suit, and answer fully what was the agreement or understanding enquired about. Answer as to each sheriff.

Int. 15. Whether the said H. C. Semple did not buy in all the property at said execution sales charged by this bill to have been bought in by him; and if not all, then what, and whether he did not take deeds to such as he so bought in his own name individually, and if to any portion thereof he took a deed or deeds otherwise than apparently
46 to his own use, then to what portion was the deed so otherwise taken, and how and in what manner. Whether said Semple paid out any money on said purchases by him; and, if so, what amounts, and to whom, of whose money and by whom handed to or placed in control of said Semple. Whether said Semple claims now any individual or personal beneficial interest in said property so bought by him at said execution sales; and, if so, to what amount and in what property, and how and for what consideration did he acquire such interest.

Int. 17. Whether said Semple has made before or since said purchases by him, any written agreements, contracts, or conveyances by and between himself and any other parties to this bill in relation to all or any of the property so bid off by him or the use or lease thereof, or whether he has made any such written agreements or contracts or conveyances in relation to the same or any part thereof with the said T. M. and N. D. Barnett or either of them; and the defendants will attach to their answers copies of all such writings as are in this interrogatory in-
47 quired about, but after one copy of each writing has been attached the other defendants may refer to the same as part of their answer; and in case said writings or copies thereof be not attached, defendants will answer why they do not do so, and will give their best recollection as to the contents of each of said writings and

answer in whose custody said writings now are, so far as they may know.

18. Whether there are and have been since January 1st, 1874, any agreements, contracts, or understandings not in writing between the parties defendant to this bill or between them or any of them and said Barnetts or either of said Barnetts or any and which of them, in relation to said lands so bid off by said Semple, or the Macon County lands bid off by B. H. Micou or any of said lands, or the use thereof, or any beneficial interest therein; and, if so, defendants will answer fully and particularly what every and each of said agreements, contracts, or understandings are, and were, and what ones of them have been
48 executed, and how and which of them have been modified and in what manner, stating all the parties in each instance and give dates as fully as possible.

Int. 19. Whether since said purchases by said Semple he has taken possession of the property so bid off by him or any part thereof, what disposition he has made of each piece or tract thereof for each year, at what price, if any, rented or leased, and to whom; and whether said rents have been paid, and when, and to whom, and in what, and how much, and whether or not his acts in the premises have been directed or authorized by the said plaintiffs in execution, and whom from he has received since said purchases his directions and instructions as to the management of said property. And if said Semple has received any moneys for the use of or for said property, state the terms of the agreement or agreements by which the same were received and how and in what manner and according to whose directions and under whose control he has applied the same.

49 Int'y 20. Whether the said B. H. Micou did not bid off said Macon County plantation as charged in the bill, and how and in what manner the deed conveying the same to him was made, attaching a copy thereof to their answers, and whether such purchase by said B. H. Micou was authorized or directed or assented to by the parties defendant to this bill, or any and which of them; whether he paid full value at said sale; what was then the value of said plantation; who has since been in possession of said plantation during each year, and under what contracts and agreements; whether any profits have arisen from said plantation, or any moneys been paid for the use thereof, and how much and by and to whom, for each year since said purchase; and whether said B. H. Micou has in any manner been benefitted pecuniarily by bidding off said property, or keeping or using the same, and if yea, to what extent; whether he has paid to his said daughters any of said profits or rents; and, if so, how much and when, and in what;
50 and for whom said B. H. Micou acted in making said purchase?

Int. 21. Whether it does not appear from the endorsements on the executions, as shown in the exhibits to this bill, that the moneys apparently realized from the sales of said lands were divided equally, or nearly equally, between said plaintiffs in executions, Clara E. and Lucy B.; whether there was any agreement between the said plaintiffs that such equal division should be made; and, if so, when such agreement or understanding was first made and had?

May it please your honors to grant unto your orator writs of subpœna, to be issued from this honorable court, directed to the said Benjamin H. Micou individually and as trustee, and to Lucy B. Micou and Clara E. Boykin and her husband, Frank S. Boykin, and the said Henry C. Semple, commanding them and each of them to come in within the time prescribed by law and answer all the allegations and interrogatories of this bill as by

note hereunder written they are requiredto do, and that upon the hearing of this cause your honors will decree that said decrees rendered
51 in the probate court of Tallapoosa County, Alabama, one in favor of Clara E. Boykin and Frank. S. Boykin, her husband, against said Benjamin H. Micou, and the other in favor of Henry A. Garrett, as guardian ad litem of Lucy B. Micou, against said Benjamin H. Micou, as set forth and particularly shown in this bill, are, together with all proceedings, executions, and sales had under them as against Benjamin H. Micou, as is also shown in this bill, null and void; and that the lands shown in this bill to have been sold under said executions as the property of said Benjamin H. Micou be subjected to the payment of orator's judgment, as set forth in this bill, and the interest thereon, together with the costs of this suit, and that said lands, or a sufficient portion thereof, be sold to pay and satisfy the said judgment, and interest, and all costs of this suit.

And if your orator has in any manner mistaken the relief to which it is entitled, then it prays your honors to grant all such other and
52 different or further relief as it may in equity and good conscience be entitled to; and as in duty bound your orator will ever pray, &c.

CLOPTON, HERBERT AND CHAMBERS,
Sol'rs for Compl't.

NOTE.—Each defendant to this bill is required to answer all the allegations of above bill, including paragraphs numbered from one (1) to twenty (20), inclusive, and all the interrogatories numbered from one (1) to twenty-one (21), inclusive.

CLOPTON, HERBERT AND CHAMBERS.

53 EXHIBIT A.

Account for final settlement.

To the Hon. Allen D. Sturdivant, judge of the probate court of Tallapoosa County:

Benjamin H. Micou, who was heretofore appointed guardian of the estates of Clara E. Micou and Lucy B. Micou, minors, respectfully represents to your honor that the said Clara E. Micou has arrived at the age of twenty-one years, and has intermarried with one Frank Boykin, and now demands a settlement of the matters and things pertaining to the said guardianship of her said estate. Wherefore the said Benjamin H. Micou now comes and files in your honorable court the following account and accompanying vouchers, and prays that the same be passed and allowed.

And the said guardian further represents that soon after taking out letters of guardianship on the estates of the said minors he received as such guardian the following personal property, to wit: From the estate of Thos. M. Barnett, sr., 18 negroes, worth and valued at $12,750.00, and mules to the value of 450.00; from the estates of Mrs. Mar-
54 garet Barnett, 3 negroes, worth and valued at $3,700.00; and from the estate of Mrs. Lucy A. Micou, 33 negroes, valued at $23,525.00, and horses and mules valued at $1,630.00—amounting altogether to $42,053.00.

And the said guardian states that he never sold any of said personal property, but placed the same on a plantation belonging to said minors, and has accounted for the use and profit of the same in the following accounts, and that said property remained on said plantation until the

close of the late war, at which time said slaves were liberated by operation of law, and said mules and horses taken by Federal soldiers; and said guardian prays that he be allowed credit for the whole am't of said personal property.

Benjamin H. Micou, guardian of Clara E. Micou, now Clara E. Boykin, formerly a minor, and now over the age of twenty-one years, in account with said Clara E. Boykin.

On final settlement of guardianship.

Said guardian charges himself as follows:

	To am't of balance ascertained against him as such	
55	guardian on annual settlement of the joint estates of Clara and Lucy Micou, made with probate court of Tallapoosa County July 18th, 1859	$9,896 75
	Int. on same to day of settlement, fourteen years and seven months	$11,546 20
	To am't ascertained as due by the said guardian for years 1859 and 1860, Statement A	6,934 08
	Interest to settlement	7,211 44
	To am't ascertained as due by said guard'n for year 1861, as per statement B	964 78
	Interest to settlement	578 86
	To am't rec'd from T. M. Barnett, adm'r of estate of T. M. Barnett, dec'd, M'ch 11th, 1861	12,210 00
	Interest to settlement	12,515 25
	Am't rec'd of Thos. M. Barnett, adm'r of T. M. Barnett, sr., March 16th, 1861	16,640 03
	Interest to day of settlement	16,972 80
	And the said guardian states that during the years 1862, 1863, 1864, and 1865 the said minors had no income arising from their lands or other sources over and above the expenditure on the same, and that since the said year 1865 the said guardian has used the plantation belonging to said minors, and allows them $1,000.00 per annum for rent of the same, over and above State and county	
56	taxes, and so charges himself with rent for 1866	1,000 00
	Interest	560 00
	Rent for 1867, $1,000.00; interest, $480.00	1,480 00
	" " 1868, $1,000.00; " 400.00	1,400 00
	" " 1869, 1,000.00; " 320.00	1,320 00
	" " 1870, 1,000.00; " 240.00	1,240 00
	" " 1871, 1,000.00; " 160.00	1,160 00
	1871, Apr'l 7. Am't of decree rendered in favor of said minors in probate court of Tallapoosa County in matter of final settlement by B. H. Micou, adm'r of Mrs. Lucy A. Micou's estate	4,512 48
	Interest	937 77
	1870, July 18. Am't of ⅓ of proceeds of sale of lands belonging to estate of T. M. Barnett, made by order of probate c't July 18th, 1870	3,190 00
	Interest	841 30
	Rent for 1872, $1,000.00; int'r'st, $90.00	1,090 00

Rent for 1873, 1,000.00; int'r'st, 10.50	1,010 50
Total am't of debts	$115,212 24
And the said guardian asks to be allowed credit for am't invested in purchase of 160 acres of land adjoining plantation belonging to minors, at $20 p'r acre, paid for Jan. 1, 1861	3,200 00
Interest on the same to day of settlement	3,360 00
57 1866, June. Taxes paid on minors' interest in Arkansas land	400 00
Interest	238 42
1871, March. Taxes paid on minors' interest in Arkansas lands, and expenses of ag't	583 30
Total am't of credits	$7,781 72
" " " debits	$115,212 24
Balance due by guardian	$107,430 52

And the said guardian shows that all the estate of the said minors was joint, and all receipts and disbursements made by said guardian have been on joint account, and have never been separated, and that the above account is a joint account, and the above balance the balance now due to both of said minors—one-half to each—and the true amount now due to said Mrs. Clara E. Boykin is one-half of the above balance, to wit, $53,715.26.

STATEMENT A.

1860.			
Jan. 24.	Guardian charges himself with proceeds of sale of 120 bales of cotton		6,034 98
	Interest to Jan. 1, 1861		482 70
Oct. 24.	Proceeds of sale 79 bales of cotton		3,510 77
	Interest		46 80
			$10,075 25
58	Guardian asks credit for—		
		Voucher.	
1859.			
Aug. 12.	Am't paid W. D. Fraser (disallowed)	No. 1	$150 00
	Interest to Jan. 1, 1861		17 00
1859.			
Nov. 2.	Am't p'd Sturdivant, judge	2	22 46
	Interest		1 94
" 4.	Am't p'd W. B. and A. R. Bell & Co. (disallowed	3	42 25
	Interest		3 66
" "	Am't p'd T. J. Dillehay (disallowed)	4	335 00
	Interest		29 03
" 8.	Am't p'd A. J. Lowry	5	4 00
	Interest		34
" 25.	Am't p'd P. Lilly (disallowed)	6	299 00
	Interest		25 83
Dec. 1.	Am't p'd J. M. Simmons (disallowed)	7	250 00
	Interest		21 00

1860.				
Jan.	1. Am't p'd T. J. Davis, ag't (disallowed)		8	269 37
	Interest			21 04
"	" Am't p'd John Lambreth		9	42 66
	Interest			3 55
"	" Am't p'd Garrett & Pollard (disallowed)		10	129 00
	Interest			10 30
"	2. Am't p'd D. A. Benjamin (disallowed)		11	36 00
	Interest			2 80
"	" Am't p'd R. H. & W. E. Offutt		12	19 64
	Interest			1 57
"	3. Am't p'd G. T. Stewart		13	78 15
	Interest			5 99
59		Voucher.		
	Feb. 1. Am't p'd John H. Murphy & Co. (disallowed)	No.	14	168 40
	Interest			11 79
	" " Am't p'd Barnett, Micau & Co. (disallowed)		15	321 52
	Interest			22 51
1860.				
M'ch	16. Am't p'd W. F. Wade		18	35 65
	Interest			2 28
"	19. Am't p'd Freeny & Lide (disallowed)		19	117 25
	Interest			7 42
Oct.	2. Am't p'd Houston		20	32 00
	Interest			48
	24. Am't p'd B. F. Russey (disallowed)		21	580 00
	Interest			8 70
Dec.	31. Am't p'd W. B. and A. R. Bell & Co		22	11 70
	Interest			23
	Total am't of credits			$3,141 17
	" " " debits			$10,075 25
Bal. due by guard'n Jan. 1, 1861				$6,934 08

STATEMENT B.

Guardian charges himself with—

1861.				
Jan.	2. Proceeds of sale of 26 bales of cotton			1,254 90
	Interest to Jan. 1, 1862			100 39
"	" Am't rec'd from Barnett, Micou & Co.—hire of Matthew			309 50
	Interest			24 76
	Total am't of debits			$1,689 55

Guardian asks credit for—

1861.		Voucher.		
Jan.	1. Am't p'd W. B. and A. R. Bell & Co.	23		33 71
60		Voucher.		
	Interest to Jan. 1, 1862			2 69
1861.				
Jan.	1. Am't p'd John Lambreth		24	77 16
	Interest			6 17

	Am't p'd Barnett, Micou & Co. (disallowed)	25	78 30
	Interest		6 16
Jan. 17.	Am't p'd Garrett and Pollard (disallowed).	26	29 43
	Interest		2 30
" 18.	Am't p'd Shular and Ardis (disallowed).	27	198 82
	Interest		15 15
Feb. 11.	Am't p'd Dr. Henderson (disallowed)	28	46 57
	Interest		3 30
Ap'l 4.	Am't p'd G. T. Stewart	29	86 75
	Interest		4 71
June 12.	Am't p'd Letunan Bros. (disallowed)	30	118 80
	Interest		4 76
	Total am't of credits to Jan. 1st, 1862		$714 77
	" " " debits " " " "		$1,689 55
	Balance against guardian		$974 78

STATE OF ALABAMA,
Montgomery County:

Personally appeared before me, Robert Parker, justice of the peace in and for said State and county, Benjamin H. Micou, guardian of Clara E. Boykin, who is known to me, and who being duly sworn deposeth and saith that the foregoing accounts and statements are correct & true.

BENJAMIN H. MICOU.

61 Sworn and subscribed before me this 13th Jan., 1874.

ROBERT PARKER, *J. P.*

This cause coming on to be heard, the said Mrs. Clara E. Boykin, by her attorney, Elmore J. Fitzpatrick, objects to the allowance of certain items in the above account, and the court having listened to the arguments of counsel and heard the testimony offered in support of the said objections, decided and ordered that the said guardian be charged with the following items, to wit:

Hire of slaves for the year 1859		6,270 00
Interest to day of settlement		7,078 10
Hire of slaves for the year 1860		6,270 00
Interest to day of settlement		6,576 50
Hire of slaves for the year 1861		6,270 00
Interest to day of settlement		6,074 90
Hire of slaves for the year 1862		4,180 00
Interest to day of settlement		3,715 45
Hire of slaves for year 1863		3,135 00
Interest to day of settlement		2,434 75
Hire of slaves for year 1864		2,090 00
Interest to day of settlement		1,523 35
Hire of slaves for year 1865		454 00
Interest to day of settlement		294 60
Rent of minors' lands for 1859		1,500 00
62 Interest to day of settlement		1,649 20
Rent of land for 1860		1,500 00
Interest to day of settlement		1,573 30
Rent of land for 1861		1,500 00
Interest		1,453 30
Rent of land for 1862		1,050 00

Int. to day of settlement			924 00
Rent of land for 1863			1,050 00
Interest to day of settlement			840 00
Rent of land for 1864			1,050 00
Int. to day of settlement			756 00
Rent of land for 1865			1,050 00
Int. to day of settlement			672 00
Am't of value of mules rec'd Jan. 1, 1859			2,080 00
Interest to day of settlement			2,246 00
3,000 bus. corn, @ 75 c., Jan. 1, 1859		2,250 00	
18,000 lbs. fodder, @ 75 c. per c. "		1,350 00	
6,000 lbs. pork, @ 7 c. per lb. "		420	
Stock, hogs and cattle, $300 "		300	
Total			4,320 00
Interest to day of settlement			4,838 40

And the court further orders that the account for rents be surcharged as follows:

For the year 1866		1,400 00
Interest to day of settlement		798 00
For the year 1867		1,400 00
Interest to day of settlement		686 00
For the year 1868		500 00
63 Interest to day of settlement		205 00
For the year 1869		1,400 00
Interest to day of settlement		462 00
For the year 1870		500 00
Int. to day of settlement		125 00
For the year 1871		500 00
Int. to day of settlement		85 00
For the year 1872		200 00
Int. to day of settlement		18 00
For the year 1873		200 00
Int. to day of settlement		2 00
		$94,799 95

And the court further orders that the following credits be disallowed and subtracted from said account.

And the court further orders that the following credits asked by the guardian be disallowed, and the amounts thereof, with interest, be added to the balance against said guardian:

For the year 1859:

Am't p'd W. D. Frazier	1	150 00
Interest to Jan. 1st, 1861		17 00
Am't p'd W. B. and A. R. Bell	3	42 25
Interest		3 66
Am't p'd T. J. Dillehay	4	335 00
Interest		29 03
64 Am't p'd P. Lilly	6	299 00
Interest		25 85
Am't p'd J. M. Simmons	7	250 00
Interest		21 00
Am't p'd J. T. Davis, ag't	8	269 37

	Interest		21 04
	Am't p'd Garrett and Pollard	10	129 00
	Interest		10 30
	Am't p'd D. A. Benjamin	11	36 00
	Interest		2 80
	Am't p'd W. E. and R. H. Offutt	12	19 64
	Interest		1 57
	Am't p'd John H. Murphy & Co	14	168 40
	Interest		11 97
	Am't p'd Barnett, Micou & Co	15	321 52
	Interest		22 57
	Am't p'd Freeny and Lide	19	117 25
	Interest		7 42
	Am't p'd B. F. Russey	21	580 00
	Interest		8 70
	Total am't to be deducted from credits for pear 1859 and 1860.		$2,900 34
	Interest on same to day of settlement		3,076 77
	Total		$5,977 11
	Amounts to be deducted from credits for year 1861:		
	Am't p'd Barnett, Micou and Co	25	78 30
65	Interest to Jan. 1st		6 16
	Am't p'd Garrett and Pollard	26	29 43
	Interest		2 30
	Am't p'd Shular and Ardis	27	198 82
	Interest		15 15
	Am't p'd Dr. Henderson	28	46 57
	Interest		3 30
	Am't p'd Lehman Bros.	30	118 80
	Interest		4 76
	Total for 1861		$503 59
	Interest		$488 48
	Total for 1859 and '60		$5,977 11
	Total am't to be added to balance on guardian' acc't		$6,969 18

And the court further orders that the following amounts of debits be stricken out from the said account, and the amounts thereof with interest thereon be deducted from the balance against said guardian in said settlement:

1860.			
Jan. 24.	Proceeds of sale of 120 bales of cotton		6,034 98
	Interest to Jan. 1, 1861		482 70
Oct. 24.	Proceeds of sale of 79 bales cotton		3,510 77
	Interest		46 80
	Total for 1860		$10,075 25
	Int. to day of settlement		10,579 01
	Total		$20,654 26
66	Am'ts to be deducted from debits for 1861:		
	1861.		
	Jan. 2. Proceeds of sale of 26 bales of cotton		1,254 90

Interest to Jan. 1st, 1862	100	39
Interest to day of settlement	1,252	53
Total for 1860	20,654	26
	23,261	98

And the court directs that the balance shown against said guardian by the account stated against him be diminished by the said amount of 23,261.98 and that said balance be increased by said before-mentioned amount of 92,553.95, making an amount of sixty-nine thousand two hundred and ninety-one $\frac{97}{100}$ dollars to be added to the balance, and also the amount of the vouchers disallowed on this settlement, making with interest thereon the sum of six thousand nine hundred and ninety-nine $\frac{11}{100}$ dollars, which, being added to the aforementioned sum, makes the amount of seventy-six thousand two hundred and ninety-one $\frac{08}{100}$ dollars to be added to the balance shown by said account, making the balance against the said guardian on the joint account one hundred and eighty-three
67 thousand seven hundred and twenty-one $\frac{60}{100}$. Error in addition should be $2,246.00 more, making actual balance against guardian $185,967.60, one half of which is $92,983.80, am't due to Mrs. Clara E. Boykin.

Commissions on 92,983.00	4,649	15
Court costs due and unpaid	34	35
	$4,683	50
Balance due ward	88,300	00
	$92,983	80

Filed in office the 17th day of January, 1874.

ALLEN D. STURDIVANT, *Judge, &c.*

Order setting day.

Clara E. Boykin, estate of, as to final settlement.

Probate court.

JANUARY 17th, 1874.

This day came Benjamin H. Micou, the guardian of the estate of said ward, and filed his statements, accounts, vouchers and evidences for a final settlement of his said guardianship, and said accounts having been examined by the court and found apparently correct, and being now reported for such settlement, it is ordered that the matter of said set-
68 tlement be set for hearing on the 10th day of February, 1874, and that notice of the time and nature of such settlement be given by publication for three successive weeks in the East Alabama Head Light, a newspaper published in said county, notifying all persons interested in said settlement to appear on said day of said settlement and contest the same if they think proper; and that notice of said settlement, and of the day and place and time of hearing the same, be given to the said Clara E. Boykin and her husband Frank Boykin.

ALLEN D. STURDIVANT, *Judge.*

Decree on final settlement.

Clara E. Boykin, estate of, decree on final settlement.

Probate court.

FEBRUARY 10th, 1874.

This day having been set to hear and determine all matters as to the accounts heretofore filed by Benjamin H. Micou as the guardian of the estate of Clara E. Boykin, formerly Clara E. Micou, and now the wife of one Frank S. Boykin, for final settlement of his said guardianship, now comes the said Benjamin
69 H. Micou, by his attorney, David T. Blakey, esq., and moves the court that his said accounts may be passed and allowed, as the same have been filed by him as aforesaid. And it appearing to the court that due notice of the nature of and of the time set to make such settlement have been given in all respects according to law, and strictly in pursuance of the order of court in said estate made and entered on the 17th day of January, 1874, by advertisement in the Dadeville Head Light, a weekly newspaper published in Dadeville, for three successive weeks next before this day, and that the said Clara E. Boykin, formerly Clara E. Micou, has attained to the full age of twenty-one years before the filing of said account, and the said Clara E. Boykin and her husband, Frank S. Boykin, now appearing in open court, by their attorney, the court proceeds to hear the matters pertaining to said accounts, and to consider the evidences submitted relating thereto.

And the said Clara E. Boykin and her husband, Frank S. Boykin, having filed exceptions to said accounts of said guardian, and in-
70 troduced evidence in support of said exceptions, the court is of the opinion from the evidence submitted that said exceptions are well taken.

It is thereupon considered and ordered that said account be surcharged and restated, in accordance with said exceptions and the rulings of the court, and said accounts having been surcharged and restated as ordered, whereupon it is shown by the accounts so restated that the said Benjamin H. Micou, as the guardian of the joint estate of Clara E. Boykin, formerly Clara E. Micou, and Lucy B. Micou, has received, including the balance due on his last annual settlement of guardianship up to the 18th day of July, 1859, the sum of one hundred and ninety-one thousand five hundred and three $\frac{32}{100}$ dollars in money, and that he has justly expended and paid out in and about the costs and charges necessary and incident to said guardianship, and in payments of the just debts accruing for and on account of said guardianship, as shown by proper and legal vouchers, the sum of seven thousand seven hundred and eighty one $\frac{72}{100}$ dollars, leaving in the hands of said guardian a balance of one hundred and eighty-three
71 thousand seven hundred and twenty-one $\frac{60}{100}$ dollars due the said Clara E. Boykin and Lucy B. Micou on account of said estate.

And it appearing that said accounts are full and correct, it is considered, ordered, and decreed by the court that said accounts be, and the same are hereby, in all things passed and allowed as above stated.

And it further appearing to the court that of the final balance of money in the hands of said guardian as found by the court, the said Clara E. Boykin is entitled to one-half, amounting to the sum of

ninety-two thousand nine hundred and eighty-three $\frac{80}{100}$ dollars, subject to court costs and commissions on said amount, amounting in the aggregate to the sum of four thousand six hundred and eighty-three $\frac{50}{100}$ dollars, which amount being deducted will still leave in the hands of said guardian the sum of eighty-eight thousand three hundred dollars due said Clara E. Boykin; it is thereupon considered, ordered, adjudged and decreed by the court that the said Clara E. Boykin and her husband, Frank S. Boykin, have and recover of and from
72 the said Benjamin H. Micou, guardian, as aforesaid, for the sole use and benefit of the said Clara E. Boykin, the sum of eighty-eight thousand three hundred dollars, for which let execution issue against the said Benjamin H. Micou and the sureties upon his guardian bond now on file in this court.

It is further ordered that said Benjamin H. Micou pay the costs of this settlement and all costs due and unpaid in this estate, for which let execution issue.

It is further ordered that all accounts, vouchers, evidences and statements on file relating to this and any former settlement and all other paper writings on file respecting said estate be recorded.

ALLEN D. STURDIVANT, *Judge, &c.*

STATE OF ALABAMA,
Tallapoosa County:

I, Allen D. Sturdivant, judge of the probate court for said county and State, hereby certify that the foregoing, from 1 to 22 pages, inclusive, contain a true and perfect transcript of the orders and pro-
73 ceedings had in the probate court in the foregoing stated case, as appears from the records on file in this office.

In witness whereof I have hereunto set my hand and official signature, at office, this 18th day of April, A. D. 1877.

ALLEN D. STURDIVANT, *Judge, &c.*

EXHIBIT B.

To the honorable Allen D. Sturdivant, judge of the probate court of Tallapoosa County:

Benj. H. Micou, who was heretofore appointed guardian of the estate of Lucy B. Micou, a minor, and having resigned said guardianship, in answer to citation served on him to make such final settlement of his said guardianship, respectfully showeth unto your honor:

That all matters, credits, charges, and vouchers in relation to the estate of the said minor, and also of the estate of Clara E. Boykin, formerly Clara E. Micou, of whose estate said Benjamin H. Micou was guardian, are joint, and relate equally to each, and that the account
74 for final settlement of the said Lucy B. McCou's estate is the same as that for the settlement of said Clara E. Boykin's estate. And, therefore, your petitioner prays that the account and vouchers heretofore filed for settlement of said Clara's estate be again filed *for* as account and vouchers in said Lucy B. Micou's estate.

BENJ. H. MICOU.

THE STATE OF ALABAMA,
Elmore County:

Personally appeared before me, E. D. Baker, an acting justice of the peace in and for said county, Benjamin H. Micou, who is known to me,

who, being duly sworn, saith that all the statements in the foregoing petition and account are true.

Sworn to and sub-cribed before me this 31st day of Jan'y, 1874.

E. D. BAKER, *J. P.*

Benjamin H. Micou, guardian of Lucy B. Micou, a minor, in account for final settlement.

The guardian charges himself with one half of the following items, to wit:

Balance on annual settlement July 18th, 1859		9,896 75
Interest to day of settlement		11,546 20
Am't rec'd from T. M. Barnett, adm'r of T. M. Barnett, sr., dec'd, March 11th, 1861		12,210 00
75 Interest to day of settlement		12,515 00
Am't rec'd T. M. Barnett, adm'r, March 16th, 1861		16,640 03
Interest to day of settlement		16,972 80
Am't of decree rendered in favor of said minors in settlem't of Lucy A. Micou's estate		4,512 48
Ap'l 7th, 1871. Interest to date		937 77
Am't ⅓ proceeds sales of lands belonging to estate T. M. Barnett, sr., July 18th, 1870		3,190 00
Interest		841 30
Hire of minor's slaves for year 1859		6,270 00
Interest to day of settlement		7,078 10
Hire of slaves for year 1860		6,270 00
Interest		6,576 50
Hire of slaves for year 1861		6,270 00
Interest		6,074 90
Hire of slaves for year 1862		4,180 00
Interest		3,715 45
Hire of slaves for year 1863		3,135 00
Interest to day of settlement		2,434 75
Hire of slaves for year 1864		2,090 00
Interest		1,523 35
Hire of slaves for year 1865		454 00
Interest		294 60
Rent of minor's lands for year 1859		1,500 00
Interest		1,649 20
Rent for 1860		1,500 00
Interest		1,573 30
Rent for 1861		1,500 00
76 Interest		1,453 30
Rent for 1862		1,050 00
Interest		924 00
Rent for 1863		1,050 00
Interest		840 00
Rent for 1864		1,050 00
Interest		756 00
Rent for 1865		1,050 00
Interest		672 00
Value of mules rec'd Jan. 1st, 1859		2,080 00
Interest		2,496 00
3,000 bus. corn, @ 75 c	2,250 00	
18,000 lbs. fodder, @ 75	1,350 00	

6,000 lbs. of pork, @ 7 c	420 00	
Stock hogs & cattle	300 00	
Total		4,320 00
Interest		4,838 40
Rent of lands for 1866		2,400 00
Interest		1,358 00
Rent for 1867		2,400 00
Interest		1,166 00
Rent for 1868		1,500 00
Interest		605 00
Rent for 1869		2,400 00
Interest		782 00
Rent for 1870		1,500 00
Interest		365 00
Rent for 1871		1,500 00
Interest		245 00
Rent for 1872		1,200 00
Interest		108 00
Rent for 1873		1,200 00
Interest		12 50
		194,672 93
One half above amount		97,336 46½

Am't rec'd by guardian.

And the guardian asks to be allowed credit for one-half of the following amounts, to wit:

1861.		
Jan. 1. Am't invested in purchase of lands		3,200 00
Interest to date		3,360 00
1866.		
June 29. Taxes p'd on minor's interest in Arkansas lands.		400 00
Interest		238 42
1871.		
March. Taxes on Arkansas lands		583 30
Interest		139 99
1859.		
Nov. 2d. Am't p'd Sturdivant, judge, &c. Vr. 2		22 46
Interest to day of settlement		25 30
Am't p'd H. J. Lowry, voucher 5		4 00
Interest		4 36
1860.		
Jan. 1st. Am't p'd John Lambreth, voucher 9		42 66
Interest		48 20
Jan. 3. Am't p'd G. T. Stewart, voucher 13		78 15
Interest		88 30
M'ch 16. Am't p'd W. F. Wade, voucher 18		35 68
Interest		37 93
Oct 2. Am't p'd Houston, voucher 20		32 00
Interest		33 80
1860.		
Dec. 31. Am't p'd W. B. & H. R. Bell & Co., voucher 22.		11 70
Interest		12 20

1861.			
Jan.	1. Am't p'd W. B. & H. R. Bell & Co., voucher 23..	33	71
	Interest.....	35	21
"	Am't p'd John Lambreth, voucher 24.....	77	16
	Interest	81	46
Ap'l	4. Am't p'd G. T. Stewart, voucher 29.....	86	75
	Interest.....	88	30
		$8,801	04
One-half of above being credits due to guardian.....		4,400	52
Commissions on $97,336.46.....		4,866	82
Court costs on this settlement.....		37	35
Balance in hands of guardian.....		$88,031	77
		97,336	46

Now comes Henry A. Garrett into open court and accepts the appointment of guardian ad litem for Lucy B. Micou, a minor, and consenting to act as such, denies each and every item and amount on the credit side of said account for final settlement, and requires strict proof of the same.

February 24th, 1874.

HENRY H. GARRETT,
Guard'n ad litem.

Filed in office the 3d day of February, 1874.

ALLEN D. STURDEVANT,
Judge, &c.

79 *Resignation of guardian.*

To the Hon. Allen D. Sturdivant, judge of the probate court of Tallapoosa County.

I hereby tender my resignation of the office of guardian of the estate of Lucy B. Micou, a minor, believing that the interest of my said ward require that I should resign said office and make settlement of my account as soon as possible.

Yours, very respectfully,

BENJ. H. MICOU.

Filed in office Jan'y 26th, 1874.

Order on resignat'n.

Lucy B. Micou, a minor, estate of, as to resignation of guardian.

Probate court.

JANUARY THE 26TH, 1874.

Now, on this day comes Benjamin H. Micou and tenders his resignation of the guardianship of said minor, and prays the court to accept the same. It is thereupon considered, ordered, and decreed that said resignation be accepted, and ordered to be recorded.

It is further ordered that said Benjamin H. Micou file his statements, accounts, vouchers, and evidences for a final settlement of his
80 said guardianship within thirty days from this day, and that citation issue accordingly.

ALLEN D. STURDIVANT,
Judge, &c.

Ord. sett'g day, &c.

Lucy B. Micou, minor, estate of, as to final settlement.

Probate court.

FEBRUARY 3D, 1874.

This day came Benjaimin H. Micou, the former guardian of the estate of said minor, and filed his statements, accounts, vouchers, and evidences for a final settlement of his said guardianship, and said accounts having been examined by the court and found apparently correct, and being now reported for such settlement, it is ordered that the matter of said settlement be set for hearing on the 24th day of February, 1874, and that notice of the time and nature of such settlement be given by publication for three successive weeks in the Dadeville Head Light, a weekly newspaper published in Dadeville, in said county.

It is further ordered that Henry A. Garrett, esq., be and he is hereby appointed guardian ad litem to represent and protect the interest of the said Lucy B. Micou, minor, as aforesaid.

81 It is further ordered that said Henry A. Garrett, esq., have notice of said appointment.

ALLEN D. STURDIVANT,
Judge, &c.

Decree.

Lucy B. Micou, a minor, estate of. Decree on final settlement.

Probate court.

FEBRUARY 24TH, 1874.

This day having been set to hear and determine all matters as to the accounts heretofore filed by Benjamin H. Micou, as the guardian of the estate of said ward, for a final settlement of his past guardianship, now comes the said Benjamin H. Micou, former guardian as aforesaid, and moves the court that his said accounts may be passed and allowed as the same stands filed by him as aforesaid.

And it appearing that due notice of the nature of, and of the time set to make such settlement, has been given in all respects according to law and strictly in pursuance of the order of court in said estate made and entered on the 3d day of February, 1874, and Henry A. Gar-

82 rett, esq., who was heretofore duly appointed by the court to act as guardian ad litem to represent and protect the interest of the said Lucy B. Micou, minor as aforesaid, concerned and interested in this settlement, now appearing and in open court consenting to act and proceeding to contest said settlement. The court proceeds to hear the matters pertaining to said accounts and to consider the evidences submitted relating thereto. Whereupon it is shown by sufficient proof that said guardian has received of the assets of the estate of said Lucy B. Micou, minor as aforesaid, the sum of ninety-seven thousand three hundred and thirty-six $\frac{46}{100}$ dollars in money, and that he has justly expended in and about the costs and charges necessary and incident to said guardianship and in the payment of all just debts and charges of said ward the sum of nine thousand three hundred and four $\frac{69}{100}$ dollars, leaving in his hands a balance of eighty-eight thousand and thirty-one $\frac{77}{100}$ dollars due said Lucy B. Micou, minor as aforesaid. And said account

appearing to be full and correct, it is considered, ordered, and
83 decreed that said accounts be, and the same are hereby, in all things passed and allowed as above stated. And it further appearing to the court that no one has come forward and qualified as the successor of the said Benjamin H. Micou, as such former guardian, and the said minor having failed to nominate to the court any person to be her guardian, it is considered, ordered, adjudged, and decreed by the court that Henry A. Garrett, esq., the guardian ad litem appointed to represent and protect the interest of the said Lucy B. Micou in this settlement, have and recover of and from the said Benjamin H. Micou, former guardian as aforesaid, and the sureties on his guardian bond, now on file in this court, the sum of eighty-eight thousand and thirty-one $\frac{77}{100}$ dollars for the sole use and benefit of said ward, for which execution may issue.

It is further ordered that the said Benjamin H. Micou pay the costs of this settlement and all costs due and unpaid in said estate, for which execution may issue. It is further ordered that all accounts,
84 vouchers, evidences, and statements on file relating to this and any former settlement, and all other paper writings on file respecting said estate be recorded.

ALLEN D. STURDIVANT, *Judge, &c.*

STATE OF ALABAMA,
Tallapoosa County:

I, Allen D. Sturdivant, judge of the probate court for said county and State, hereby certify that the foregoing from 1 to 14 pages, inclusive, contain a true and perfect transcript of the orders and proceedings had in the probate court in the foregoing stated case, as appears from the records on file in this office.

In witness whereof I have hereunto set my hand and official signature at office this 18th day of April, A. D. 1877.

ALLEN D. STURDIVANT, *Judge, &c.*

EXHIBIT C.

To the Hon. Charles Turner, chancellor of the middle chancery division of Alabama:

Your petitioner, Benjamin H. Micou, who is a resident of the
85 county of Elmore and State of Alabama, respectfully showeth unto your honor—

1st. That he is the father of Lucy B. Micou, a minor, over the age of eighteen years, who resides with petitioner, and that he is also the guardian of said minor.

2nd. That it would be to the interest of said minor to be relieved from the disabilities of minority for the following reasons: Said minor is possessed in her own right of a considerable estate, real and personal, and a large part of said personal estate consists of demands against petitioner, which he is now ready and willing to settle and account for; said minor is a young lady of at least average intelligence and more than ordinary education and acquirements, and is perhaps as competent now to manage her own affairs as she ever will be. Your petitioner is at this time able and willing to settle all her demands against him. But inasmuch as he is engaged in commercial and manufacturing pursuits, and as the result of such pursuits is proverbially uncertain, petitioner

may, by adverse fortune, be deprived of the means of making
86 such full settlement after said minor arrives at the age of twenty-one years; and petitioner further states that Thomas M. Barnett and Nicholas D. Barnett, the sureties of petitioner on his bond as guardian, are engaged in the same pursuits as himself, and liable to the same disaster. And petitioner further showeth unto your honor that the real estate belonging to said minor could be employed by her to much greater benefit if she were able to act for herself in relation to it.

And your petitioner most respectfully prays that your honor will decree that said minor, Lucy B. Micou, be relieved of the disabilities on nonage; and your petitioner will ever pray, &c.

BLAKEY AND FERGUSON,
Sol's for Benj. H. Micou.

THE STATE OF ALABAMA,
Montgomery County:

Personally appeared before me, B. D. Fry, a notary public and ex-officio J. P. for said county, Benjamin H. Micou, the petitioner in the foregoing petition. who is known to me, and who, being duly sworn, saith that the statements in the foregoing petition are true.

BENJ. H. MICOU.

87 Sworn to and subscribed before me this third day of May, 1873.

B. D. FRY,
Notary Public and ex-officio J. P.

Filed in office May 23d, 1873.

W. P. GADDIS, *Register.*

THE STATE OF ALABAMA,
Elmore County:

In chancery at Wetumpka. Vacation after fall term 1872.

In the matter of the petition of Benj. H. Micou, father and guardian of Lucy B. Micou, a minor.

In this matter it being made to appear to the chancellor that the said Benjamin H. Micou has filed in said court his petition, praying that the said Lucy B. Micou may be relieved from the disabilities of non-age, and application having been made to me, at chambers in vacation, upon said petition for an order directing in what manner the evidence touching the maters set forth in said petition shall be taken, it is therefore,

upon consideration thereof, ordered, adjudged, and decreed that
88 all evidence touching said petition be taken ore tenus before the court at the term thereof to be held at Wetumpka on Monday, the 2d day of June, A. D. 1873.

May 17th, 1873.

CHAS. TURNER,
Chancellor.

In chancery at Wetumpka.

In the matter of Lucy B. Micou. Petition of B. H. Micou, guardian, &c.

I, W. P. Gaddis, register in chancery at Wetumpka, hereby certify to the court that the following order of publication heretofore made in this cause, to wit——

Guardian's notice.

To all whom it may concern:

Take notice that Benj. H. Micou, guardian of Lucy B. Micou, a minor over the age of eighteen years, and also the father of said minor, has made application to the chancery court of this district to have said relieved from the disabilities of minority, and that motion will be made in said court on Wednesday, the 4th day of June next, for the granting of said petition, at which time and place all persons interested may appear and contest the same.

W. P. GADDIS,

89 *Register in Chancery for 2d Dist., Middle Division, &c.* ——

was published for one week, commencing on the 23d day of May, 1873, in the Elmore Republican, a newspaper published in Wetumpka. The said Elmore Republican is the only newspaper published in the 2d district of the middle chancery division of the State of Alabama.

June 2d, 1873.

W. P. GADDIS, *Register.*

In chancery at Wetumpka.

In the matter of Lucy B. Micou for removal of disabilities of nonage.

This cause coming on to be heard was submitted for final decree on the petition of Benj. H. Micou, father of said minor, and the certificate of publication by the register, and the evidence of Benj. H. Micou, taken ore tenus in open court in accordance with former order of Chas. Turner, chancellor, made in vacation after fall term, 1872; and it appearing to the court from the evidence that it is to the interest of said minor to be relieved from the disabilities of minority, it is therefore ordered,

90 adjudged, and decreed that the said Lucy B. Micou, a minor over the age of eighteen years, be relieved from all the disabilities of minority, and that she be and hereby is empowered to contract and be contracted with, to sue and be sued, implead and be impleaded, to buy, sell, and hold real estate, and in fine to do and perform every act and thing of any and every kind and description as fully and completely as she might and could do if of the age of twenty one years; except that she shall not be allowed during her minority to give to her late guardian, or the sureties on his guardian's bond, any acquittances or releases of any kind on account of his or their indebtedness to her for money or property belonging to her estate, and received by her said guardian, that shall be binding upon her to any extent beyond the value of the money or property actually paid or delivered to her.

It is further ordered that Benj. Micou pay the costs herein to be taxed.

June 1st, 1874.

CHAS. TURNER, *Chancellor.*

91 (Endorsed:) Filed in office for record on the 4th day of June, 1874, and duly recorded in book L of conveyances, page 222.—W. E. Dennis, Judge of Probate.

THE STATE OF ALABAMA,
Elmore County:

In chancery at Wetumpka, 2d dist. mid. chan. division.

I, Wm. P. Gaddis, register in chancery at Wetumpka, in said district

and division, hereby certify that the foregoing paper writing, embracing six pages, numbered 1, 2, 3, 4, 5, and 6 respectively, constitutes a correct and full transcript of all the file and proceedings in the said court of chancery at Wetumpka in the matter of the application of Benj. H. Micou, father and guardian of Lucy B. Micou, minor, for the removal of the disabilities of nonage, lately pending in said court, as the same appears of record.

Given under my hand and the seal of the said court of chancery on this the 19th day of July, A. D. 1877.

W. P. GADDIS, *Register.*

92 EXHIBIT D.

Order to enter nunc pro tunc certain orders, &c., on petition to purchase plantation, &c.

Clara E. and Lucy B. Micou, minors.

Probate court, Tallapoosa Co., Alabama.

JULY 18, 1859.

This being the day to which the report of the purchase of certain lands for said minors, by their guardian, Benjamin H. Micou, was ordered to lie over for confirmation, now comes the said guardian, by his attorney, and moves the court to enter nunc pro tunc on the minutes of the court an order appointing Thomas M. Barnett, Nicholas D. Barnett, C. L. Matthews, and James Jones commissioners to examine and report upon the value as well as the necessity of the purchase of the S. E. ¼ sec. 27; northeast ¼ of sec. 34; west ½ of S. W. ¼ of sec. 35; the E. ½ of S. E. ¼ of sec. 34; and N. W. ¼ sec. 35, all in township 16 of range 20, by the said Benj. H. Micou, as guardian of the said Clara E., Lucy B. Micou, minors as aforesaid, which said order was made, but not entered up in full on the minutes of the court, by Simeon Goolsby,
93 then the presiding judge of this court, on the 22nd day of November, 1858, and also to enter nunc pro tunc on the minutes of this court an order made on the 20th day of December, 1858, on the coming in of the report of said commissioners as to the value of said lands in said first order mentioned, and the necessity of the purchase thereof by said guardian for said minors, authorizing and empowering said guardian to proceed and make said purchase of said mentioned and described lands for said minors at the sum or price of twenty-two $\frac{50}{100}$ dollars, amounting in the aggregate to the sum of fourteen thousand and four hundred dollars, which said order was also made by Simeon Goolsby, the then presiding judge of this court, on the application docket of said court, on the day aforesaid; and also to enter nunc pro tunc on the minutes of this court such other and further orders and decrees on any and all matters pertaining to the guardianship of the said Benjamin H. Micou, over the persons and estates of the said
94 minors, Clara E. and Lucy B. Micou, from his appointment as such guardian in this court up to the present time;

And it appearing to the satisfaction of the court that, by legal and proper evidence, and by entries made on the papers on file in this office in the handwriting of the said Simeon Goolsby, the presiding judge of this court at that time, and by entries also in his handwriting on the

application docket of this court, that Thomas M. Barnett, Nicholas D. Barnett, C. L. Matthews, and James Jones were appointed by this court on the 22 day of November, 1858, commissioners to examine S. E. ¼ sec. 27, northeast ¼ of sec. 34, west ½ of S. W. ¼ of sec. 35, east ½ of the southeast ¼ sec. 34, and the northwest ¼ of sec. 35, all in township 16 of range 20, in Montgomery County, Ala., and to report upon the value of the same and the necessity of the purchase thereof by the said Benj. H. Micou, guardian, &c., for the use and as a plantation for the said Clara E. and Lucy B. Micou, minors as aforesaid, which said order was omitted to be entered in full and in regular form on the minutes of the
95 court by the then presiding judge (who has since died), leaving the record imperfect; and Henry A. Garrett, who was appointed guardian ad litem to represent and protect the interests of said minors in this proceeding being present, and consenting to act, making no objection to this motion;

And it also appearing to the court by legal and proper evidence, and by an entry made on the application docket of this court in the handwriting of the said Simeon Goolsby, the then presiding judge of this court, on the 20 day of December, A. D. 1858, that an order was made, on the coming in of the report of said Thomas M. Barnett, Nicholas D. Barnett, Charles L. Matthews, and James Jones as to the value of said land set out and described in the order of this court of November 22, 1858, and the necessity of the purchase thereof by the said Benjamin H. Micou, guardian as aforesaid, as a plantation for the said Clara E. and Lucy B. Micou, minors as aforesaid, authorizing and empowering the said Benjamin H. Micou to proceed and purchase said lands mentioned and described in the report of said commissioners at the
96 price or sum of twenty-two $\frac{50}{100}$ dollars per acre, amounting in the aggregate to the sum of fourteen thousand four hundred dollars;

And it also appearing to the court by legal and proper proof, and by entry made on the application docket of this court in the handwriting of the said Simeon Goolsby, the then presiding judge of this court, that letters of guardianship over the persons and estate of Clara E. and Lucy B. Micou, minors, were granted by this court to the said Benjamin H. Micou on the 28th day of November, A. D. 1857, upon his entering into bond, with sufficient security, in the sum of two hundred and fifty thousand dollars; and that the said Benjamin H. Micou, having executed such bond, with Thomas M. Barnett and N. D. Barnett as his securities therein, which bond was approved and ordered filed and recorded by the court, and that said letters of guardianship did issue to the said Benj. H. Micou over the persons and estates of the said Clara E. and Lucy B. Micou, minors as aforesaid, on the 28th day of November, 1857;
97 And it also appearing to the court by legal and proper evidence that the said by entries made on the paper itself, and on the application docket of this court, in the handwriting of Simeon Goolsby, the then presiding judge of this court, that said guardian filed an inventory of the estate of Clara E. and Lucy B. Micou, his said wards, on the 27th day of January, 1858, which said inventory was examined, approved, and ordered to be filed and recorded on the 27th day of January, 1858, all of which said orders were omitted to be entered up in full and in proper form on the minutes of this court by the then presiding judge of this court, who has since died, leaving the record of this court as to said matters incomplete and imperfect, and Henry A. Garrett, who was appointed to represent and protect the interest of said minors being present and consenting to act as such guard'n ad

litem, making no objection to the motion of the said Benjamin H. Micou, guardian as aforesaid, to enter said orders nunc pro tunc on the minutes of this court:

It is therefore ordered, adjudged, and decreed by the court that
98 each and all of said orders and decrees be entered nunc pro tunc as of the respective dates when the said several orders were made and should have been entered upon the minutes of this court in the order following, to wit:

Application for letters of guardianship.

In the matter of the estate of Clara E. and Lucy B. Micou, minors.

NOV. 28TH, 1857.

Present Hon. Simeon Goolsby, judge of probate, presiding.

Probate court, Tallapoosa County, Alabama. Special term.

NOV. 28, 1857.

This day came Benjamin H. Micou, and moves the court to appoint a guardian over the persons and estates of Clara E. and Lucy B. Micou, minors, under the age of fourteen years, and it appearing to the court that said minors have in expectancy an estate in their own right of about one hundred and twenty-five thousand dollars, that they are minors under the age of fourteen years, and that they reside with their father, Benj. H. Micou, in this county, it is therefore ordered by the court that letters of guardianship issue to the said Benjamin H.
99 Micou, over the persons and estates of Clara E. and Lucy B. Micou, minors, as aforesaid, on the *the* said Benj. H. Micou entering into bond and security in the sum of two hundred and fifty thousand dollars; and the said Benj. H. Micou having execu'ed such bond with Thomas M. Barnett and Nicholas D. Barnett as his securities therein, and having duly filed said bond in the office of the judge of this court, it is therefore ordered that the same be, and the same is hereby, approved, and that said letters of guardianship do forthwith issue; and it is further ordered that said bond be filed and recorded.

SIMEON GOOLSBY,
Judge of Probate.

Order on filing inventory.

In the matter of the estate of Clara E. and Lucy B. Micou, minors.

Probate court, Tallapoosa County, Alabama. Special term.

JANUARY 27, 1858.

Present, Hon. Simeon Goolsby, judge of probate, presiding.

JAN'Y 27, 1858.

This day came Benj. H. Micou, guardian of Clara E. and Lucy B. Micou, minors, and presents his inventory of the estate of Clara E. and Lucy B. Micou in due form and properly verified. It is
100 ordered that the same be filed and recorded.

SIMEON GOOLSBY,
Judge of Probate.

Application to purchase plantation for minors.

In the matter of the estate of Clara E. and Lucy B. Micou, minors.

Probate court, Tallapoosa County, Alabama.

Present, Hon. Simeon Goolsby, judge of probate, presiding.

Probate court Tallapoosa Co., Alabama. Special term.

NOV. 22D, 1858.

This day came Benjamin H. Micou, guardian of Clara E. and Lucy B. Micou, minors, and filed his petition in writing under oath, setting forth among other things that it is to the interest said minors that the slaves belonging to them be kept together and worked on a plantation, instead of hired out, and that for said purposes it is necessary to purchase a plantation on which to work said slaves and to the interest of said minors so to do, also suggesting the following lands contracted for by him at the price of twenty-two $\frac{50}{100}$ dollars per acre, lying in Montgomery
101 County, Alabama, as a suitable plantation for the use and purpose aforesaid, to wit, S.E. $\frac{1}{4}$ of section 27; northeast $\frac{1}{4}$ of sec. 34; west $\frac{1}{2}$ SW. $\frac{1}{4}$ of sec. 35; the east $\frac{1}{2}$ of SE. $\frac{1}{4}$ of sec. 34, and the northwest $\frac{1}{4}$ of sec. 35; all in township sixteen, of range twenty, in said county of Montgomery, Ala.; and praying an order of court authorizing and empowering him to purchase said land for said minors, and for them, out of any moneys in his hands, or that may hereafter come into his hands as the guardian of said minors, at the price of twenty-two $\frac{50}{100}$ dollars per acre, amounting, in the aggregate, to the sum of fourteen thousand four hundred dollars. And it appearing to the court from legal and proper evidence that it is to the interest of said minors that said slaves should be kept together and worked on a plantation, it is therefore ordered by the court that Thomas M. Barnett, N. D. Barnett, C. L. Matthews, and James Jones be, and they are hereby, appointed commissioners to ex-
amine said lands, and report on oath to this court as to the value
102 of said lands, and also as to the necessity of the purchase thereof by Benj. H. Micou, guardian of Clara E. and Lucy B. Micou, minors, for the use of said minors; said report to be made and returned into this court on or before the 20th day of December, 1858.

SIMEON GOOLSBY,
Judge of Probate.

Order to purchase plantation.

In the matter of the estate of Clara E. and Lucy B. Micou, minors.

Probate court, Tallapoosa County, Alabama, December 20th, A. D. 1858.

Present, Hon. Simeon Goolsby, judge of probate, presiding.

Probate court, Tallapoosa Co., Alabama. Special term.

DEC. 20, '58.

This day came Benj. H. Micou, guard'n of Clara E. and Lucy B. Micou, minors, and filed the report in writing and under oath of Thomas M. Barnett, Nicholas D. Barnett, C. L. Matthews, and James Jones, commissioners appointed by order of this court, made and entered on

the 22d day of Nov'r, 1858, to examine and report upon the value of the S. E. ¼ of sec. 27; northeast ¼ of sec. 34; west ½ of the S. W.
103 ¼ of sec. 35; the E. ½ of the S. E. ¼ of sec. 34; and the N. W. ¼ of sec. 35; all in township 16, of range 20, in Montgomery County, Alabama; and also to report upon the necessity of the purchase of said lands by the said Benj. H. Micou, guardian of Clara E. and Lucy B. Micou, minors, for the use of said minors, and for the purpose of keeping the slaves belonging to said minors together and working them on a plantation. And it appearing to the court, from the report of said commissioners and from legal and proper evidence, that it is to the interest of said minors that said slaves should be kept together and worked on a plantation, and that the purchaser of said above-described plantation is a necessary one, and it also appearing to the court that the price agreed to be paid by the said Benj. H. Micou for said plantation, to wit, twenty-two $\frac{50}{100}$ dollars, or, in the aggregate, the sum of fourteen thousand four hundred dollars, though high, is not an unreasonable one, &c., &c., it is therefore ordered, adjudged, and decreed by the
104 court that the said Benjamin H. Micou do forthwith proceed and purchase said lands or plantation above described at the price or sum aforesaid, for the use and benefit of the said minors, the said Clara E. and Lucy B. Micou, and that the said guardian be and he is hereby authorized to pay for said plantation, out of any moneys in his possession, or that may hereafter come into his possession, as guardian of the said Clara E. and Lucy B. Micou, minors as aforesaid; and it is further ordered the title above described lands be taken or made in the name and for the use, benefit, and behoof of said minors, Clara E. and Lucy B. Micou; and it is further ordered that when said guardian shall have perfected said purchase, and received titles for said land, he report the same to this court.

SIMEON GOOLSBY,
Judge of Probate.

And it is further ordered by the court that the report of commissioners, Thomas M. Barnett, Nicholas D. Barnett, C. L. Matthews, and James N. Jones, made under and in pursuance of the order of this
105 court made the 22nd day of November, 1858, as to the purchase of said lands for said minors be endorsed filed as of that date, and recorded, and that all other papers on file relating or in any way pertaining to the guardianship of said minors be also recorded. And it is also further ordered, adjudged, and decreed that said guardian pay all the costs accruing from or under or by reason of this motion, for which execution may issue.

ALLEN D. STURDIVANT,
Judge of Probate.

EXHIBIT E.

THE STATE OF ALABAMA,
Montgomery County:

Whereas an execution issued from the office of the judge of probate court of Tallapoosa County on the 11th day of May, 1874, in favor of Clara E. Boykin and Frank Boykin against Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, and judgment rendered against them on the 10th day of February, 1874, for the sum of eighty-eight thousand three hundred dollars by the consideration of said
106 court;

And whereas another execution issued from the office of said judge of probate court in favor of Henry A. Garrett as guardian of Lucy B. Micou against said B. H. Micou, N. D. Barnett, and T. M. Barnett, on a judgment rendered against them on the 24th day of February, 1874, for the sum of eighty-eight thousand and thirty-one $\frac{77}{100}$ dollars by the consideration of said court, commanding me as sheriff of said county to levy for the same on the goods and chattels, lands and tenements of said defendant, to make said monies, and which said executions came into my hands as such sheriff on, to wit, the 13th day of May, 1874, and were then and there levied on sundry lands, lots and parcels of land which are endorsed on said fi. fa.;

And whereas after the levy of said fi. fa's, to wit, on the 3d day of August, 1874, there came into my hands sundry other alias fi. fa's issued by the clerk of the city court of Montgomery, on the day last aforesaid, to wit, one in favor of Alexander Pitman against Benjamin H. Micou,
N. D. Barnett and T. M. Barnett, for the sum of five thousand three
107 hundred and fifty-two $\frac{88}{100}$ dollars, and judgment rendered in said court on, to wit, the 25th day of February, 1874, one in favor of James F. D. Lanier against N. D. Barnett, for the sum of six thousand and three $\frac{14}{100}$ dollars on a judgment rendered in said court on, to wit, the 21st day of February, 1874; one in favor of said James F. D. Lanier against T. M. Barnett, for the sum of six thousand and three $\frac{14}{100}$ dollars on a judgment rendered in said court on, to wit, the 21st day of February, 1874, and one in favor of said James F. D. Lanier against Benjamin H. Micou, for the sum of six thousand and three $\frac{14}{100}$ dollars on a judgment rendered in said city court, to wit, the 21st day of Februar, 1874;

And whereas, after the levy aforesaid, having given defendants notice thereof at the time of making said levy, and after having given notice of the time and place of sale for thirty days by publication thereof in the Montgomery Advertiser, a paper published in the city of Montgomery,
State and county aforesaid, on Monday the 3d day of August,
108 1874, I did expose said lands at public sale, at the Artesian Basin in the the city of Montgomery during the legal hours of sale, and at which said sale Henry C. Semple, he being the highest, best, and last bidder therefor, became the purchaser of the following lots and parcels of land so levied upon, to wit: Section 17, the S. $\frac{1}{2}$ the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$; sec. 8, the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$; sec. 5, in T. 15, R. 20, the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of sec. 10, T. 15, R. 20, at the sum of $7,000.00. Lots 1 & 2, in square 9, Hanrick's Plat, at the sum of $4,000.00; part of lot, in square No. 14, being 26$\frac{1}{2}$ feet by 120 on the southeast corner of Bibb and Commerce streets, at the sum of $10,000.00. Lots No. 11, South Market street, and lot No. 11, North Washington street, at the sum of $9,000.00; also became the purchaser of section 6, section 7, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$; sec. 18, the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$; sec. 5, the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$; sec. 18, the N. $\frac{1}{2}$ of sec. 5; the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, sec. 4, in T. 15, R. 20; the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ in sec. 32, T. 16, R. 20; the NE. $\frac{1}{4}$ the SE. $\frac{1}{4}$, sec. 31, T. 10, R. 20, at the sum of $20,000.00. Also lots 1 & 2,
South Adams street, and lot No. 11, East Court street, at the sum of
109 $15,000.00. Also the W. $\frac{1}{2}$ and NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ sec. 15; the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, sec. 4; the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, sec. 16; the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, sec. 16, in T. 15, R. 20, at the sum of $8,000.00; also part of lot 5, square 8, East Alabama, 80 feet on Commerce street by 100 feet deep, at the sum of $18,000.00. Also part of lots 4 & 5, square No. 10, East Alabama, measuring 80 feet on Bibb street by 100 feet on Moulton street, at the sum of $3,000.00. Also the south 44 feet of lot No. 1,

whole of lot No. 2, in square No. 8, East Alabama, at the sum of $10,000.00, and the undivided one-fourth (¼) interest of said T. M. Barnett in part of lots No. 9 & 10 in square No. 7, East Alabama, measuring 130 feet on Tallapoosa street, at the sum of twenty-five hundred dollars ($2,500.00), amounting in all to the sum of $106,500.00; all of the above mentioned "lots" being in the city of Montgomery.

Now, therefore, know all men that for and in consideration of the premises and of the payment of the said sum of one hundred and six thousand five hundred dollars to me in hand paid, the receipt of which is hereby acknowledged, I, as sheriff of said county of Montgomery, do hereby sell, transfer, and convey unto the said Henry C. Semple, his heirs and assigns, all the right, title, and interest which the said Benjamin H. Micou, Nicholas D. Barnett and Thomas M. Barnett or either of them had and held in and to the lands and lots of lands herein described and sold as aforesaid to said Henry C. Semple, to have and to hold the afore granted and sold premises to the said Henry C. Semple, his heirs and assigns forever.

In witness whereof I, Paul Stroback, sheriff of said county, do hereunto set my hand and seal this the 10th day of August, A. D. 1874.

[L. S.] PAUL STROBACK,
Sheriff of Montgomery County.

THE STATE OF ALABAMA,
Montgomery County:

I, George Ely, judge of the probate court of said county, hereby certify that Paul Stroback, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 7th day of November, A. D. 1874.

GEORGE ELY,
Judge Probate Court Montgomery County.

THE STATE OF ALABAMA,
County of Montgomery:

OFFICE OF THE JUDGE OF PROBATE.

I hereby certify that the within deed was filed in this office for record on the 7th day of November, 1874, at one o'clock p. m., and duly recorded in book C of deeds, page 477, and examined.

GEORGE ELY,
Judge Probate Court Montgomery County.

EXHIBIT F.

CLARA E. BOYKIN AND FRANK S. BOYKIN
vs.
BENJ. H. MICOU, NICHOLAS D. BARNETT, Thomas M. Barnett. } No. 1.

TALLAPOOSA COUNTY:

Fi. fa. No. from probate court of Tallapoosa Co. Damages, $88,300.00. Judgment 10th day of February, 1874. Total costs, $35.00; probate fees, $35.00.

Costs received December 16th, 1874.

ALLEN D. STURDIVANT,
Judge, &c.,

By JNO. A. TERRELL,
Ag't & Attorney.

112 Received in office 27th day of February, 1874, at 10 minutes after 10 o'clock a. m.

Levied this fi. fa. on all of sec. 17, T. 15, R. 20, the S. ½ of the NE. ¼ and the E. ½ of the NW. ¼ of sec. 8, T. 15, R. 20; SE. ¼ and E. ½ of SW. ¼ of sec. 5, T. 15, R. 20; W. ½ of the NW. ¼ and W. ½ of SW. ¼ of sec. 16, T. 15, R. 20; SE. ¼ of sec. 27, T. 16, R. 20; NE. ¼ of sec. 34, T. 16, R. 20; NW. ¼ and W. ½ of SW. ¼ of sec. 35, T. 16, R. 20; NW. ¼ of sec. 26, T. 16, R. 20; all situated in the county of Montgomery and State of Alabama. Lots 1 & 2, square 9, Haurick's plat, 26½ by 120 feet on the northeast corner of Bibb and Commerce street, being part of lot 10, square 14, East Alabama. Lot No. 11, South Market street. Lot No. 11, North Washington street, situated in the city of Montgomery in the State of Alabama, as the property of B. H. Micou.

Also all of sec. 6, T. 15, R. 20; all of sec. 7, T. 15, R. 20; N. ½ and SE. ¼ of sec. 18, T. 15, R. 20; W. ½ of SW. ¼ of sec. 5, T. 15, R. 20; W. ½ of SW. ¼ of sec. 5, T. 15, R. 20; W. ½ of NW. ¼ sec. 8, T. 15, R. 20; W. ½ of NW. ¼ and W. ½ of SW. ¼, sec. 32, T. 16, R. 20; N. ½ of sec. 5, T. 15,
R. 20; W. ½ of NW. ¼ sec. 4, T. 15, R. 20; NE. ¼ and SE. ¼ sec.
113 31, T. 16, R. 20; all situated in the county of Montgomery and State of Alabama. Lots 1 & 2 South Adams street, and lot No. 11 East Court street, in the city of Montgomery and State of Alabama, as the property of N. D. Barnett.

Also, all of sec. 9, T. 15, R. 20; W. ½ & NE. ¼ and W. ½ of SE. ¼ sec. 15, T. 15, R. 20; S. ½ and S. ½ of NW. ¼ sec. 4, T. 15, R. 20; NE. ¼ and N. ½ of SE. ¼ sec. 16, T. 15, R. 20; E. ½ of NW. ¼ sec. 16, T. 15, R. 20; all situated in the county of Montgomery and State of Alabama. Also, the City Hotel, on Commerce street, and part of lots 4 & 5, square 10, East Alabama, 80 feet on Bibb street, by 100 feet on Molton street, in the city of Montgomery, State of Alabama, all as the property of T. M. Barnett.

February 27th, 1874, at 1.30 p. m.

No advertisement having been made, this fi. fa. is returned for an alias, by order of H. C. Semple, plff's att'y, May 5, 1874.

Received alias fi. fa. 13th May, 1874.

After having given legal notice of the time and place of sale by
114 advertisement thereof in Montgomery Advertiser, a paper published in said county, for thirty days, on Monday, the 3d day of August, 1874, I did expose the above lands and lots to sale, at the Artesian Basin, in the city of Montgomery, between the legal hours of sale, and at which sale Henry C. Semple became the purchaser of the following lots and parcels of land, he being the highest bidder and last bidder therefor, to wit: sec. 17, the S. ½, the NE. ¼, the E. ½ of NW. ¼ of sec. 8, the SE. ¼ and the E. ½ of SW. ¼ sec. 5, all in T. 15, R. 20; the W. ½ of NW. ¼ and the W. ½ of SW. ¼ of sec. 16, T. 15, R. 20, at the sum of 7,000.00; lots 1 & 2, in square 9, Haurick's platt, at the sum of $4,000.00; part of lots No. 10, in square No. 14, being 26½ ft. by 120 on the southeast corner of Bibb and Commerce sts. at the sum of $10,000.00; lots No, 11, South Market street, and lot No. 11, North Washington street, at the sum of $9.000.00; also became the purchaser of sec. 6, sec. 7, the north ½ and SE. ¼ sec. 18, the W. ½ of SW. ¼ sec. 5, the W. ½ of NW. ¼ sec. 8, the N. ½ of sec. 5, the N. ½ of the W. ½ of NW. ¼ sec. 4, all in
T. 15, R. 20; the W. ½ of NW. ¼ and W. ½ of SW. ¼ of sec. 32, T.
115 16, R. 20; the NE. ¼ and SE. ¼ of sec. 31, T. 16, R. 20, at the sum of $20,000.00; also became the purchaser of lots 1 & 2, South Adams street, and lot No. 11, East Court street, at the sum of $15,000.00;

also became the purchaser of the W. ½, the NE. ¼, and W. ½ of SE. ¼ sec. 15, the W. ½ of SW. ¼ sec. 4, the NE. ¼ & the NE. ¼ & the N. ½ of SE. ¼ sec. 16, and the E. ½ of NW. ¼ sec. 16, all in T. 15, R. 20, at the sum of $8,000.00; also part of lot 5, square 8, East Alabama, 80 feet on Commerce street, by 100 ft. deep, at the price of $18,000.00; also parts of lots 4 & 5, in square No. 10, East Alabama, measuring 80 ft. on Bibb st. by 100 ft. on Molton st. at the sum of $3,000.00; also became the purchaser of the south 44 ft. of lot No. 1, the whole of lot No. 2, in square No. 8, East Alabama, at the sum of $10,000.00; also the undivided one-fourth (¼) interest of T. M. Barnett, in a part of lots 9 & 10, in square No. 7, East Alabama, having 130 ft. on Tallapoosa st. by 200 ft. on Commerce street, at the sum of $2,500.00, and at which sale Alexander Pitman, being the highest, best, and last bidder therefor, became the purchaser of the SE. ¼, E. ½ of SW. ¼, the S. ½ of NW. ¼ of sec 14,
116 the whole of sec. 9, all in T. 15, R. 20, at the price of $5,540.77; the whole of said sales amounting to $112,040.77 dollars, and applied the same as follows:

Sundry court costs	159
Printing fee	40
Shff's costs	1,000
Fi. fa. for Ax. Pitman	5,540 77
" Jas. T. D. Lanier	6,220 27
Pl'ff' demand on this fi. fa	49,540 36
" " in favor H. A. Garrett	49,540 37
	112,040 77

PAUL STROBACH, *Sh'ff.*

Received on act. of plff's demand, forty-five thousand five hundred and forty $\frac{36}{100}$ dollars, Aug. 15, 1874.

HENRY C. SEMPLE,
Plff's Att'y.

Returned for alias Aug. 21, 1874.

Recd. alias 7 Sept. 1874. Returned by expiration of term of office, Nov. 11th, 1874. Tallapoosa County.

H. A. GARRETT, GUARDIAN AD LITEM OF LUCY B. Micou,
vs.
BENJ. H. MICOU, N. D. BARNETT, T. M. BARNETT. } No. 2.

Fi. fa., No. from probate court of Tallapoosa Co., damages, 88,031.77. Judgment, 24th day of February, 1874. Total costs, 38.10.

117 Received in office, 4' day of March, 1874, at 12.40. o'clock, p. m.

Levied March 4th, 1874, at 2.30 o'clock p. m.

Levy same as No. 1.

Returned for alias May 8th, 1874. Paul Strobach, sheriff.

Received alias 13th day of May, 1874.

Received on a/c of plaintiff's demand forty-five thousand five hundred and forty $\frac{36}{100}$ dollars.

August 15, 1874.

HENRY C. SEMPLE,
Pl'ff's Att'y.

For sale, see No. 1.

Returned for alias Aug. 21st, 1874.
Received alias 7th Sept., 1874.
Returned by expiration of term of office Nov. 11th, 1874.

I acknowledge myself security for the costs that may accrue in this cause at the instance of complainant.

C. J. CAMPBELL.

Witness:
H. A. SEELYE.

(Across the face:)
Approved by me this 6th day of August, 1877.
J. W. DIMMICK, *Clerk.*

Filed this 6th day of August, A. D. 1877.
J. W. DIMMICK, *Clerk.*

118 *Summons.*

UNITED STATES OF AMERICA,
Middle District of Alabama:

THE FIRST NATIONAL BANK OF MONTGOMERY, which is a banking corporation under and by virtue of the laws of the United States, compl't,
and
BENJAMIN H. MICOU, AS TRUSTEE AND INDIVIDUALLY; Henry C. Semple, as trustee for Lucy B. Micou and Clara E. Boykin; also Lucy B. Micou, Clara E. Boykin, and Frank S. Boykin, defendants. } In equity.

The President of the United States of America to Benjamin H. Micou, as trustee and individually; Henry C. Semple as trustee for Lucy B. Micou and Clara E. Boykin; also Lucy B. Micou, Clara E. Boykin and Frank S. Boykin, her husband, who are citizens of the State of Alabama, greeting:

You are hereby commanded and strictly enjoined that, laying all other matters aside and notwithstanding any other excuse, you and each of you personally be and appear before the judge of the circuit court of the United States for the middle district of Alabama, at the clerk's office of the said court, in the city of Montgomery, at rules to be
119 had, on the first Monday in September next, to answer a bill of complaint exhibited against you in the said court by the First National Bank of Montgomery, which is a banking corporation under and by virtue of the laws of the United States, and which is located at Montgomery, Alabama, which is a citizen of the State of Alabama, and to do further and receive what the said court shall have considered in that behalf, and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars; and have there then this writ.

To the marshal of the United States for the middle district of Alabama to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, on the 6th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and second.

[SEAL.] J. W. DIMMICK,
Clk U. S. Cir. Court, Mid. Dist. of Ala.

CLOPTON, HERBERT and CHAMBERS,
Complainants' Solicitors.

120 NOTE.—The defendants are required and hereby notified to enter appearance in the above-entitled cause in the clerk's office of said court on or before the rule day next ensuing, to wit, the third day of September, 1877, or the bill may be taken pro confesso against them.

J. W. DIMMICK, *Clerk.*

CLOPTON, HERBERT and CHAMBERS,
Complainants' Solicitors.

The within summons served on the defendants Lucy B. Micou, Clara E. Boykin, and Frank S. Boykin, on August 9th, 1877, and on Benj. H. Micou, August 10th, 1877, by delivering to and leaving with him a copy thereof, and at the same time showing him the original, with the seal of the court attached.

GEORGE TURNER,
U. S. Marshal,
By H. A. WILSON,
Deputy Marshal.

Also, on the 13th day of August, 1877, served a copy of the within on Henry C. Semple, esq., by leaving a copy at his residence in Montgomery with his wife.

121 GEORGE TURNER,
U. S. Marshal,
By L. J. BRYAN, *Deputy.*

Returned and filed 13th Aug., 1877.

J. W. DIMMICK, *Clerk.*

Answer of B. H. Micou.

The separate answer of Benj. H. Micou.

In the circuit court of the United States for the middle district of Alabama. In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
BENJ. H. MICOU ET ALS. }

The separate answer of Benjamin H. Micou, one of the defendants in the above stated cause, to the bill of complaint filed by the complainant in said cause.

The said respondent, for answer to the said bill of complaint, or so much thereof as he is advised it is important for him to answer, answering, says:

1st. That he admits the truth of the allegations contained in the first paragraph of said bill of complaint.

122 2nd. For answer to the 2nd paragraph of said bill, respondent says that he admits that he was the guardian, in Tallapoosa County, of his two daughters, Clara E. Boykin and Lucy B. Micou, but denies that he has ever at any time combined or conspired with his said two daughters, or said Frank Boykin, or either or any of them, to have any of the things done that are alleged in the said 2nd paragraph, or in any way to hinder, delay, or defraud any creditors of respondent; and therefore denies the truth of the allegations contained in said paragraph.

3rd. Respondent admits that he was president of the Tallassee Manufacturing Co., and managing partner of the firm of Barnett, Micou & Co., as charged in the 3d paragraph of said bill, and that each of the members of said partnership was a large stockholder in said manufacturing company, owning largely more stock than any other person outside of said partnership, and that said firm lent its credit to the Tallassee Manufacturing Co., as charged, and that said firm was, in the fall of 1873, liable on account of said suretyship for a large amount,
123 fully as much as three hundred thousand dollars, and that said Tallassee Manufacturing Co. was at that time financially embarrassed and unable to pay its indebtedness, as the same might mature, and that, in December, 1873, said corporation suspended payment and called a meeting of creditors and an exhibit was made of its condition; and respondent admits that he knew, in January, 1874, that said concern was insolvent; and admits that he knew that said firm of Barnett, Micou & Co., and each member thereof, was in immediate danger of insolvency, and that the same was notorious, but does not know what information the other defendants had of that fact, he never having had any conversation with them about it. But respondent denies that Thomas M. Barnett and Nicholas D. Barnett and respondent owned no other real property in 1873–'4, subject to levy and sale, than that shown to have been bought in for the said daughters of respondent; and respondent avers the fact to be, that Nicholas D. Barnett owned a
124 valuable residence in the city of Montgomery that was subjected to the payment of a debt due one Lanier; and the two Barnetts and respondent owned at the time a large and valuable plantation in the county of , in the State of Mississippi, and also some real estate in the city of Montgomery, Alabama, that has not yet been sold or levied on, and the two Barnetts owned large and valuable tracts of and in the State of Arkansas.

4. Respondent admits that all the property then belonging to said Barnetts and himself was not worth more than one hundred and seventy-five thousand dollars; but denies that said parties each owed individually two hundred thousand dollars outside of their liability on account of the Tallassee Manufacturing Co., or that the firm of Barnett, Micou & Co. owed three hundred thousand dollars, except as surety for said manufacturing co. Respondent states, on information and belief, that the indebtedness of the two Barnetts, outside of their liability for the Tallassee Manufacturing Co., and outside of their liability as sureties on the bond of respondent, as guardian for his daughters,
125 did not exceed five thousand dollars each, as respondent is informed and believes, and the indebtedness of the firm of Barnett, Micou & Co. outside of any liability on account of said Tallassee Manufacturing Co. did not exceed one hundred thousand dollars, and this was secured by mortgage on property considered to be worth the am't of the debt at the time. Respondent admits that he knew the condition of the Tallassee Manufacturing Company and of the firm of Barnett, Micou & Co. at the time charged, and respondent's individual indebtedness did not exceed forty thousand dollars, thirty-five thousand dollars of which indebtedness was secured by mortgages on property which has never been subjected to the payment of the probate decrees mentioned in the bill of complaint in this cause. Outside of his liability as surety for Tallassee Manufacturing, and as guardian for his daughters, respondent admits that these facts were known to him and to Henry C. Semple, except the individual indebtness, but does not
126 know to what extent they were known to other defendants.

5. Respondent denies that he and his said daughters and Frank Boykin conspired together at the time stated in the 5th paragraph of said bill, or at any other time, to cause any false or fraudulent settlements to be made in the probate court of Tallapoosa County; but, on the contrary, respondent states that his daughter Clara became of age in , and soon after that event he commenced to make preparation for settling the whole of his account with his two daughters of his guardianship of their property, and in the spring of 1873 he collected up his accounts and vouchers in regard to his management of their estates, and placed them in the hands of his attorney, David T. Blakey, and directed him to make out a full and correct account for settlement of said guardianship; and as he desired to be relieved of the responsibility of said trust entirely, and his other daughter, Lucy, was nearly of age, he, at the same time, instructed his said attorney to prepare a petition to the chancery court of Elmore County, praying to have said
127 Lucy relieved from the disabilities of minority, so that he might settle at the same time with both of his said wards; that he failed to procure a decree at the June term of said chancery court of Elmore County, and on account of bad health and absence from the city of Montgomery, and State of Alabama, during most of the summer of 1873, was unable to furnish his attorney with the information necessary from time to time to enable said attorney to properly prepare said accounts; the said settlement was further delayed by the breaking out of yellow fever in Montgomery in the fall of 1873, and by the financial panic which occupied the whole of respondent's attention and compelled him to give the whole of his time to the management of the affairs of the Tallassee Manufacturing Company to the exclusion of his private business, so that he was unable to take up the matter of the settlement of his guardianship until after his connexion with the Tallassee Manufacturing Co. ceased, in Jan., 1874, and that in making said settlements he did
128 not consult or confer with said Clara or Frank Boykin or Lucy Micou, and did not give to his attorney any instructions to make out any different account from the one ordered to be made in the spring of 1873, when respondent believed himself to be a rich man and amply able to pay all his debts; and respondent is informed by his said attorney and believes, and so states, that the account filed by him for settlement of his guardianship in the probate court of Tallapoosa County is substantially the same that was prepared by his said attorney in the summer of 1873. Respondent admits that the decrees were rendered as stated, but denies that they were false or fraudulent; admits that Lucy was a minor, over nineteen years of age, at the time of said settlement, but states that her disabilities of minority were not removed until June, 1874. Respondent does not know whether Exhibits A and B and C are correct or not, having had no opportunity of comparing them with the original entries, and therefore can neither admits nor deny correctness of said copies.

129 6. For answer to the 6th paragraph of said bill, respondent says that he did not himself personally do anything in the matter of said settlement; did not state any account or contend for anything; but the whole matter, so far as respondent was concerned, was entrusted to and conducted by his attorney, David T. Blakey, and he turned over to said attorney every paper or receipt of any and every kind that he had in relation to said ward's estates, and furnished him with all information that respondent had as to said estates, and directed him to state a full and fair account; and respondent did not instruct his attorney to make any charge, or submit to any charge that was not

fair and just. Respondent had no design or desire to defraud any person by said settlement. Respondent admits that at the time he filed his account for settlement in said probate court, he did not think he was liable for the rents and negro hires afterwards charged against him, because he believed that an order had been made by the probate
130 court of Tallapoosa directing said estate to be kept together, and so informed his attorney, and therefore his account was made out on the basis of charging himself only with the nett profits derived from the cultivation of the plantation purchased for said wards, after deducting the plantation expenses and the expense of stocking said plantation with mules, utensils, and other stock; and respondent had no knowledge that any effort would be made to charge him with the said hires and rents until the question came up in the probate court of Tallapoosa County on the said settlement, when Elmore J. Fitzpatrick, representing the interest of said wards, contended that the order which respondent had always understood to be an order to keep the said wards' estate together, was in fact an order only to buy a plantation, and insisted on his right to charge respondent with rents and hires. Respondent's attorney, acting under his instructions, resisted said claim and argued the question of the proper interpretation of said order to the said
131 probate court, but the court decided that respondent should be charged with rents and hires. But respondent denies that the said rents or hires were charged or allowed at a higher price than their true value.

7. Respondent denies that he made any payment of money, stock, or other thing of value to his daughter Clara or her husband, Frank Boykin, on the 10th of July, 1873, or after her marriage, or at any other time, except as hereinafter stated, to wit: Respondent's daughter Clara was married to Frank Boykin about the 22d of October, 1873, in the evening. On the morning of the said day, and before said marriage, respondent handed to his said daughter an envelope containing a certificate of stock for three hundred shares of stock in the Tallassee Manufacturing Co. No. 1, of the nominal value of $100.00 per share, and with it a note, the exact contents of which respondent does not now recollect, but believes the substance of said note was to the effect that he therewith handed to her $30,000.00 of stock in the Tallassee factory, which he considered good and valuable property, and intended
132 as a payment of $30,000.00 on what might be ascertained to be his indebtedness to her on account of his guardianship of her property, and requesting her to sign a receipt for the same, which receipt he also enclosed with the stock and note, and remarked to his said daughter to take that (the envelope containing note, stock, &c.) to her room and read it; that she did so, and after a short time returned and handed to respondent the receipt signed, as he had requested. Respondent denies that he made any other payment, or delivered any other property or money or thing of value to his said daughter on account of his said indebtedness to her.

Respondent denies that said $30,000.00 was collusively or fraudulently omitted from the settlement of his guardianship in the probate court of Tallapoosa County. But respondent avers the truth to be that when he informed his attorney, David T. Blakey, that he had delivered to his said daughter the certificate of stock mentioned above and obtained a receipt as stated, and of all the circumstances attending
133 the same, and the condition of the said Tallassee Manufacturing Company, and of the fact that Frank Boykin, the husband of the said Clara, had repudiated the acceptance by her of the said stock, and

had tendered the same back to respondent, his said attorney told him that he (respondent) could not, either in equity or conscience claim that the delivery of the said certificate was a payment of $30,000.00 to his said daughter, and that no court would allow such a claim after understanding the circumstances; and that, even if the said credit was allowed by the probate court, his daughter could have the matter reviewed by a court of chancery that would certainly strike out a credit obtained under such circumstances; and so large an amount being involved, there was little doubt but that she would take that course, if necessary, which would simply increase the cost and time of litigation, and therefore the said attorney advised respondent not to claim said credit on the statement of his account in the said probate court.

8. Respondent admits that by the failure of the Tallassee Man-
134 ufacturing Co. in 1873 the stock of the Barnetts and himself became worthless, but he says that said parties did not own three hundred thousand dollars each of said stock and says that they did not own exceeding one hundred and eighty thousand dollars each of said stock, and admits that besides said stock their property consisted entirely of the things charged in said bill, but respondent denies that said parties had in February, March, and April, or either of those months, 1874, any cotton that had been raised on their respective plantations, and says that none of said parties had any considerable amount of corn or fodder on said plantations, but the exact amount of the same respondent does not know; as for himself, after the month of March in said year, he had no corn on any plantation, and after the month of April no fodder, all of said corn and fodder having been consumed by the stock on said plantations; and respondent denies that in the year 1874 he raised on all the lands cultivated or controlled by him the amount of
135 cotton, corn, and fodder alleged to have been raised by him in the said eighth paragraph of said bill; but he says that the truth is that during said year he only raised eighty-seven bales of cotton and less than one thousand bushels of corn and ten thousand pounds of fodder. Respondent has no knowledge or information as to what amount of corn, cotton, or fodder was raised by either of said Barnetts during said year. Respondent admits that he and the two Barnetts each owned during the months of March, April, May, June, and July twenty-five mules and horses, some of which were worth one hundred and twenty-five dollars each, but many of them were worth much less; but respondent denies that Lucy B. Micou and Clara and Frank Boykin fraudulently used their executions on said probate decrees so as to protect all or any of said cotton, corn, fodder, and mules from the creditors of respondent and said Barnetts, and respondent denies that he or either of the said Barnetts converted to their own use any of the per-
136 sonal property mentioned in said paragraph; and respondent states that he, in the early part of 1874, and before the rendition of the said probate decrees, had made an arrangement with Mess. Moses Bros. to advance the necessary supplies to run his plantations for said year, and had pledged to them enough of the cotton raised on said plantation to pay for the same.

That fifteen bales out of the eighty-seven made by him were run off and sold by his overseer, one Simmons, under the pretense of being a partner of respondent and having the right to sell the same, and the remainder of said cotton was delivered to Mess. Moses Bros. and was not sufficient to pay them for the advances made by them; that all of the corn and fodder raised on said places in 1874, and all the mules, stock, and utensils belonging to respondent, were levied on in the latter part

of 1874 and sold in January, 1875, under executions issued out of the probate court of Tallapoosa County on the decrees heretofore mentioned in the bill of complaint in this cause.

137 Respondent is informed and believes, and so states, that all the personal property owned by the said Barnetts in 1874 was sold under executions issued on said decrees, and all the crops raised by them said year over and above what was necessary to discharge liens existing on said crops before the rendition of said decrees, were sold under said executions.

9. Respondent has no knowledge or information as to when execution issued on said decrees or what was done in relation to the same, except that respondent's property was levied on and sold about August, 1874, and was bid off by Henry C. Semple. But respondent has been informed and believes that some of the property of the said Barnetts was at said time bid in by or for account of one Lanier, who had a judgment amounting to some six thousand dollars against said Barnetts and respondent.

10. Respondent has no information and cannot say whether Exhibit F is correct, so far as it is a copy from the sheriff's docket, but re-
138 spondent denies that said exhibit shows all that was done by the sheriff of Montgomery County, for respondent knows that mules and personal property were sold under said executions by Sheriff Murphy, and respondent denies that the property shown to have been levied on as his was all his own, but says that the house and lot in Montgomery, on the corner of Goldthwaite and Heron streets, and known as his residence, and the property on Market street known as the Dexter House, and the property on Commerce street known as the Commercial Hall, all belonged to his wife, Mary J. C. Micou, having been conveyed to her by him or purchased in her name many years before the time here spoken of and long before any part of complainant's debt accrued. That the land lying in Montgomery County known as the Prairie and Wallahatchie plantations of respondent, and that were sold by said sheriff, were at the time really the property of respondent's two daughters, they having inherited the same from their mother, and respondent's interest in said land was only the life interest which he took under
139 the code, his first wife having died intestate. Respondent denies that he was a citizen of Montgomery County in 1873, but says that his residence was removed to Montgomery County in 1874.

11. Respondent is informed and believes, and so states, that H. C. Semple contracted with Paul Strobach, then sheriff of Montgomery County, to accept $1,000.00 in full of his commissions, no matter what price the property sold by him might bring; as to the other matters charged in this eleventh paragraph, respondent has no knowledge or information concerning the same.

12 and 13. For answer to paragraphs 12 & 13 of said bill of complaint, respondent says that he denies that he owned any personal property in Macon County, Ala., in the year 1874, at the time charged in said paragraph, and denies that he had any growing crop at said time or that he raised any crop in said county during said year; as to the sale made being a pretended sale, respondent says that he at the time and
140 now believed and believes that the same was a bona fide sale and purchase by H. C. Semple for Clara Boykin and Lucy Micou, and acting under this belief he delivered the possession of said lands to said Clara and Lucy, who still hold and occupy the same; as to the rest of the statements contained in said two paragraphs, respondent has no

knowledge or information concerning the same, and is therefore unable to answer the same.

14. Respondent denies that he owned any personal property in Macon County at the time charged in this 14th paragraph, but says the personal property of every kind on said Macon County plantation at said time (except possibly two or three milk cows that might have been there temporarily on pasture) was the property of one J. Watson Walker, who held the said plantation under a contract for three years, made about the 1st of Jan'y, 1872. Respondent has no knowledge or information of any promises, directions, or instructions that influenced said sheriff not to make any levy, or of any promises, directions, or instructions of any kind or at any time having been given or sent to
141 said sheriff.

Respondent denies that he sold or disposed in any manner of any personal property from or belonging to the said Macon County plantation from May the 5th to December 16th, 1874, and denies that he disposed of any crop of cotton, corn, or grain raised on said plantation in 1874. Respondent says that at the time stated in this paragraph a portion of said plantation was sold by the sheriff of Macon County, but that respondent was not present at said sale and had nothing to do with the same, and did not bid for or purchase, or authorize any other person to bid for said land, and no deed has ever been made to him as trustee, or in any capacity whatever, by said sheriff of said land. But respondent states, on information and belief, that said land was purchased at said sale by H. C. Semple, and a deed made to him by the said sheriff. Respondent admits that he did not pay any money for said lands, but denies that any costs or commissions were paid out of his own money. Respondent denies that the portion of said
142 plantation mentioned in said paragraph and sold at said time was worth six thousand dollars, but says he will admit that the whole of the Shorter plantation was and is worth six thousand dollars; denies that it was purchased or sold at the price of twelve hundred and fifty dollars, but, upon information and belief, states that the portion sold at the time mentioned was purchased by H. C. Semple for $2,500, and that the whole plantation was purchased by said Semple for about $8,000.

15. For answer to the 15th paragraph of said bill, respondent says he admits that his residence at Tallassee in Tallapoosa County was levied on and sold, as stated in said paragraph, and also the said stock in Tallassee Manufacturing Co., and, on information and belief, says that he believes the statements in said paragraph as to the sale of T. M. and N. D. Barnett's property in said county are true; as to the remaining statements of said paragraph he has no knowledge or information concerning the same, and therefore can neither admit nor deny their truth.

143 16. Respondent states, on information and belief, that about 1871 Thomas M. Barnett conveyed to his daughter, Mrs. Margaret Storrs, the place in Elmore County known as his River Plantation, and turned over the possession of the same to her husband C. P. Storrs, and after said time said Barnett did not have any personal property or raise any crops of any kind on said plantation, and that after said time all of the personal property on said plantation and all crops raised on said plantation were the property of said Storrs and wife, and that this was the true reason why said property and crops were not levied on and sold under said executions.

17. For answer to the 17th paragraph of said bill of complaint respondent says that the only conveyance that he has any knowledge of having been made by said Semple was a conveyance to Lucy B. Micou of the mules and stock on the prairie plantation in Montgomery County, formerly belonging to respondent; he does not know how the
144 said property stands on the records, but is informed and believes that it stands in the name of H. C. Semple. Respondent further states, on information and belief, that said Semple does not claim to be the beneficial owner of the property spoken of in the bill of complaint, but that at some time in 1874 Clara and Frank Boykin and Lucy Micou assigned to said Semple the two decrees in the probate court of Tallapoosa County upon certain trusts mentioned in the writing of assignment, a copy of which said Semple has attached to his answer in this cause, and that said Semple claims to hold said property under the terms of the said writing. Except the said writing, respondent does not know of any agreement or understanding of any kind between the said Semple and the said parties, either plaintiffs or defendants, to said execution; and respondent, upon information and belief, denies that there is any such agreement or understanding, and respondent denies that there has been any agreement or understanding, by and between the said Clara E. Boykin, Frank S. Boykin, Lucy B. Micou, Thomas M. Barnett,
145 Nicholas D. Barnett, and respondent; that the decrees should be had and made as set forth in the bill of complaint in this cause, or that none of the said parties should offer anything more than pretended opposition to the rendition of said decrees, or that any or all of the things charged to have been done and performed in the said bill should be so done and performed in and to the pecuniary benefit, interest or profit of each of the said parties to said decrees or to the prejudice, binderance, or delay of other creditors of said Barnetts, or respondent, and respondent denies all the rest of the allegations of said paragraph.

21. Respondent for answer to the 21st paragraph of said bill of complaint says, that all the statements in said paragraph referring to his possession and control and enjoyment of the use, benefits and profits of said property sold under said decrees are untrue, and he denies the same, and upon information and belief says that so far as the said statements refer to the two Barnetts he believes them to be untrue;
146 and respondent states the fact to be that since the sale of said property he has remained in possession of his residence in the city of Montgomery, by the permission of Mrs. Virginia M. Ring, who holds a valid mortgage on said house for ten thousand dollars and accrued interest, which is past due, and under the terms of said mortgage she is entitled to the possession of said property. That the Dexter House and Commercial Hall in the city of Montgomery were immediately after the sale thereof turned over to Clara Boykin and Lucy Micou who have rented out the same ever since and received the rents. That the Macon County plantation, known as the Shorter place, was turned over after the sale of the same to said Clara and Lucy, and they have received the incomes and profits of the same ever since. That the prairie and Wallahatchie plantations in Montgomery County have been ever since the sale of the same run by Lucy B. Micou, and the only connection that respondent has ever had with the same since said sale has
147 been as the agent of said Lucy. Respondent is informed and believes and so states that H. C. Semple took control and management of the property of the two Barnetts after the sale of the same, and that he has since controlled and managed the same in accordance with the terms of the assignment to him heretofore mentioned.

1st int. For answer to the 1st interrogatory in said bill, respondent saith that he did make application to have Lucy B. Micou's disabilities of minority removed, but the said application was made to the June term of the chancery court for Elmore County, 1873, and was made with the consent of said Lucy B. Micou; but that no other person defendant to this bill, nor either of the Barnetts, was consulted or had any knowledge of said application so far as is known to respondent. That the chancellor of that district directed that evidence on said application should be taken in open court ore tenus, and respondent with his attorney went to Wetumpka, where said court was held, on the morning of the third day of said court to attend to the said cause, but met
148 the chancellor at Elmore Station, who informed him that said court was adjourned. That he was unable to attend said court at the fall term thereof by reason of the press of factory business, and said matter was not finally disposed of and said application granted until the June term, 1874, and respondent does not know when and by whom any of the parties to this bill were informed of said application or said order.

Respondent answering the 2nd interrogatory in said bill contained saith, that some time in the summer or fall of 1873 he directed $30,000.00 of his stock in the Tallassee Manufacturing Co. to be transferred on the books of said company to Clara E. Micou, his daughter, but does not recollect the date of said transfer. Respondent intended said transfer to be in consideration of a like amount of his indebtedness to the said Clara; said transfer was made solely by the authority of respondent; said transfer was not made with the approbation, knowledge or assent, either before or after said transfer, of said Clara, or her hus
149 band. Respondent does not know that either the said Clara or her husband were ever informed of the transfer on the books of the company of said stock. A receipt was given by said Clara, a copy of which is hereto attached, and in explanation of this answer respondent states that on the morning of the day on which his daughter Clara was married, to wit, the 22nd of Oct., 1873, and before her marriage, he handed her a certificate of stock in said factory, of 300 shares, at the nominal value of $100 per share, and with it a receipt for the same, to be signed by her, and a letter telling her that he had given her this certificate of stock as a part payment on his indebtedness to her, and requesting her to sign the enclosed receipt. He handed all these to his said daughter, and said nothing to her except to take that to her room and read it. Soon after she returned the receipt to him signed as he had requested. No conversation in regard to the matter passed between them at the time, or afterwards.

3. For answer to the 3rd interrogatory respondent says that he
150 never made at any time any such transfer, payment, conveyance, or assignment.

4. Answering the 4th interrogatory, he says: Elmore J. Fitzpatrick represented the said Lucy and Clara on the said settlement, and Henry C. Semple in subsequent proceedings; but respondent does not know who employed them, or by whose authority they were selected, or what information or instructions were given them.

5. Respondent, in answer to the 5th interrogatory, saith, that Frank S. Boykin knew of the suspension of payment by the Tallassee Manufacturing company, and the meeting of its creditors, and that respondent and the two Barnetts were each largely involved, and there solvency endangered thereby, and that the same was common and public rumor; but respondent does not know what information Clara Boykin or Lucy

Micou had of said facts. Respondent never had any conversation with either of them on said subject. Said Clara was at that time with her husband, keeping house in respondent's residence, in the city of Montgomery, and said Lucy was living with the rest of respondent's
151 family, at Tallassee. Respondent did not tell them, or either of them, or said Frank Boykin, of said failure, or of his inability to pay what he was due them as guardian, unless they shou ld get decrees against him and his sureties, or any other thing to that effect, neither before nor after a movement was made towards settling said guardian matters in the probate court.

6. Answering the 6th interrogatory, respondent says, that he never had any conversation with any of the other defendants to this suit of the character enquired about in this interrogatory, or in regard to said settlements at all, and has no knowledge or information that any such conversation was had between any of the said defendants.

7. Respondent says, for answer to the 7th interrogatory, that he never, at any time, had any conversation or conversations with the two Barnetts, or either of them, of the character inquired about in this interrogatory, and does not know and has no information that any such conversation or conversations ever was had between the said Bar-
152 netts and any of said defendants. Neither of said Barnetts was present at the settlement in the probate court of Tallapoosa County, and he does not know why they were not.

To the eighth interrogatory, respondent, answering, says, he was present at said settlement in Tallapoosa probate court. Before said settlement he informed his counsel of the transfer made to Clara of the Tallassee stock. Said matter was not called to the attention of said probate court, because when respondent stated to his counsel the circumstances connected with the said transfer of stock and delivery of certificate and taking of receipt, and of the subsequent repudiation of said stock by the husband of said Clara, respondent's counsel, D. T. Blakey, told him that he had no right to claim said transfer of stock as a payment to said Clara, and that said claim, if made, would not be allowed, and ought not to be allowed; and therefore the said item did not appear on respondent's account as a credit claimed by him. There was an order purporting to relate to the keeping of said ward's estate together, and the same was called
153 to the attention of said probate court. It was left to the court after argument by counsel on both sides to pass upon the effect of the same.

Respondent's account was made out on the basis of charging himself for certain years, to wit, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, and 1865, on the basis of charging himself with the profits of keeping his ward's estate together, and the account was surcharged, on motion of Mr. Fitzpatrick, by charging respondent for those years with negro hire and rent of land, whereby his liability was increased some sixty thousand dollars. The question of such increased liability was really presented to the court for consideration and decision; and said court, after hearing argument and authorities on both sides of said question, passed on the same, it was not settled by concurrence of counsel. David T. Blakey represented respondent, and Elmore J. Pitzpatrick represented the said wards.

The order relating to keeping the estate together was well known to David T. Blakey in the summer of 1873. Elmore J. Fitzpatrick found said order on the books and in the file of the said estate
154 in the office of the judge of probate of Tallapoosa County on the

morning of said settlement, and read the same before said settlement came up; whether he had any information of the existence of such order before that time respondent cannot say. The amounts charged in said account for negro hire and rent of land were passed upon and found by the said court, taking one negro at a time. David T. Blakey and Benjamin H. Micou were called as witnesses by Elmore J. Fitzpatrick, and were examined by the judge of the said court himself. Respondent instructed his counsel not to allow any charge to be passed against him that was not legal and right and that would not bear the most rigid scrutiny; and respondent believes that the efforts of his counsel were honestly and fairly directed towards carrying out those instructions, and that the contestation was really made, as shown on the record, that the court might fairly pass on the questions at issue, and, as proof of the bona fides of the contestation, respondent states that his counsel succeeded in convincing the court that
155 some of the claims made by Mr. Fitzpatrick should not be allowed, and his motions for surcharging were overruled. Respondent did not furnish his counsel with the names of witness' to examine in relation to prices of negro hire and rents of lands, because he believed that he had fairly stated the prices, and the other witness, Blakey, had testified that he himself had hired negroes in the same locality for all the years except the three last, and was well acquainted with the value of the hire of negroes for all said years in the locality in which said negroes were, and no other witnesses having like knowledge could have been procured without adjourning the said settlement over four or five days. Respondent answers that he was willing that a decree or decrees might be rendered against him for such amount as the court might ascertain was actually due from him to his daughters, and he believes that such was the decree rendered. As to the two Barnetts, respondent does not know what they were willing to. About the time these things occurred, there was a bad state of feeling
156 between respondent and the two Barnetts, and they had no conversations or intercourse.

9. For answer to the 9th interrogatory respondent says he knows nothing whatever of the matters inquired about.

10. For answer to the 10th interrogatory respondent says Nicholas D. Barnett had no personal property in Elmore County in March and April, 1874. Thomas M. Barnett had some household and kitchen furniture; one, or, possibly two, cows; two or three hogs, and two mules, not probably altogether worth more than $1,000.00; he knew of his having this property; neither of said Barnetts made any crop in Elmore County in said year, except that T. M. Barnett rented some 20 acres of land a mile or so down the river from Tallassee, and raised about one hundred bushels of corn on the same; said mules were sold under execution issued on said decrees; and said corn was used in feeding said mules and other stock, and was probably all consumed before the sale of the mules.

157 11. Answering the 11th interrogatory, respondent says that he had no personal property on his Macon County plantation in 1874, and did not raise any crop thereon said year. Respondent had never, up to that time, carried on said plantation himself, but always had it leased or let out on some arrangement whereby some other person had entire control of the same. Plaintiffs in execution knew of the existence of said plantation; the personal property and crop on said place in 1874 was not levied on because it was not liable; it was the property of J.

Watson Walker. Respondent knows nothing of any instructions given to the sheriff of Macon County.

12. Answering the 12th interrogatory respondent says that he knows nothing about the issue and return of the said executions, or whether any time elapsed without any execution being in the hands of the sheriff. Respondent never gave any directions or instructions relating to any of the executions.

13. For answer to the 13th interrogatory, respondent says that he knows nothing of any sum of money having been at any time
158 paid to either the sheriff of Elmore or Macon County, upon the understanding that they or either of them was not to levy the executions on said decrees in their hands in the spring or summer of 1874 upon personal property, or that no sale of real or personal property was then to be had, and respondent knows nothing of any monies paid, or agreed to be paid, to either of said sheriffs on any understanding whatever.

14. Respondent, answering the 14th interrogatory, says he knows nothing about or has ever heard or had any information about any of the matters enquired about in this interrogatory.

15. Answering the 15th interrogatory, respondent says, on information and belief: He states that H. C. Semple did buy in all said property, as stated in said paragraph, and took the deeds in his own name. Respondent does not know whether said Semple paid out any money on said purchases, and has no information on that subject. Said Semple does not now claim any individual, personal, or beneficial interest
159 in said property so bought by him at said execution sales.

17. Answering the 17th interrogatory, respondent saith: H. C. Semple made, early in 1875, a conveyance to Lucy B. Micou of the mules and stock on the Prairie plantation, in Montgomery County, sold as the plantation of respondent; and Lucy Micou and Clara and Frank Boykin made, in 1874, an assignment of their decrees to said Semple; the first of these papers is not in possession of respondent, and he don't know what has become of it. A copy of the latter paper is attached to the answer of said Semple in this cause. Respondent has no knowledge of any other contract or conveyance or writing of any kind made between the parties inquired about in this interrogatory.

18. For answer to the 18th interrogatory, respondent says that he has no knowledge information of any contract or agreement such as is inquired about in this interrogatory, and on information and belief says that there never has been any such.

19. Answering the 19th interrogatory, respondent says that he
160 has no knowledge of the matters inquired about in this interrogatory, but on information and belief says that, in 1875, H. C. Semple took legal possession, and charge and control, of the plantations and city property bid off by him as the property of the two Barnetts, except the residence of N. D. Barnett and of C. P. Storrs; has rented out the city property and received the rents, and has run the plantations and received the crops made on them; as to the rest of the matters inquired about in this interrogatory respondent has no knowledge or information except that said Semple did not take possession of the property sold as respondent's property. Respondent's residence has remained in his own possession by permission of the mortgagee, Mrs. V. M. Ring. The Dexter House and Commercial Hall have been rented out by Clara Boykin and Lucy Micou, and they have received the rents. The Macon County plantation was run in 1875 for Clara Boykin and Lucy Micou, and was taken possession of in 1876 by Frank Boykin for

said parties, and they have, since that time, received the profits of the same.

161 20. For answer to the 20th interrogatory respondent says that he did not bid off the Macon County plantation, and no deed has been made to him for it. Said plantation is worth about $5,000.00. It was run by respondent in 1875 for his two daughters; since that time it has been in their possession, and has been run for them by Frank Boykin. No profit resulted from said plantation in 1875. He does not know and is not informed whether any profit has resulted from the same since that time. If any, it has gone to his two daughters. Respondent has not been in any manner pecuniarily benefitted by said property since its sale.

21. Answering the 21st interrogatory respondent says: That it does appear from the endorsements on the executions, as shown in the exhibits to this bill, that the moneys, apparently realized from the sales of said lands, were equally divided between said plaintiffs, Clara and Lucy, but has no information that any agreement to that effect was made between the said parties and no knowledge of such agreement.

162 And having fully answered the paragraphs and interrogatories in said bill contained, respondent prays to be hence discharged with his reasonable costs.

ELMORE AND GUNTER,
Sols. for Respondent, B. H. Micou.

UNITED STATES OF AMERICA,
Middle District of Alabama:

Before me, J. W. Dimmick, as commissioner of the circuit court of the United States of America, personally appeared Benjamin H. Micou who being duly sworn, says that the facts stated in the foregoing answer, so far as stated of his own knowledge, are true, and where stated on information and belief he believes them to be true.

BENJ. H. MICOU.

Sworn to and subscribed before me this 28th day of September, A D. 1877.

J. W. DIMMICK,
U. S. Commissioner in and for said Middle Dist. of Ala.

Filed the 29th day of Sept., A. D. 1877.

J. W. DIMMICK, *Clerk.*

163 *Answer of Henry C. Semple.*

In the circuit court of the United States for the fifth judicial circuit.
In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY, complainant,
vs.
BENJAMIN H. MICOU, HENRY C. SEMPLE, AND others, defendants.

The separate answer of Henry C. Semple, one of the defendants in said cause, to the bill filed therein against himself and others.

This defendant, saving and reserving all benefit of exception to said bill, for answer thereto saith:

1. He is informed and believes that the allegations of the first paragraph of said bill are true, and admits the same to be true.

2. He has no knowledge of the truth of any one of the allegations of the second paragraph of the bill, but is informed and believes that
164 they are all untrue and false, and so denies the same, except that Micou was guardian of his daughters, and the value of the property.

3. He is informed and believes that the allegations of paragraph three are true, and he admits the statements of said paragraph, except that he denies that the only real property owned by the Barnetts and Micou subject to sale under legal process, was as stated in the bill, except that bought by Pitman, bought in for the use of Lucy B. Micou and Clara Boykin. On the contrary he answers and says that a valuable residence on Court street, in Montgomery, Alabama, owned by Nicholas Barnett, was bought at execution sale by respondent by agreement with Lanier with an execution owned and held by him against Benjamin H. Micou, Nicholas Barnett and Thomas M. Barnett, so far as said execution would go in the purchase of said property; and indeed all the property bought at said execution sale, by agreement of respondent with Lanier, was to be held by him subject to the duty of paying the said Lanier the amount of said execution, being a sum between five and six thou-
165 sand dollars, which is not yet fully paid; and respondent, in execution of said agreement, has conveyed said residence on Court street to N. H. R. Dawson, trustee, as security to said Lanier for the amount of said execution. He also says he is informed and believes that said Barnetts and Micou or some of them owned other real property, some of it in the city of Montgomery, which he has not yet been able to trace so as to proceed against it; and he is also informed and believes and so answers that they owned a large and valuable real estate in Mississippi, Arkansas and Texas, or some of said States.

4. Answering the 4th paragraph he says he is informed and believes that the property owned by said Micou and Thomas and Nicholas Barnett in this State, subject to levy and sale, was not worth after discharging incumbrances thereon more than one hundred and seventy-five thousand dollars, and could not have been sold at that time for more than one hundred and twenty thousand dollars, and is now de-
166 preciated still further. He is now informed that the members of the firm of Barnett, Micou & Co. had individually become sureties for a loan by the Life Association of America to said Tallassee factory but he does not know the amount thereof, and in the fall of 1873 and until recently he was ignorant of the fact. He does not believe that outside of their liability on Micou's guardian's bond and to said Life Association of America the whole of the individual liability of Thomas or Nicholas Barnett exceeded sixteen thousand dollars. As to Benjamin Micou's condition he was not so well informed, but he did not regard his liability as being considerable for a man of his means, and he denies that the members of said firm were individually liable for two hundred thousand dollars each exclusive of their liability for the Tallassee factory. He believes they as a firm were liable to different individuals for a very large amount, and that the members thereof were by reason of the firm liabilities together with their individual liabilities insolvent, and
167 that their liability on said guardian's bond would alone have rendered them insolvent, and he then thought them insolvent, and he believes it was known to all the defendants to this bill.

5. He admits the rendition of the decrees stated at the dates and for the amounts stated, but denies all fraud or conspiracy in the procure-

ment of the same; he has had no opportunity of comparing the exhibits with the records of the courts, and cannot answer as to the accuracy or correctness of the same or whether complete or not, but submits that such records are but proved by certified transcripts, and demands production of the same. He admits that Lucy B. Micou was a minor over 19 years old at the time of the settlement, but denies that her disabilities as a minor had then been removed, and answers and says that he is informed and believes that the settlement was fairly made and for an amount really due by Micou to his wards.

6th. That the respondent cannot know the intention of Micou
168 in making said settlement, but he knows no fact indicating an intention to procure a decree for a larger amount than that really due to be entered against him, and knew none then; he does not know, as he was not present at said settlement, but he is informed and believes that Micou did make real efforts to prevent being charged with amounts which an honorable attorney engaged for the wards thought he ought to be charged with and insisted on, but in some of which he was overruled by the court; but he insists that neither he or Clara or Frank S. Boykin or Lucy Micou colluded with said Micou or participated in any fraudulent intent if it existed in his mind, and cannot in any way be affected thereby if the said Benjamin H. Micou really harbored such intent and carried it into effect.

That he denies that said Micou allowed his accounts to be surcharged and falsified with ninety one thousand six hundred and forty-eight $\frac{95}{100}$ dollars; he denies that it was an improper charge, or that Boykin or his wife or Lucy Micou knew it to be an improper charge or had any
169 peculiar information showing it to an improper charge; he admits that Benjamin H. Micou thought it an improper charge, and answers that he is informed he contended against and resisted it, and he here answers and gives his whole connection with said settlement.

After the failure and suspension of the Tallassee Company, and the knowledge of the embarrassment of Barnett, Micou & Co. from their connection therewith, respondent was applied to by Frank S. Boykin, who said he could obtain no satisfaction from (him) Micou in relation to his wife's property. He spoke of the danger of Micou and the Barnetts being declared bankrupt. On examination, I told him that as the individual debts of Micou, his wife's guardian, and the sureties, the Barnetts, were inconsiderable, there would be no great trouble if they were declared bankrupt; that the bankrupt court would apply the individual property to the individual debts first, and the partnership property to the partnership debts, and thus the individual property of the guardian and his sureties would be applied to the satisfaction of their liability on the guardian's bond, and to the debts
170 due to Lanier and Pittman, together somewhat less than twelve thousand dollars. He then saw Lucy Micou, who sent for me, and I informed them all—Lucy, Clara, and Frank—that the proper step would be to insist on a settlement of the guardian's accounts in the probate court.

In my first interview Boykin told me of Micou's having delivered his wife a certificate of stock for a considerable sum about the date of his marriage, on 22nd October, 1873, and I said to him that it was a transaction which no court would inforce: the acceptance of stock by a ward, recently of age, from her father and guardian, without settlement of accounts, at a time when the company (Tallassee Factory) was really insolvent and the stock worthless, and when he ought to have known that it was worthless, and that it was not binding on her

or him, Boykin. I was about to cite Micou to a settlement, when I was informed by his attorney, D. T. Blakey, that Micou had either been cited to settlement, or else had voluntarily proposed to settle
171 his accounts in the spring of the year 1873, in anticipation of his daughter's marriage, and had left papers with him to make out his accounts, and that delay had been caused by Micou's absence in the North during the summer. He also informed me of the application to have Lucy declared free of disabilities of non-age, and that no decree had been rendered. I never had any interview with or consultation with Micou on this subject. Lucy was as profoundly ignorant of business as any well-educated young girl of 19 could be. Clara seemed to know nothing of her business or property, and Frank S. Boykin, while very anxious and apprehensive, seemed to know but little more. I told them that the settlement would soon be made, and being so engaged as to be unable to go up to Dadeville, Tallapoosa County, I employed Mr. Elmore J. Fitzpatrick, in whose honor, judgment, and professional skill I had confidence, to go up and attend to the settlement for my clients, the wards. When I retained him I told him of the general features of the case—the embarrassment of Micou, and Barnett,
172 Micou & Co. he knew as well as myself—and having a wholesome apprehension of bankrupt courts, I especially cautioned him to be careful to make no charge which would not be sustained on the most jealous scrutiny. I knew nothing of the question as to charging Micou with rents and hires, or that it would arise. I am informed and believe that Micou filed his accounts on the basis of charging himself with the income of the cultivation of the lands; that Mr. Fitzpatrick, on examination, became satisfied that there was no order to keep the estate together, which exempted the guardian from liability to account for rents and hires, and felt that his duty required him to make the effort to charge him; that he did so, and that after hearing authority on the subject from each side, the judge, looking into the paper which the bill insists was authority to keep the estate together, decided deliberately that it was no such authority, and held him liable for rents and hires; that thereupon witnesses were examined as to the value of the hires and rents, and the judge decided upon the amount;
173 that in this there was no surrender on Micou's part, but a fair contestation; that the matter has been decided by a competent judicial tribunal, whose decision is final. As to the amount of profits as distinguished from hires and rents, this respondent thinks, on examination of the transcript, that the charge in the amount due by Micou was about sixty-five thousand dollars, but he denies that the rents and hires, or either of them, were charged at improper rates, and says that he is informed that they were fixed by the judge after hearing the evidence of those accessible at the time who were best informed on the subject, and that their testimony was that of witnesses who were well informed. Neither respondent, Lucy Micou, or Clara, or Frank Boykin were present at the settlements, or knew of the question having arisen, or that it would arise; it was raised by Mr. Fitzpatrick, on careful examination of the papers, and was, in respondent's opinion, correctly decided.

7th. Answering the seventh paragraph, he says: He denies on
174 information and belief that any delivery of stock in the Tallassee Company was made by Micou to said Clara after her marriage, or on or about the 10th July, 1873, but says he is informed and believes that on the day of her marriage, which took place October 22d, 1873, and before it, said Micou handed a certificate of stock in said company

to said Clara Micou for thirty thousand dollars, with a letter inclosing or covering it, stating that it was a payment on account of his liability to her as her guardian, and which letter inclosed a receipt to be signed by her for the amount of thirty thousand dollars, with a request that she would read it and sign it; that said Clara, relying on her said guardian as a good man of business, and as acting for her interest, signed and returned the receipt, thinking that the stock was worth the amount, but that shortly after her marriage, within a very few days, she mentioned it to her husband, who then told her that it was, in his judgment, of no value, or of but very little value. On information and belief, he denies that any other property or money was, before
175 said settlement in the court of probate, paid to said Clara or husband. He denies that the amount of said receipt was fraudulently or collusively withheld or omitted from said settlement by him, and answers and says: That as soon as he was informed of the delivery of said stock by Boykin, as hereinafter stated, he told him that it amounted to nothing, that it was no payment, and would not be so regarded by any court, and that he was soon after informed that Micon and his sureties had all agreed that it should not be regarded as a payment; and he answers that they did so agree before said settlement, and that said agreement was not fraudulent or collusive, but was fair and just, and demanded by common honesty and the rules of courts of equity regulating dealings and settlements between guardian and ward, and for these reasons thought it unnecessary to mention it to Mr. Fitzpatrick, and for no other reasons or reason whatever.

8. Answering the 8th paragraph, respondent says that he
176 does not know the amount of stock in the factory held by the Barnetts and Micou in 1873, but is informed that it was not 900,000 dollars in the aggregate, nor did either of them own so much as three hundred thousand dollars, but it was all worthless, and known in the fall or winter of 1873 to be worthless, and was in fact worthless in the spring or summer of 1873, though not so generally esteemed at the time. He admits that the chief part of the visible property of Micou and the Barnetts consisted of houses, and lots, and plantations, with horses, mules, plantation tools, crops, and the proceeds of crops thereon grown, lying in the counties of Elmore, Macon, and Montgomery, Alabama; that after the rendition of the decrees mentioned in the spring of 1874 he denies that Thomas M. Barnett had any crop, plantation tools, proceeds of crops, or horses or mules in Elmore County, and as to this matter says that the plantation described in the bill as the river plantation of Thomas M. Barnett had long before that time, and before plaintiff's debt accrued, been conveyed by Thomas M. Barnett to his daughter,
177 Mrs. C. Storrs, who were in possession thereof, and all the mules, stock, tools, and crops thereon were the property of Storrs and wife, and not of Thomas M. Barnett, and that he caused the plantation to be sold under executions on said decrees, because said conveyance was a voluntary one, and after the liability accrued on which the decrees were rendered. He is informed and believes that Benjamin H. Micou did not own the stock, crops, tools, horses, and mules on the plantation in Macon County, but they were in possession of one Walker, who claimed the same and was the owner thereof.

As to the crops on the lands in Montgomery County, he says that he directed the levy of the executions in the hands of the sheriff on all of the property of said Barnetts and Micou, in said county, liable to levy and sale, and it was the duty of the sheriff to execute the process. That all the horses, and mules, and plantation tools, and crops of corn and

said decrees, but says that the plantation in Montgomery County was held by him as tenant for his life only, and was inherited by Lucy Micou and Clara Boykin from their mother, the wife of said Micou, who was the owner of the same in fee simple at her death intestate; and that the residence of said Micou, in Montgomery, on Goldthwaite street, was subject to a mortgage of more than its value, still in full force and unsatisfied.

He admits the residence of Micou in Montgomery County, as stated. And, further answering this paragraph, he says that he is informed and believes that before the organization of said national bank said Micou had conveyed to the use of his present wife the property in the city of Montgomery, known as Commercial Hall, on Commerce street, and the property known as the Dexter House; and that said conveyance was valid and good as against all the creditors of Micou whose debts accrued after the war, and against all other creditors of said Micou than
186 said Clara and Lucy at the time of said sale; that the other property sold as his was liable to sale under execution.

11. Answering paragraph eleven, he says he, as owner of said executions, did so bargain with Paul Strobach, sheriff as aforesaid, and said Strobach agreed to sell all the real and personal property for said commission of one thousand dollars, to be paid at a future day, and he has paid it, though said Strobach failed to sell the personal property, and he thereby was subjected to the expense of additional commissions, and he entered the receipt of the amounts stated on each of the executions; he owning the same, entered one-half on each, as stated by the sheriff, but he paid no money at the time, and afterwards only the costs and commissions, as above stated. According to his best recollection, the reason a sale was not made on the first executions was the defective description of the real property and the pending elections, in which the sheriff was interested, prevented any levy and sale of the personal property by him at that time; but respondent denies that the
187 failure to levy on the mules, stock, and other personal property resulted from any directions given by him to the sheriff, or that he gave him any other directions than assistance in correcting the description of the real estate, or that he in any way suspended such executions or controlled the same with a view to benefit the defendants therein.

12 and 13. Answering paragraphs twelve and thirteen, he says he admits that execution issued as stated in paragraph 12, on Feb'y, 1874, and was returned as stated, but he denies that no other execution issued on said decree till December 16th, 1874; on the contrary, execution issued and came to the hands of said Grimmett on the 16 June, 1874, and under said execution said Grimmett sold and conveyed to this respondent, as the property of Benjamin H. Micou, north ½, all south Tallapoosa River, of section 21, township 17, range 21; all section 28, T. 17, R. 21; S. W. ¼ part S. 22, T. 17, R. 21; all except 72.23 acres, belonging to Howard and Finlay, of section 33, T. 17, R. 21; all except 15 acres, belonging to old Cliett Place, of section 32, T. 17, R. 21; all east of
188 Calebee Creek of section 5, T. 17, R. 21; S. W. ¼ part S. 3, T. 16, R. 21; and 4½ acres in the N. W. ¼ of S. W. ¼ section 16, T. 17, R. 21—all in Macon County, for the sum of five thousand five hundred and forty-eight dollars. He admits the issuance and proceedings under the execution issued December 16th, 1874, mentioned in paragraph 12, but denies that Micou had any growing crop on said place or any considerable personal property thereon, having been informed and believing as he does that the personal property was the property of one

Walker, then in possession of the place. He admits the issuance of the execution stated in paragraph 13 as of March 2d, 1874, and the return thereof; and he admits the issuance of the two executions on Dec'r 16th, 1874, but denies that any pretended sale was made thereunder, but answers and says that a real sale was made to him, and a conveyance by said Felts of the lands described in paragraph 14, for the sum of twenty-five hundred dollars, to respondent, as trustee for Clara E. Boykin; that said sale was ordered because the description in the first levy
189 and sale and conveyance was defective and did not embrace and properly describe all the lands, and a mistake was made in describing him as trustee, which he did not think of sufficient consequence to correct.

14. Answering paragraph 14, he says he has before denied and now denies that Micou owned the personal property on said plantation, and he now says that he never gave or authorized any one to give any directions as to not levying said executions, or gave any inducement or authorized any inducement to the sheriff not to levy them on any property of defendants therein; the land at the sale by Felts was bid off by him, respondent, at 2,500 dollars, which is stated in his conveyance to be the consideration, and he does not believe that any other conveyance was executed by the said sheriff to Micou, as trustee, or any one else; he does not believe that it was bid off by Micou or any one else but himself. He admits that the plantation was worth about 6,000 dollars, and he has paid for it, by bids on his executions, $8,048 dollars.
190 He does not know or believe that Micou paid anything. He himself paid the costs and commissions on the sales.

15. Answering paragraph fifteen, he says that he believes that the executions and returns thereof set out in said paragraph are correctly set out; that the bids were made by him as stated, and the conveyance as stated; and that, being the owner of said decrees, he paid nothing more in money than the costs and commissions on the sales. He further answers that he has since paid to the holders and owners of other executions on which said real property was sold about that time twenty-five hundred dollars, the said execution being for the sum of upwards of five thousand dollars against the defendants in the decrees owned by him, and, also, against Clara Boykin and Lucy Micou, said payment being in compromise of a decree which he attempted to resist, but was advised before appeal to compromise.

16. Answering paragraph sixteen, he says that in the year 1874 Thomas M. Barnett owned nothing whatever on said river plan-
191 tation subject to levy and sale, and the plantation itself was subject under his executions, and none others, for the reasons and facts hereinbefore set out; and he denies that Thomas M. Barnett owned, disposed of, or made use of any such property, or was suffered by this defendant to do so, or by any of his co-defendants, and he denies the fraudulent acts and intents charged in said paragraph.

17. Answering paragraph seventeen, he says he admits he has made no other conveyance of said property, or any of it, than the one before stated and hereinafter stated, and he does not claim to be the beneficial owner of said property except to cover such liabilities as he has assumed or become liable for in respect of the administration of the trust created by the assignment hereinafter set out; and as to the remainder of the allegations of said paragraph, he answers that they are untrue, and he denies the same. He has executed a mortgage to the Life Association of America to secure a loan on real estate in the city sold as T. M. Barnett's property, and to S. C. Marks on the Nich. Barnett place, and

192 part of the T. Barnett place, with the stock and crops, to secure an advance of funds, both in Montgomery County.

21. Answering paragraph 21, the next in order as numbered in the bill, he says he admits that, so far as he is informed, there has been no division between Lucy B. Micou and Clara Boykin of the real estate purchased by him under said executions, but he denies that the defendants in said execution have remained or been suffered to remain in possession of each and every parcel of the property owned by them respectively before said purchase by him, but he answers and says that he has assumed and taken possession of all of said property except the residence of Benjamin H. Micou, in the city of Montgomery, incumbered by a mortgage equal to its value, and has since the 1st January, 1875, controlled the same. That by direction of Lucy Micou and Clara Boykin, or their acquiescence, he has allowed Charles Storrs to remain in possession of the river plantation, once owned by Thomas M. Barnett, in Elmore County, and the wife and child of Nicholas Barnett to dwell in
193 and enjoy the residence formerly owned by Nicholas Barnett in the city of Montgomery, and Lucy Micou has herself cultivated the plantation in which B. H. Micou had a life interest in Montgomery County, and she has by cultivation of the same become liable for heavy losses, more than ten thousand dollars, for which a judgment has been rendered against her.

Boykin and wife have been in possession of the plantation in Macon County formerly owned by B. F. Micou; the real estate in the city of Montgomery, other than the residence of Micou, sold as his property, has been in possession of Lucy Micou and Clara Boykin, and the rents received by them; the real estate in said city sold as the property of Thomas M. and N. D. Barnett has been in possession of respondent, and the plantation sold as the property of N. D. Barnett has been cultivated by respondent, and the plantation sold as the property of Thomas M. Barnett has been in possession of and cultivated by respondent.

It is true that he has, in the cultivation of the said plantations,
194 up to this year, employed Thomas M. and Nicholas Barnett as his agents, and during this year Nicholas Barnett alone; but they managed it and them solely as his agents. He was and is responsible for all expenses and has received all incomes.

He admits also that he has permitted, with the consent or acquiescence of said Clara and husband and said Lucy, Ben. Micou and family and Thomas Barnett and family to occupy the houses formerly owned by them at Tallassee, in Elmore County; but he has managed and controlled by his agents the house formerly owned by Nicholas Barnett at Tallassee; and so he denies that the said Thomas M. and Nicholas D. Barnett and Benjamin Micou have been suffered to enjoy for their own benefit all said real estate, and he denies that such occupation of said property or parts thereof, as is here admitted, was in pursuance of any previous agreement or understanding, or that any such previous agreement or understanding, or any other or any such fraudulent agreement or purpose as was charged in this
195 paragraph, ever existed; and he denies all the allegations of said paragraph not herein admitted; but he admits that Lucy Micou has received a transfer from him on the 2nd March, 1875, of all the stock, mules, crops, and utensils bought by him in Montgomery County as the property of B. H. Micou, and that it was made at the request of herself and said Frank and Clara.

Answering the interrogatories propounded in said bill, he says:

Int'y 1st. To the 1st he says: The application was made as charged,

and granted when shown by the exhibits to the bill. He is informed that it was made by B. H. Micou, and first learned it about 1st Feb'y, 1874, from David T. Blakey; does not know whether authorized by Lucy B. Micou or not; never heard her speak of it.

2 int'y. To the 2d interrogatory he says: He has no knowledge, but he is informed that said B. H. Micou did in some manner, but he does not know how or precisely when, transfer in the summer of 1873 on the books of the Tallassee Factory thirty thousand dollars of the
196 stock of said company to the name of his daughter Clara, then unmarried, and, as he is informed, without her knowledge. That on the day of her marriage or the day before, namely, the 22d October, 1873, and before she was married, he, Micou, handed her a letter containing a certificate for thirty thousand dollars of stock in the factory issued to her, saying that it was payment of thirty thousand dollars on account of his liability as her guardian, and requesting her to sign a receipt therefor, which was inclosed, and return the receipt to him. That she went to her room, read it, and, without opportunity of consultation with her intended husband, signed the receipt, which, he is informed, was a receipt for thirty thousand dollars, and handed it to him immediately and before her marriage; that she never heard of the matter before, and gave no authority for the transfer of stock to her. That she informed her husband very soon after the marriage (within a few days), and he said that, from what he had heard, the stock was
197 worthless or of but little value. Said transfer was not made even with her knowledge; the delivery to her was by her consent; it was not made either with the knowledge of her husband or his consent, as it was made before marriage, and he knew nothing of it till after the marriage, and objected to it, or rather said that the stock was worthless as soon as he was, after his marriage, informed of it; he knows of no agreement or writing inquired of, but was informed of the letter and receipt, and has never seen the receipt. He is informed that Micou, on being told by Frank Boykin that I had said the payment by delivery of the stock was void, agreed to consider the transaction as cancelled; and this was before the settlement in the court of probate. The letter (or a copy of it) is attached to the answer of Frank and Clara Boykin, and he refers to that answer for a copy of the letter.

3 int'y. Answering the 3d interrogatory, he says: He has no knowledge or information on the subject inquired of, and does not be-
198 lieve that any such transfer or transfers, conveyances, or assignments were made.

Int'y 4. Answering the 4th interrogatory, he says: That said Clara and Lucy employed him personally, after a previous conversation hereinbefore set out with F. S. Boykin. He does not know of their having employed any other attorney, but he employed Elmore J. Fitzpatrick, and notified them thereof. Said Clara and husband informed him of the delivery of stock, but of no other transfer. He was not informed by said Lucy or Clara or Frank S. Boykin of the proceedings to relieve the said Lucy of non-age, which had not then gone to decree. The only instructions given by them, or either of them, consisted in assent to my suggestions that a speedy settlement of accounts should be had. After my employment I was told, before the settlement, that Micou and his sureties had agreed that the transfer of stock should be considered as null and void, and no payment in consequence. I thought it unnecessary to mention it to Fitzpatrick. They gave me no instructions or directions as to the settlement further than to attend to it for them.

199 Int'y 5. To the fifth (5th) interrogatory he says: Clara and her husband and Lucy were living in the house with B. H. Micou; and he is satisfied they knew or had heard all the facts inquired of, but whether from Benjamin H. Micou he does not know. He believes, from what he saw of them and said Micou, that they learned nothing of the matters inquired of from him.

Answering the 6th interrogatory, he says: He had conversations on the subject, the first with Frank S. Boykin, about the time of the meeting of the creditors and stockholders of the Tallassee Factory. No one was present but him and the said Frank. Frank expressed his apprehension of the insolvency of Micou, and that the troubles of Barnett, Micou and Co. would involve and render insolvent his sureties, the said Barnetts, and that they would be all declared bankrupt, and the amount due his wife and her sister would be lost. I inquired if anything had been paid him or his wife since her majority or marriage. He told me of the delivery by Micou to his wife of a certificate of stock
200 in the Tallassee Company for thirty thousand dollars or thereabouts on or just before her marriage, and that his wife had given a receipt for it, or for $30,000 *dollars*. I told him it was worthless when delivered, and that Mr. Micou ought to have known it, and that its delivery did not amount to anything. He said it was all he had ever given her. I told him not to be afraid of the bankrupt court; that they did not owe much individually except the amount on the guardian's bond, and the law would in the bankrupt court, or any other court of equity, apply their individual property to their individual debts first. The next conversation I had was with Frank and wife and Lucy Micou, no one else present, at their residence, and in Frank's sitting room. I did not allude to the stock in this conversation, but repeated to them all what I had said to Frank as to the fact that Micou and the Barnetts individual liabilities being small, except on the guardian's bond, and their right to have their individual property applied to their individual debts.
201 They then told me to do what was necessary to secure them; and I said it must be done by having a settlement in the court of probate, and I would see to it. Nothing whatever was said by any of us as to suffering Micou or the Barnetts to remain in possession of any property, or as to indulging them, or doing anything for their benefit at this time. Up to the time of the settlements these were the only conversations I had with any of them except Frank Boykin, who would come to me almost daily, but nothing passed except his expressions of fears and apprehensions of ruin, and my telling him to leave it to me and I would attend to it, and all would go well, I hoped. He frequently said he could not get Micou to talk to him, and I told him not to worry him.

I have answered as fully as possible this interrogatory. I had no conversation whatever on the subject of Micou's indebtedness to his daughters with him until after the settlements in the court of probate at Dadeville.

202 7 int'y. Answering the 7th interrogatory, he says: That he knows of no such conversation as that inquired of, or any conversation in relation to said indebtedness on the guardian's bond between Lucy Micou and Thomas or Nicholas Barnett, or Clara Boykin, or Frank Boykin, and either of said Barnett, or any one for them, before the rendition of said decrees on the subject of the amount thereof, or how it should be effected, nor did he have any conversation with either of them, or any one for them, on the subject before the rendition of the decrees.

After the rendition of said decrees he saw and conversed with D. S.

Troy, att'y, who was consulted by Thomas M. Barnett as to his troubles, and with Nicholas Barnett, who had consulted this respondent after being informed of his retainer by Frank Boykin and wife; he cannot pretend to state exactly when or where these conversations occurred. Before the rendition of the decrees, Troy and respondent had serious doubts as to the liabilities of the two Barnetts for the debts of
203 the firm of Barnett, Micou & Co.; this was in the fall of 1873. They doubted whether the Barnetts could be made liable for the debts of Barnett, Micou & Co., and had frequent consultations on this subject. They finally concluded that they would be held so liable, and were in fact thereby rendered insolvent. Some of these conversations were between Troy and respondent alone, some with Troy and the Barnetts, or one or both of them, and some when all were present, and Storrs, the son in-law of Thomas Barnett, was also present. In none of these conversations was it ever hinted or suggested that any fictitious debt should be made use of or pretended. The Barnetts knew that their liability as sureties must be for a large amount, but were ignorant of its extent. Nothing was said about the Barnetts, or either of them, being present at the settlement of the accounts, and neither was present in person or by attorney. They were both broken in spirit and utterly dejected, and were extremely unhappy from an apprehension that
204 their good name would suffer as honest men from the failure of the factory and the failure of Barnett, Micou & Co; they expressed themselves as ready to sacrifice or part with every dollar of property if only their good name, inherited from an honest parentage and enjoyed till then without blemish, could be preserved; they felt that they were ruined. Troy knew it and I knew it, and they seemed to give themselves no uneasiness as to how their property was to be disposed of. When the decrees were rendered I communicated to Col. Troy the fact and the amount, and my views as to right of the wards to have the individual property of the Barnetts and Micou applied to their individual debts. I said that the only debts I knew of as due by the Barnetts were the two debts to Pittman and Lanier (less than twelve thousand dollars) and the debt on the decrees. That Micou owed a debt of ten thousand dollars besides, secured by a mortgage on real estate in the city. That I thought the debts to Pittman and Lanier ought to be paid, and though our decrees were prior liens to their
205 judgments, I would recommend and insist to my clients on their satisfaction, because they were debts of their father on which the Barnetts were his sureties; having done so and received their sanction, I assured Pittman's agent and his counsel that his judgment should be secured or paid, and also Pettus and Dawson, the counsel of Lanier. I knew of no other considerable individual debt of either of said defendants to the decrees. I then told Troy and the Barnetts that we would proceed to sell under the executions; that the times were so bad there was little hope of sale of real estate for anything like its estimated value, but that I would advise the purchase of the whole of it at fair prices and the holding it as an investment.

I never offered any inducement either to Troy or either of the Barnetts to consent to any decree or to consent to any mode of satisfaction of the decrees, nor was any doubt entertained by myself or Troy or the Barnetts, so far as I was ever informed, as to their liability
206 on decrees or as to the fairness of the decrees. By my advise, and in order the better to secure the execution of the decrees, the sisters agreed to transfer them to me for their benefit, with full power to use them for their joint benefit. I then conversed with Frank

Boykin, who was intimate with me, being a cousin by marriage. I told him that the debt due by the Barnetts to his wife and her sister was a security debt due by them as surety for his wife's father; that in my judgment, and in that of all good men, he and his wife and her sister would suffer greatly if they stripped their uncles in their age of the property inherited from the father of the Barnetts, who was the grandfather of his wife and sister. Boykin said he was powerless himself and would readily do anything which his wife and sister would agree to. I suggested that it would be monstrous for them to be rich and live in luxury while their uncles were poor and wretched, and the young ladies on being assured by me that they would have a right to
207 do as they pleased with their own, agreed to make the provision indicated in the assignment hereto attached, and did so by executing it; after their agreement and before the execution of the paper I told Col. Troy of it and he said he had supposed that I could or would induce them to be more liberal or generous. The Barnetts and Micou were not on friendly terms at this time, they thinking that they had cause of complaint, and that in the business transactions in which they were connected he had abused their confidence and ruined them.

The arrangement made by the assignment was purely voluntary on the part of Boykin and his wife and her sister, and was made by me and without any inducement being extended or offered to either of the Barnetts or their consent or acquiescence being required to anything. This all happened in numerous conversations. Those with Troy were in his office or mine, those with Boykin were at my office, on the streets, or at my house. Those with his wife and sister when I called on them.

Since her majority, Lucy Micou has ratified my acts in the
208 premises, and nothing was to be done, acquiesced in, or omitted by the said Barnetts or Micou or either of them; it was purely voluntary on the part of the ladies and Boykin and at my urgent request.

Int'y 8. Answering interrogatory eight (8) he says: I was not present. I had been informed of the delivery of the certificate of stock as before stated. I did not, as well as I now recollect, inform Fitzpatrick of it, as it was in my opinion of no consequence whatever. I knew of no advancements, and of course did not inform him of any. I do not know whether it was called to the attention of the court, but presume it was not; if it was it must have been by the guardian or his counsel. The orders of the court of probate inquired of were unknown to me till after the settlement, when Fitzpatrick reported the matter to me; thinks the orders are correctly set out, but does not regard them as authorizing the estate to be kept together. He sees from the exhibits that the orders of the court of probate, assumed by the bill to be authority to keep the estates together, were called to the notice of the court, and
209 he was so informed by Mr. Fitzpatrick, and it was left to the court to decide on the effect thereof. Micou's account was so made out and was surcharged as inquired.

The question was, in fact, submitted to and decided by the court, and was not settled by concurrence of counsel; there was no such concurrence. The counsel were David T. Blakey for Micou and Elmore J. Fitzpatrick for the wards. The orders were called to the attention of the counsel of Micou by Fitzpatrick at Dadeville after a careful examination of the orders on the day of the settlement or the night before, as I am informed, and I am informed that the amounts were so founded on testimony of witnesses, and the witnesses were Micou, who worked the land and negroes, and David T. Blakey, who was familiar with the value of hires and rents, and was not agreed upon; it was agreed to take the

sworn estimate of Micou and Blakey, to dispense with sending for other witnesses, and that said Micou did instruct his counsel to make a real contestation, such as appears to have been made, by being present and witnessing it, and that he did not furnish him with
210 names of witnesses, as he did not know or expect the question to arise, and after it arose he found it unnecessary, as he and his counsel, who knew everything about it, were the only witnesses offered; knows not what their secret wishes may have been been, but knows nothing to indicate that they were so willing.

Int'y 9. To the ninth interrogatory he answers: No such instructions were given to the sheriff of Elmore County, nor were any special instructions given him by me, or by authority, so far as I now remember, nor was any information given him by me in relation to it, except directions as to ascertaining the amount of stock in the Tallassee Factory held by defendants in execution, and the mode of levying on the same, nor do I know of any instructions to the sheriff of said county having been given by any other person. I think that before the levy I furnished a list of real estate to be levied on, but do not remember
211 any other information or instructions than those alone indicated. I had no instructions from the plaintiffs as to enforcement of the executions; they left the whole matter to me.

Int'y 10. Answering interrogatory tenth (10) he says: I do not know or believe now, nor did I believe at the time, that either of said Barnetts had any personal property of any consequence in Elmore County, or any personal property in said county beyond their Tallassee stock and household furniture in the summer houses or residences owned by at Tallassee, and which I supposed, and now suppose, to have been so inconsiderable in value as to be exempt from levy and sale. I cannot state its value or of what it consisted specially, but supposed it to be beds, tables, chairs, and other household furniture. I do not know or believe they either had made crops or owned mules in said county in 1874, nor do I now believe they, or either of them, had, except that I have heard that Tom Barnett did that year cultivate a small crop of corn of only a few acres near Tallassee, but I do not now know the amount or value
212 thereof. I know nothing of the sale of any crop or corn or mules under said execution or decree; he made no effort to sell such crops of corn, cotton, or mules, because he did not know of their existence, and not because he wished to screen them from sale or pursuit by the creditors of said Barnetts.

Int'y 11. Answering the eleventh interrogatory, he says: So far as he was then informed said Micou did not cultivate or manage the Macon County plantation in 1874, but it was cultivated and managed by one Walker, who was then in possession thereof, and claimed the personal property thereon, and so far as he then knew or believed, B. H. Micou had no personal property thereon. In the summer or fall of 1873 Micou himself told respondent, when passing the place, that Walker was managing it, and made all contracts and purchases for it, principally in cattle raising and trading, and was to pay him a share of the profits, after deducting his expenses. The said contract with Walker he has since been informed was to expire on the 1 Jan'y, 1875,
213 but by consent of Walker and Micou it was terminated in the fall of 1874, and by the agreement Walker did as he had engaged to do, turn over to Micou an amount of cattle, grain, and farming utensils equal in value to the outfit that Micou had provided at the beginning of the contract; he knew nothing of this turning over of property to Micou till some few days ago, and has been informed that the cattle,

grain, and farming utensils were of the value of about two thousand dollars, and were delivered by him to Lucy Micou, who cultivated the place in 1875 upon an agreement that Micou should have credit for it, which he is willing to give.

I do not remember giving any instructions to the sheriff of Macon as to not levying on the personal property on the Macon County place, but if I had been asked for instructions as to whether it should be levied on I think I would have directed no levy to be made, as I would have regarded it as vexatious to Walker. Walker himself told me that the property on the place was his, and I paid him cash for a cow I
214 bought of him from the place in the fall of 1873, or early in 1874, and I know of no instructions or information being given by either of plaintiffs to the sheriff in relation to the personal property. I think I wrote by Frank Boykin to Governor Ligon to direct the sale of the Macon County lands and have it bid in for me, but have no copy of my letter or other recollection of its contents.

Int'y 12. Answering interrogatory twelfth (12) he says: It is not true an execution was issued on the decree in favor of Clara and Frank Boykin, on the day of , 1874, and came to the hands of Sheriff Grimmett, on the 16th June, 1874, under which, on the first Monday in November, 1874, he sold to respondent as before answered; the fact being denied, he thinks it unnecessary to explain why.

Int'y 13th. Answering the thirteenth interrogatory, he says: He knows of no payment of any money to either the sheriff of Macon or Elmore, except for their lawful fees and commissions for the levies and sales made, which sums were paid by him, after careful scru-
215 tiny of the accounts, and these sums were paid after the sales; he knows of no other payment or payments to them or either of them, and he knows of no agreement for the payment of any sum or sums to them. He has some indistinct recollection of endeavoring to get them or one of them to make some such bargain as that he made with Strobach for a reduction of the regular commission, but does not now remember whether successfully or not.

Int'y 14. Answering interrogatory 14th, he says: He has before answered that he has no knowledge or information of such payment or payments or agreement or agreements to pay. He does not believe any such existed. He has before answered as to the agreement with Sheriff Strobach and refer' to the answer in relation thereto in answer to the bill.

Int'y 15th. In answering interrogatory fifteenth (15th) he says: I did buy in all the property in my own name or direct it to be so bought in, but a mistake was made as to the second sale in Macon County as before stated, and he took deeds in his own name as to all
216 of it except that conveyed to him by Sheriff Felts as above stated, which was by mistake conveyed to him as trustee for Clara Boykin. I paid out no other money than the costs and commissions; this was paid by me out of my own pocket, and was handed to me in no other way than my money is generally earned as a practicing lawyer; it was paid generally by checks, and I cannot say it came from this person or that person, but none of it came from Micou or the Barnetts or either of them; the returns of the executions indicate the amounts so paid and he cannot state them more precisely. After the purchase of the property he discounted his own note for six thousand dollars on a mortgage of some of the Barnett real estate in Montgomery to raise money to pay to Lanier and for taxes and insurance and other expenses incurred on the property; this is due and unpaid. He borrowed money

in 1875 to cultivate the lands with and gave a mortgage on crops to pay it, some $2,000; this he has paid; and again in 1876, which
217 he paid out of the crops, and in 1877 he borrowed some $5,550 *dollars* to pay off a compromise of a decree of about $5,000 against the plaintiffs in said execution, and expenses of cultivating the crops he is making, and gave a mortgage of the crops and the Nich. Barnett plantation and some lands to S. C. Marks to secure it, besides the mules on the lands. This is not yet paid. He has no other claims on the property individually than for his services and advances beyond the cash received by him, which after the present crop will be nothing he thinks, as he expects to be able to pay all the advances made by him and the balance of the debt due to Lanier, and the mortgage to the life association he regards as sufficiently secured. I claim to be reimbursed out of all the property to which I have the legal title.

Int'y 17. To the seventeenth (17th) interrogatory, next in order of number, he answers: He has made no written agreement and he
218 knows of none. He, however, is desirious of furnishing the fullest information in his power, and therefore attaches hereto a copy of the assignment to him by Lucy B. Micou, and Frank and Clara Boykin, of the decrees and executions mentioned before by him. He knows of nothing else in the nature of an agreement, verbal or written, or of any conveyance except as above stated. The assignment was executed on the day of its date. The copy attached is marked "A."

Int'y 18th. Answering interrogatory 18th (eighteenth), he says: He knows of none, except that he has heard that there is some understanding, verbal he thinks, between Clara and Lucy, that Clara is to have a certain part of the Macon County lands on the north of the railroad, and Lucy that on the south. Also, that Clara and husband, and Lucy, requested him early in 1875 to transfer to Lucy the mules, stock, and implements, and corn on the old Ben. Micou place and on the Campbell place in Montgomery County, so that she could pledge them for supplies, which he did at their request. There has been none
219 with either of the Barnetts.

Int'y 19th. Answering interrogatory nineteenth, he says: He has not taken personally, by going on it and staying on it, possession of any of said lands, nor has he gone to take personal possession of the mules, stock, and crops, but he has had the possession, control, and direction of all of it; as to the river plantation, once owned by Storrs, he has suffered Storrs to remain in possession and has not demanded any account of the income or rents; Micou's family to occupy his residence there, and the Nich. Barnett one has been rented out by his direction. As to the houses at Tallassee, he has suffered the family of Thomas M. Barnett to occupy and enjoy that formerly owned by him; as to the city real estate, except the residence of Capt. C. P. Storrs, sold as the property of Thomas M. Barnett, the residence of Nicholas Barnett, on Court street, the residence of B. H. Micou, and the property known as the Dexter House and Commercial Hall building, he has rented
220 them out by his agents, Moses and Bros.; that the Dexter House and Commercial Hall have been rented out by Moses Bros. for Boykin and wife and Lucy Micou; that he has allowed Capt. Storrs to remain in the Storrs residence, and the family of Nicholas Barnett to remain in the residence formerly owned by him on Court street, or has rented it out for two years and suffered Mrs. Nicholas Barnett to receive the rent for the support of her family. In the year 1875, Boykin and wife occupied and cultivated the Macon County lands, and in 1876 and 1877, Frank Boykin and wife. In the year 1875, 1876, 1877, Lucy Micou

occupied and cultivated the Campbell place and the Micou Montgomery County plantation. He himself has, in 1875, 1876, and 1877, cultivated the Tom Barnett and Nich. Barnett plantations in Montgomery County; has been responsible for expenses and entitled to and received the crops; this includes the land, 1,000 acres of the 1,828 of the Tom Barnett place, which was bought by Pittman and occupied by him by Pittsman's consent, on an agreement to purchase, which he has since carried out by purchase from Pittman,
221 to whom he has executed a mortgage for the unpaid purchase money, some 3,000 dollars, recorded in Montgomery County, as well as the deed to him; he cannot without too much labor go over all his plantation accounts and accounts of rents, but thinks it sufficient to say that he has acted upon his construction of the assignment to him, and no complaint has been made by Lucy Micou or Boykin and wife, except that Boykin thinks that the only ten thousand and five hundred dollars in cash paid him is quite a small sum; Miss Lucy has only received from me five hundred dollars, and seems satisfied to allow me to try to work it out; they have not given me any directions whatever. I charged no rent for the occupation of any of the property occupied by either of the families of the Barnetts or Micou or Storrs.

Int'y 20th. Answering interrogatory twentieth (20th) he says: Micou did not bid it off; know of no deed to him for it; never knew of or assented to such purchase. I think I was mistaken in bidding
222 5,548 dollars for it at the first sale if the description had been full. I afterwards bid $2,500 more at another sale, and think the place was not then worth more than $5,000 dollars, or $6,000 at the outside. Lucy Micou has received the income of it in 1875, and Boykin and wife since. I think they have lost money on it each year. Nothing has been paid to me; on a settlement each will account for the part occupied by her to the other.

Int'y 21. Answering interrogatory twenty-one (21) he says: The indorsements do show this, and the division was so made because I was the owner of both, and merely as a matter of convenience, and for no other reason whatever. I know of no other agreement between plaintiffs than that set out in the assignment to me, which was made at its date, April 4th, 1874.

HENRY C. SEMPLE,
In person.
ELMORE AND GUNTER,
Sol. for H. C. Semple.

223 UNITED STATES OF AMERICA,
Middle District of Alabama:

Personally appeared before me, Joseph W. Dimmick, commissioner of the circuit court of the United States for the 5th judicial circuit, Henry C. Semple, who being by him first duly sworn, doth depose and say that the facts set forth in the foregoing answer subscribed by him as of his own knowledge are true, and those set forth on information and belief he believes to be true.

HENRY C. SEMPLE.

Subscribed & sworn to this 29th September, A. D. 1877.
J. W. DIMMICK,
U. S. Commissioner for said dist.

Exhibit A to answer of Henry C. Semple to the 17th interrogatory.

STATE OF ALABAMA,
Montgomery County:

This indenture, made by and between Clara E. Boykin and Francis S. Boykin, husband of the said Clara, Lucy Micou, and Henry C. Semple, witnesseth:

That the said Clara and Francis Boykin and Lucy Micou, in
224 consideration of one dollar paid to them by Henry C. Semple, and of other good and sufficient considerations, have respectively assigned, sold, transferred, and set over to the said Henry C. Semple the two judgments or decrees of the court of probate of Tallapoosa County in their favor, respectively, and against Benjamin H. Micou and Thomas M. and Nicholas D. Barnett, as sureties of said Benjamin H. Micou, with the executions issued thereon, with the right to control, manage, collect, and receive the amount of said decrees, and said decrees and executions. But upon trust nevertheless—

1st. So to proceed upon the same as to secure to the said Clara E. and the said Lucy, clear of all expense to them, the title to the property in the city of Montgomery known as the Commercial Hall property, owned by B. H. Micou, with the rents thereof from the time of sale; the property known as the Dexter House, in the city of Montgomery, with the rents from time of sale. That part of the lot on which the dwelling-house of B. H. Mi,
cou, in the city of Montgomery, stands, fronting on Herron street-
225 bounded on the east by the line of the brick wall between the yard lot and the stable lot, on the south by Heron street, on the west by the western boundary of the lot, and on the north by the northern boundary of the lot; also the plantation in Macon County known as the Shorter plantation, with the stock thereon, or in lieu thereof the value of said stock in money; also the one-third interest in the Greenville place in Elmore County, which is owned by B. H. Micou.

2nd. Upon the further trust to purchase and convey to the said Clara E. and the said Lucy each one-sixth of all the stock owned by the defendants, which can be sold under execution on the said decrees.

3rd. Upon the further trust to purchase as much of the remainder of the property held and owned by the said defendants, respectively, as can be sold under said executions and purchased therewith, and to settle that part of it owned by Benjamin H. Micou and sold as his property
on the wife and children of the said Micou by his present
226 wife in such proportions as said trustee may in his discretion consider fitting, and to settle that part of it so purchased which is sold as the property of Thomas M. Barnett on the wife and children of the said Thomas M., in such proportions as the said trustee may think fit, also to settle such part as shall be sold as the property of N. D. Barnett on the wife and children of said N. D. in such proportions as said trustee may in his discretion think fit. But the whole of the property so settled on the family of Thomas M. Barnett shall be charged with the sum of eight thousand five hundred dollars, to be paid to said Clara E. and said Lucy, and the whole of the property so settled on the family of N. D. Barnett shall be charged with a like sum to be paid to said Lucy and Clara E. with interest to be paid annually thereon until the said sums are paid, the principal not to be required to be paid until 1st of January, 1876, provided the interest thereon is punctually paid at the end of each year from the date of the sales.

227 It is, however, understood that all the expenses and costs of obtaining and executing said decrees are to be paid by said trus-

tee out of the proceeds thereof, and that the property and money provided herein to be settled on the said Clara and Lucy is to be received by them clear of all expense.

In witness whereof we have hereto set our hands and seals this the 4th day of April, 1874.

CLARA E. BOYKIN.
F. S. BOYKIN.
LUCY B. MICOU.

Witness:
R. H. SOMERVILLE.
SPENCER C. MARKS.

Examined, compared, and found to be a true copy.
HENRY C. SEMPLE.

Filed this the 29th day of September, A. D. 1877.
J. W. DIMMICK, *Clerk.*

228 *Answer of Clara E. and Frank S. Boykin.*

In the circuit court of the United States for the fifth judicial circuit at Montgomery, Alabama. In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY, complainant,
vs.
BENJAMIN H. MICOU, CLARA E. BOYKIN, AND Frank S. Boykin and others, defendants.

The said Clara E. Boykin and Frank S. Boykin answering said bill of complaint, for answer thereto say:

1. They admit the statements of the first paragraph of said bill.

2. They deny the statements of the second paragraph of said bill, except that they admit that said Micou was the guardian of his said daughters and the value of the property.

3. They have read the answer of Henry C. Semple to paragraph three of the bill and adopt it as their own.

4. They have also read and adopt as their own the answer of Henry C. Semple to the fourth paragraph of the bill.

5. They deny all combination and conspiracy alleged in the fifth paragraph of the bill and adopt the answer of Henry C. Semple thereto as their own.

6. Respondents deny that they had any peculiar knowledge of the facts necessary to a fair settlement of accounts, or that they had any
229 knowledge that was conducive thereto which was not communicated to their counsel, Henry C. Semple; they deny that they intended or desired or made any effort to secure a decree for a larger amount than was really due to them or that such decree was rendered; and, denying all charges of combination, fraud, and conspiracy in paragraph six of the bill, they say they have read the answer of Henry C. Semple thereto and adopt it as their own.

7. Answering paragraph seven they say that they were not married until the 22nd of October, 1873; that Benjamin H. Micou did not after said marriage pay to said Clara thirty thousand dollars or any other sum in stock of the Tallassee Company or otherwise; and they deny that after said marriage he paid her in money or property any other sum, but they say that before her marriage on the 22nd day of

October, 1873, the said Benjamin H. Micou, about 12 o'clock m. of the 22nd of October, 1873, handed to her a letter, a copy of which she attaches hereto marked A, inclosing a certificate of stock in the Tallassee factory for 300 shares, which certificate was a certificate of ownership to Clara E. Micou, dated July 1st, 1873, of 300 shares of stock in said factory. She took the letter to her room, read it, and signed a receipt for thirty thousand dollars, she thinks, which she handed to him before her marriage, and on the same day, 22 October, 1873; she was not then married and she did take the said stock in pay-
230 ment of the amount stated in said receipt; she has never seen the receipt since. This was the first occasion on which she knew or was informed of the fact that any stock of said factory had been transferred into her name on the books of the factory or that it was comtemplated or intended. She was ignorant of its value and knew nothing of the state of her guardian's account with her. She had been engaged to be married to her husband since May, 1873, and she is informed that her father had never said anything to him on the subject of the stock, and he says that Micou had never said anything to him on the subject or on the matter of the settlement. She did not inform her husband of the said matter till some days after the marriage, when she handed him the letter and certificate of stock, and she is informed and believes that this was the first he knew of it, and he answers that this was the first he ever knew of it or had heard of it.

They both answer that when he was so informed of it he said that it was not worth anything in his opinion. She answers that she never spoke to her father on the subject, except to hand him the receipt she gave him, then or since, and he answers that he never spoke to Micou on the subject till after his conversation with Semple on the subject, which Semple has correctly detailed in his answer, which conver-
231 sation was before the call of the Tallassee meeting in the fall of 1873; immediately after the said conversation he sought an interview with Mr. Micou and told him that he was advised that the transaction was not a just or legal payment and he wished him to consent to take it back or cancel the matter; he said he would do so if his sureties, the Barnetts, were willing to have it done, and he saw them and they agreed to it and he told Mr. Micou of it, and this was everything that ever passed between them on this subject, and he told his wife of this conversation and consent of her father and the Barnetts; and she answers that she never had any other knowledge or information on the subject than that above stated. They are informed and believe, and so answer, that the condition of the factory at the time of the delivery of such certificate, October 22, 1873, was such that the stock was in fact worthless. He further answers and says that being requested by Mr. Durr to participate in the meeting of stockholders and creditors in respect of said stock standing in his wife's name on the books of the company, he declined to do so, on the ground that she was not the owner of any stock. And they both deny any payment, transfer, or conveyance to said Clara before said settlement in the court of probate; and they deny all fraud and collusion alleged in said paragraph against them respectively, and all knowledge or information or belief of any fraud or collusion on the part of any of the other defendants to said bill or of any other person, and believing and being advised that the said transfer and delivery of said stock did not under the circum-
232 stances above stated constitute any payment to her or discharge of any portion of the liability of said Micou to her as her guardian

did not credit him with it; but she denies any collusion with said Micou or any design thereby to defraud any creditor of said Micou.

8. Answering the eighth paragraph, they say that by the failure of the said Tallassee Company, it became known to all in the fall of 1873 that said stock was worthless, but that the real condition of the company was such that it was really without value long before that time, to wit, in the spring of 1873. They deny that they fraudulently used the executions on their decree to protect the property of the defendants therein or any of it, and answer and say that they did not interfere in any manner with the execution of said decree, but left it entirely in the hands of Henry C. Semple, upon whose judgment and integrity they relied, and having no special knowledge of the subjects alledged, except said fraudulent intent and conduct attributed to them, they say they have read and adopt as their own the answer of said Semple to said paragraph.

9. Answering paragraph 9 & 10 of the bill, they say they have no information on the subject, except that derived from Henry C. Semple, and no knowledge of the matters alledged, except as to the pur-
233 chaser of the real estate by Henry C. Semple, and being informed by said Semple of the facts set forth in his answer to the said paragraphs 9 & 10, they adopt it as their own, and for the same reason they adopt his answer to paragraph eleven (11) of the bill. They have no knowledge of the matters alleged in the twelvth (12th) paragraph of the bill, and no information thereof except from said Semple, and they therefore adopt on his informationh is answer to said paragraph; and also to paragraph 13 (thirteen) of said bill, except as to the personal property, which they answer in the next paragraph.

14. Answering paragraph 14 (fourteen) of the bill, they say that they deny that in March and April, 1874, while executions were in the hands of the sheriff of Macon County, said Micou had and owned the personal property on said plantation. They deny that they gave or authorized or knew or were informed that any one in their name or the name of either of them, or of Lucy Micou or Henry C. Semple, gave any instructions in relation to not levying on the personal property on said place. They deny any purchase by Micou at the execution sales, and say that they are informed and believe that the answer of Henry C. Semple to said paragraph is true, and they adopt it as their own so far as they have not already answered it.

15. They have no personal knowledge of the matters set forth
234 in the 15th paragraph or any information other than that derived from said Semple, and they adopt, on information and belief, the answer of said Semple thereto.

16. They deny that they wilfully permitted the conversion by said Thomas M. Barnett of the personal property mentioned in paragraph sixteen to his own use in fraud of his creditors, and they say that they had then and have now no knowledge of the matters alledged in said paragraph, or any other information than that derived from said Semple, and believing his statement to be true they adopt his answer thereto as their own.

17. As to most of the allegations of paragraph seventeen (17), they say that they adopt the answer of Henry C. Semple thereto as true, but as to those charged as within their own knowledge and with regard to the alledged agreement or agreements between them and said B. H. Micou and Thomas M. Barnett and Nicholas Barnett, or either of them, they deny them entirely, or that there ever was any such agreement or agreements between them or any of them, or that there has ever been any

understanding or agreement to use the decree, or execution or executions, in such a manner as alleged, or in any manner, for the benefit of the defendants in said decrees or any of them, or with reference to obtaining said decrees.

335 21. Answering the twenty-first paragraph (21st) of the bill, they say: There has been no formal division of the property purchased by said Semple or of that part which by the terms of their assignment to Semple was to be delivered and conveyed to them, other than that these respondents have been in possession of and cultivated the Shorter place, in Macon County, and Lucy has been in possession of and cultivated the Campbell place and the old Macon place, but they deny that said Micou or Thomas or Nich. Barnett have been suffered to remain in possession of and to enjoy all their former real property so purchased by said Semple, or to enjoy any other parts thereof than are stated in the answer of said Semple to said paragraph which they adopt as their own; and they deny that such occupation was in pursuance of any arrangement or plan by which a secret use was reserved to said defendants in said executions, or either of them, or that there ever was any such secret agreement or any such agreement or understanding.

Answering the interrogatories, they say:

1st. To the 1st: They do not know, but they are informed and believe that such application was made by B. H. Micou, as charged, but that, though removed, they were not removed when charged, but in June, 1874, as appears from the exhibit to the bill itself. It was not made with the knowledge of either of respondents, when done it

236 was done with their approbation, and we were first informed thereof by Henry C. Semple or David T. Blakey after it was done. We do not know whether it was with the knowledge of Lucy Micou or not, or whether with her approbation, or when she first knew of it; we have no information as to this.

To the second they say: They are informed that Benjamin H. Micou did transfer on the books of said Tallassee Company thirty thousand dollars of its stock into the name of said Clara, and that this was done on the 1st day of July, 1873, and in the year 1873, but when it was done neither of us had any knowledge of the fact that it was done or was to be done, nor were any authority given by us or either of us for it, nor did we either know anything of its being done or contemplated until on the 22nd day of October, 1873, just before the marriage of said Clara with said Frank, said B. H. Micou handed her a letter (a copy of which is attached to this answer, marked A), about 12 o'clock of the 22nd of October, 1873, the day on which she was afterwards married, which letter inclosed a certificate of 300 shares of stock in the Tallassee Factory No. 1, in her name, which said Micou, as she is informed, had caused to be issued by said company in her name on the 1st July,

237 1873. She took the letter to her room, read it, and signed a receipt to him thirty thousand dollars, she now thinks, which she handed to him on the same day, 22 October, 1873, and before her marriage on that day. She did take the said certificate in payment of thirty thousand dollars of the amount due her by him as well she now remembers, but she has never seen the receipt since, and cannot recollect its amount or terms precisely. She had no information till that time that any stock had been transferred to her name, and had given no authority for its transfer, and she then approved it by taking said certificate and giving said receipt. She was ignorant of its value and knew nothing of its value or of the state of her guardian's account with her.

She had been engaged to marry her present husband since May, 1873,

and she has been informed and he answers that he had never heard of it or been informed that it was contemplated, and knew nothing of it till informed by her a few days after the marriage, when she handed him the letter and certificate and told him what had occurred.

They both answer that he, when informed of it, at once said that he did not approve it; that it was worthless or of little value. She answers that she never spoke to her father on the subject then or since, except to hand him her receipt. He answers and says that he never spoke to or was informed by Micou of said transfer, or that it was designed
238 or intended, and that he never spoke to him or communicated with him on the subject till after his conversation with Semple, which Semple has correctly set out in his answer; that immediately after his conversation with Semple, which occurred at Semple's house, in Montgomery, just before the call for the meeting of the creditors and stockholders of the factory—the yellow fever had prevailed in Montgomery and he was unable to call on him sooner—he sought an interview with Mr. Micou and told him of his conversation with Semple and that Semple said it was no payment and ought to be cancelled; he did not tell him all the strong language that Semple had used, from motives of delicacy. Micou said the Barnetts were his sureties and he was willing to cancel it if they would agree to it, and having called on them and stated the matter to them they agreed to it, and he then informed Mr. Micou that they had so agreed to it, and he answered that the transaction was cancelled; he informed Semple of this. This was the only subject relating to his indebtedness upon which he ever conversed with Micou, and he has stated all that occurred between them. And she further says that nothing else ever passed between her father and herself on the subject of his indebtedness to her.

3. To the 3rd interrogatory they say: He never, during the year 1872, 1873, or 1874, made any transfer, payment, conveyance, or
239 assignment of any money or other thing to said Clara, as she answers on knowledge, and her husband, Frank S., on information and belief, nor to said Lucy, so far as they are informed or believe, and as to which they know nothing.

Interrogatory 4. To the fourth int'y they say: They and the said Lucy employed but one attorney, Henry C. Semple, and he was first spoken to by Frank Boykin, and afterwards formally by said Frank, Clara, and Lucy B., and by their own authority only, except that Semple, being unable to attend at the settlement, employed Elmore J. Fitzpatrick to do so, and informed us of it afterwards; we assented to it, as we did to his advice in the whole matter; neither of us saw or spoke to Mr. Fitzpatrick, except that Frank went to tell Mr. Fitzpatrick how to go to Opelika; he did not inform him, Semple, that Lucy's non-age had been removed, as it had not then been done. He was informed by F. S. Boykin of the transfer of the stock, and all the circumstances attending its delivery to Clara; he was not informed of any other transfer or payment, as none had been made. We neither of us gave him any instructions or directions as to the mode or time of obtaining the decrees, or as to the mode of making the settlement, beyond the retainer to protect our interests.

Int'g'ry 5th. To the 5th interrogatory they say: They did so hear of it when it occurred, about the winter of 1873; it was common and public rumor, and they all heard it. They were all living with Mr.
240 Micou at the time. Mr. Micou did not talk with them on the subject; he was much busied and occupied, and neither of them saw much more of him than if he had been absent from the city, and

neither of them spoke to him or he to them on the subject of his indebtedness, except as before stated, in relation to the stock he had transferred to Clara. The call of the meeting of the creditors of the Tallassee Company and stockholders was before any proceedings commenced for the settlement in the court of probate, but not before Semple was first spoken to by Frank Boykin on the subject of Clara's claim.

Int'g'y 6th. There was, as Clara is informed and as Frank Boykin knows, a conversation between said Frank and Semple, before any movement made in the court of probate by any of them for the settlement of the guardianship accounts, as to whether said settlement should be had, but not how; and it also involved the reason for having it speedily; said conversation was held before the time of the call of the Tallassee meeting in the winter of 1873, at Semple's house in Montgomery, and no one was present but Frank Boykin and Semple. The substance of the conversation was that Frank said to Semple that Micou, his wife's father, was her guardian and also Lucy's; that Tom and Nich. Barnett were his sureties on his bond, and he found that the failure of Barnett, Micou & Co. and of the Tallassee factory
241 would ruin them all; that they would be declared bankrupt, and his wife and Lucy would be ruined. Semple inquired how much he owed them, and what he had paid, and whether his wife was of age. Frank told him his wife was of age; that there had been no settlement, but Micou had. on the day of the marriage, given his wife a certificate of 30,000 dollars of stock in the Tallassee factory, and taken her receipt for $30,000 dollars. Semple told him that this would not prevent his collecting what was really due; that it was no payment, and no court would hold it to be such, and went on to tell him how he could collect what was due to Lucy and his wife. Semple afterwards conversed with us all—Clara, Lucy, and Frank S. The subject of these conversations was solely and entirely the securing and recovering what was due to Lucy and Clara, and they were only between us and said Semple, and none, as far as we knew or are informed, was held with Micou or the Barnetts, or either of them, except those related in answer to the second interrogatory. There was no suggestion or consideration of securing any benefit to Micou or the Barnetts. The only other conversations than those with Semple were held between Lucy, Clara, and Frank S. in relation to the danger of their being left penniless, as they then apprehended.

7th intg'ry. To the 7th interrogatory they say: Clara, that she knows or is informed of no such conversation. Frank S. says that he conversed with Mr. T. M. and Nich. Barnett as to the matters inquired of
242 only as to the transfer of the stock as set out in answer to the second interrogatory, and he had no other conversation with them or either of them relating to the subject, and has no information of such conversation before or after such decrees. They are informed that said Barnetts were not present at said settlement, either in person or by attorney; they don't know and have no information as to why they were not.

Interrogatory 8. Answering 8th interrogatory they say: They were neither present. Frank S. did inform Semple of the only transfer ever made; he did not inform Mr. Fitzpatrick, and gave him no information as to the settlement. Say they are informed the matter was not called to the attention of the court of probate, and because Semple considered the transfer as void as a payment, and Micou had agreed to consider it null. They know nothing except from the bill as to orders of the court of probate, and neither of them ever heard of the matter till the bill was

read to them, or as to what took place at the settlement or in the course of the settlement. They left it entirely to their lawyer, and knew nothing about it. They have no knowledge or information, nor do they believe that said Micou, or either of the Barnetts, desired or were willing that decrees should be rendered for larger amounts than were really due.

9th int'g'ry. Answering inter'ogatory 9th, they say: They do
243 not know of, and have no information as to, any such instructions to the sheriff of Elmore; as to any instructions to said sheriff, Clara is ignorant, but Frank answers that he handed the executions to the sheriff, and instructed him to proceed at once to execute them. This was done in person. Mr. Semple was our attorney, but was sick, and Mr. Fitzpatrick sent me up with the executions. I know of no other instructions in relation thereto.

Inter'ogatory 10th. To the 10th int'y they say: They did not so far as they were informed, or as they are now informed or believe, beyond some household furniture of inconsiderable value. They cannot state the value further than it would probably not exceed three or four hundred dollars. They were informed and believed, and now have no reason to doubt, that they neither had mules or made crops in said county in 1874. None were so sold as far as we know or have heard. If such crops or property ever existed the only reason it was not sold was that Mr. Semple and ourselves were ignorant of their existence.

Int'y 11th. Answering 11th int'y they say: He had no such property thereon, at least not till the fall of 1874, and he made no crop thereon in 1874. In 1874 it was cultivated by J. W. Walker, as it had been for some years; his lease or contract expired 1 January, 1875, but he made a settlement in the fall of 1874, by which he transferred certain
244 property thereon to Mr. Micou. This was stock, grain, and farming utensils, and respondent undertook to take them from Micou at valuation, and did so, agreeing to credit him with the amount on his and wife's decree; twelve hundred and fifty dollars was the whole value, and respondent, Frank S., used them and mortgaged them to Mr. Moses for the expenses of the cultivation in the year 1875. Walker carried off his own property, and I retained the balance and have used it in cultivation of the place ever since. None of it went to Micou's use further than as it paid part of his debt, and none was carried off by him or his orders. Micou had never cultivated the plantation himself for several years. We all knew of the plantation and that the personal property was not his, though we did not know the precise contract between him and Walker. They have no knowledge or information of any such instructions, and they believe that it was not levied on, because Mr. Semple knew, as they did, that the property was not Micou's.

Int'g'ry 12. Answering inter'ogatory 12th they say: They have no information, save from Mr. Semple's answer, as to the fact in relation to the issuance of executions to Macon County except that respondent Frank S. went up by Semple's direction to bid in the real estate; he thinks at the time a bid of about $5,000 was made by him for Semple. If it was so, then it was not by the procurement or with the knowledge or consent of either of respondents, or of Semple or Lucy Micou,
245 as far as they know or are informed. They have no knowledge or information as to any such directions, or any directions or instructions by Micou in relation thereto.

Int'y 13. Answering the 13th inter'ogatory they say: They have no knowledge or information on the subject inquired of.

14 int'y. To the 14th inter'ogatory they say: They answer the same

as to this as to the 13th inter'ogatory. They are entirely ignorant of the matter inquired of.

Int'g'y 15th. Answering inter'ogatory 15th they say: They have no knowledge of the matters inquired of, and their only information on the subject is derived from Semple's answer to the inter'ogatory, which they believe to be true.

Inter'ogatory 17th. To the 17th inter'ogatory they say: The only writing or agreement they know of is the one a copy of which is attached to Semple's answer, the assignment by respondents and Lucy Micou to Semple, to which they refer. Their information on the subject is derived only from Semple's answer to this inter'ogatory, which they believe to be true.

18th int'y. To the 18th inter'ogatory they say: There is and has been no such verbal or written contract, agreement or understanding between any of said parties as far as respondents are informed. Respondents and their sister Lucy have an agreement as to how the Macon
246 County land shall be divided between them so that each shall have one-half in value. The Campbell place and such part of the Macon County land as shall be equal in value to the remainder to sister Lucy, and the part of the Macon County place north of the road, and such part south of the said road as shall make it equal to Lucy's, to Clara.

19th. Answering inter'ogatory 19th they say: That they have read the answer of Henry C. Semple to this inter'ogatory, and they believe it to be true and so far as they know the facts it is true. As to the property occupied or enjoyed by them, it is true of their knowledge. They gave no directions on the subject. They considered Semple as acting under the assignment, and have recognized his acts, believing them to be directed by a sound judgment.

Int'y 20th. Answering inter'ogatory 20th they say: They have no knowledge or information of any such purchase or bidding by said Micou. The value of the plantation when bought by said Semple was between five and 6,000 dollars. Respondents have been in possession thereof since the fall of 1874, and under an agreement with Lucy to acacount to her for her share as half owner, and since the verbal agreement to account for the use of the share which shall fall to her. The plantation has lost us money since we have been in possession. Mr. Micou has had no benefit or use of it and has paid nothing on it to us or our sister so far as we know.

247 Int'y 21st. Answering intr'ogatory 21st they say: They are informed that it does so appear the endorsements were made by Mr. Semple's directions after the assignment. There has been no such agreement and no other agreement in relation to the said executions or decrees beyond the said assignment to said Semple.

ELMORE & GUNTER,
Solicitors for Clara E. Boykin.

EXHIBIT A.

TOLLASSEE, ALA., *October* 22, 1873.

Miss CLARA E. MICOU:

MY DEAR DAUGHTER: This being the day of your expected marriage, I wish to settle in part my guardianship for property received & held for you from estate of your mother and from estate of your grandfather and grandmother Barnett.

I estimate the amount due you from these estates amounts to about

the sum of *of* thirty-five thousand dollars. I propose to settle this by transferring to you three hundred shares of stock in the Tullassee Manufacturing Company No. 1, the par value of which is one hundred dollars per share, amounting to thirty thousand dollars, and propose to pay for the house & lot purchased of Mrs. James Marks at the price of five thousand dollars. The payment for the house I hereby charge
248 as a debt to you against my estate to amount of five thousand dollars. The date of payment of thirty thousand dollars to be from 1st day of July, 1873, the date at which the stock commences to participate in business of the company. The date of payment for the house and lot to date when titles are perfected to her, &c.

Wishing you happiness in your expected marriage, I sign, your loving and affectionate father & guardian,

BENJAMIN H. MICOU.

UNITED STATES OF AMERICA,
Middle District of Alabama:

Personally appeared before me J. W. Dimmick, commissioner of the circuit court of the United States, Frank S. Boykin and his wife, Clara E. Boykin, who, being duly sworn, say that the facts stated in the foregoing answer where stated on their own knowledge are true, and where stated on the knowledge of either are sworn to be true by the one so stating, and where stated on information and belief are believed to be true.

F. S. BOYKIN.
C. E. BOYKIN.

Subscribed and sworn to before me Sept. 29th, 1877.

J. W. DIMMICK,
Commissioner U. S. circuit court, Middle District of Ala.

Filed this 29th day of Sept., A. D. 1877.

J. W. DIMMICK, *Clerk.*

249 *Answer of Lucy B. Micou.*

In the circuit court of the United States for the fifth judicial circuit, at Montgomery, Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY, complainant,
vs.
BENJAMIN H. MICOU, LUCY B. MICOU, ET AL., defendants.

The answer of Lucy B. Micou to said bill of complaint.

1. To the first paragraph, she says she admits it to be true that the judgment was recovered as stated, and upon a liability of said Micou and Barnetts on bills of exchange as stated, but the bills were drawn or accepted or endorsed by the firm of Barnett, Micou & Co., and not by the individual members of the firm, as she is informed and believes.

2. And to the second she says, she denies all fraudulent conspiracy or combination as stated in the second paragraph and every fact stated therein except that Micou was guardian of his daughters.

250 3. Answering the third paragraph she says, she was at the time of the occurrences stated and alledged a minor not over twenty years

of age and entirely ignorant of business, and knew but little of the condition of the Tallassee Factory or her father or the Barnetts, but she is informed and believes that the statements therein are true except those which are denied in the answer of Henry C. Semple thereto, which she adopts as her own.

4th. Answering the 4th paragraph she says, she is ignorant of the matters alleged except that she believed the parties on Semple's information to be insolvent in the winter of 1873; she has no knowledge of the matter alleged in said paragraph but is informed and believes that the facts are as stated in Semple's answer thereto, which she adopts as her own.

5th. Answering the fifth paragraph she says, she denies all knowledge of or participation in any fraudulent conspiracy to procure the rendition of decrees or a decree for a larger amount than was really due;
251 denies that her disabilities had then been removed; admits the rendition of the decrees for the amounts and at the dates stated, but denies that they were fraudulently procured or for an improper amount; has not seen the records and knows nothing of them or of the correctness of the exhibits thereof.

6. Answering the sixth paragraph she says, she knows nothing to show that her father did not desire and make efforts to have a fair settlement, and is informed and believes that he did desire it, and did make every effort in his power to secure it. She is entirely ignorant of the matter or manner of said settlement, and cannot answer thereto further than she is informed and believes that it was just and proper, and denies that she did know that he was not chargeable with any sum charged to him or with the sums alledged specially to have been improperly charged to him, and denies all knowledge or information of anything unfair or illegal in said settlement, and is informed by her counsel and believes that it was fair and proper.

252 7. Answering the seventh she says, she has no knowledge of the matters stated in this paragraph; she cannot remember when she first heard of it and knows nothing about it; all that she ever heard about it she heard from her sister Clara or Mr. Boykin after it happened, and substantially as far as she remembers what they say of it in their answer.

8th. Answering the 8th paragraph of the bill she says, that she knew nothing as to the nature or amount of the property of the parties mentioned, further than that it consisted generally of property of the character of that described in the said paragraph, and denies all fraudulent use of the executions by her or her directions for the use or benefit of either of the Barnetts or her father, and says that she had nothing whatever to do with the use made of the executions beyond the execution by her of the assignment of said executions to Henry C. Semple, a copy of which is attached to his answer. That she confided her interests in the matter to him, relied on him implicitly, and never made any inquiry of him as to the management of the matter or gave any direc-
253 tions to him or any one else in relation thereto.

9th. Answering the 9th paragraph she says: She knows nothing whatever of the matters stated except so far an informed by the said Semple, who has answered the same correctly as far as she knows, and she refers to and adopts his answer thereto.

10th. Answering the 10th paragraph she says: She knows nothing as to the matters stated, but is informed and believes the facts to be as set forth in Semple's answer thereto, which she so adopts.

11. Answering the 11th paragraph she says: She knows nothing of

it, but is informed thereof soiely by Semple, whose answer she believes to be true and adopts as her own.

12th. Answering the 12th she says: She knows nothing of the matter herself, and was informed thereof only by Semple, whose answer she believes to be true and adopts as her own, and so of the matters set forth in the

13th paragraph: She knows nothing of any of them except as
254 informed by Semple, whose answer thereto she believes to be true, and adopts as her own.

14th. Answering the 14th paragraph she says: She denies that she ever gave any such instructions or directions as are alleged, or that any were given with her knowledge by her sister or Frank Boykin, or by any agent of hers or theirs, or by any attorney with her knowledge, or that so far as she is informed any personal property was made use of by said Micou. She has no knowledge or information as to any such purchase by or conveyance to Micou, and does not believe it was ever made. The plantation was, she is informed, worth about 6,000 dollars, but she is informed the purchase was made by Semple, and at two sales for about $8,000 dollars, and that he paid the costs and commissions himself, and Micou paid none.

15th. Answering the 15th paragraph she says: She says she knows nothing of the matters alledged except as informed by said Semple, and she believes his answer thereto correct and adopts it as her own.

255 16th. Answering 16th paragraph she says: She says she denies that she, or her sister, or her husband, as far as she knows, or is informed, committed any of the acts or fraud alledged to have been committed by them, and denies all knowledge of the matters alledged, but is informed that the answer of Semple thereto is true, and adopts it as her own.

17th. Answering the 17th paragraph she says: That she is informed and believes that said Semple has not made any conveyance of said property except as stated by him in his answer, but that he does not claim to hold it beneficially, but under the trusts of said assignment only; but she denies any such agreement or understanding as is alledged, or any other than that set forth by said transfer or assignment of the decrees, either verbal or written.

21st. Answering the 21st paragraph she says: On information and belief she denies that the Barnetts have been suffered to remain in the possession, control, and enjoyment of the real estate sold as theirs, but says she is informed and believes that H. C. Semple has
256 possessed and controlled the same since the sale thereof. That she denies of her own knowledge that Benjamin H. Micou has been suffered to remain in the possession and enjoyment of the real estate sold as his property. On the contrary she has, herself, been in possession and control of the prairie plantation, and she and her sister, jointly, of the city property other than his residence, and her sister and husband in that of the Macon County plantation; that this was done not in pursuance of any fraudulent agreement, but in pursuance of the terms of the trust created by the assignment above set forth or referred to, and she denies any such secret understanding or agreement, or any other agreement than that set forth in said assignment, which was an agreement between her sister and husband and herself only, and not with the said Barnetts, or Micou, or either of them, and one which they had a right to make, and execute, and carry out, and without injury to any creditor of either of the defendants to said decrees, and without any such purpose or intent.

257 Answering the interrogatories she says:

To the 1st: The application was made with her knowledge in the spring of 1873; she did not object to it when told of it by her father; it was granted in June, 1874.

To the 2d: She knows nothing of the matter of her own knowledge as to said transfer or delivery of stock. She has heard her sister and Mr. Boykin speak of it, and her only information as to it was from them and what they have said in their answer.

To the 3d: She knows of nothing else having been given, transferred, or conveyed to her sister and has heard of nothing else; nothing was ever given or conveyed to her.

To the 4th: They each employed Henry C. Semple by their own authority and personally, but he was first spoken to by F. S. Boykin. She informed him of no transfer; is informed that Mr. Boykin did inform him of the transfer of the stock. I did not inform him of the removal of the disability of nonage; it had not occurred; I gave
258 no directions or instructions beyond the simple engagement, nor do I know of any others having been given.

To the 5th: They did both hear of it, and such was common rumor, as she has learned since; they were living at Tallassee at times and at Montgomery at times, but both with their father, Clara keeping house at Montgomery, and father and wife at Tallassee; they heard nothing whatever on the subject from Mr. Micou, who never conversed with them on the subject.

To the 6th: There was a conversation with Mr. Semple, Clara, Frank, and myself; Frank had spoken to him before he came up to the house; no one else was present; it was in the fall of 1873 or beginning of the winter; I can only recollect that we wanted to know how we ought to do to try and save ourselves from loss, and Mr. Semple said he would attend to it, and how he would do it, but I can only remember that he was to do his best to help us; nothing was said about Mr. Micou or Barnetts being indulged or permitted to remain in possession of their prop-
259 erty, or any benefit to them, or offering any inducement to them; have answered as fully as possible.

To the 7th: I never had any such conversation with either of them, or any conversation with either of them, and I don't know, and I never heard, of my sister or Mr. Boykins having had any; I know nothing of the matters inquired of; I don't know whether said Barnetts were to be present or were present, and have been informed they were not, but don't know why not, and have no information why not.

To the 8th: I was not present at said settlement; I did not inform counsel of any payment to Clara or myself; I know nothing of what occurred on said settlement; I know nothing of the facts inquired about in this interrogatory, except as shown by exhibits to the bill; and that I employed H. C. Semple to represent me, and he employed Elmore J. Fitzpatrick to attend to said settlement, but I never saw or spoke to said E. J. Fitzpatrick or gave him any instructions about the settlement; I do not know, but have no reason to believe that B. H.
260 Micou and the two Barnetts were willing that decrees should be rendered against them.

To the 9th: I do not know and never heard of any such instructions being given; have no idea what instructions were given, or whether any were given.

To the 10th: I know nothing about what property T. M. and N. D. Barnett had in Elmore County, except that they had some household furniture, the value of which I do not know, but it was plain, and, I

suppose, cheap; know nothing as to the remainder of the matters inquired of in this interrogatory.

To the 11th: I know that my father did not cultivate the Macon County place in 1874, and had not cultivated it for several years before, and knows nothing of his having any personal property on said place; knows nothing and has no information as to what instructions, and whether any, were given to the sheriff of Macon County; I had nothing to do with the executions, and knew nothing about their management; I knew nothing and have no information as to the matters inquired
261 of in the 12th and 13th interrogatories, except from Mr. Semple, whose answer thereto she believes to be true.

14. And I answer the 14th interrogatory the same as 12th and 13th.

15th. And also the same answer to the 15th interrogatory.

To the 17th: I know nothing of the matters inquired of in the 17th interrogatory except as to the assignment of the decrees and executions by myself and Frank Boykin and wife to H. C. Semple, a copy of which he has attached to his answer, and except so far as informed by said Semple, whose answer to this interrogatory I believe to be true.

To the 18th: There have not been any such contracts, agreements or understanding, so far as I am informed and believe, between any of the parties defendant or between any of them and the said Barnetts or either of them.

To the 19th: Said Semple has taken possession of said property since said sales. I and my sister have been in possession of all the property in the city and county of Montgomery and county of Macon that was sold as the property of B. H. Micou, except his residence, and we
262 have either occupied or managed it or rented it out, and such as has been occupied or controlled by us we have received the incomes and profits from, and such as has been rented, the rents have been paid to us. Capt. Storrs and his wife have been in possession of the river plantation in Elmore County without rent. Semple has himself cultivated the other lands sold as the property of the Barnetts, and he has permitted N. D. Barnett's family to remain in or enjoy the use of the house sold as his residence; and the house in Montgomery, sold as the property of T. M. Barnett, he has permitted Capt. C. P. Storrs to retain and occupy, and all this without any directions so far as I know from the plaintiffs in said executions, further than the terms of the assignment of the same to the said Semple.

To the 20th: I am informed and believe that B. H. Micou did not bid off the Macon County plantation, and that it was not conveyed to him, and that the value of the said plantation was at the time of said sale about $6,000.00, and Boykin and wife have been in possession of said
263 plantation since said sale. B. H. Micou has not kept or used the said property.

To the 21st: It does so appear from the endorsements on the said executions. There was no agreement between the said plaintiffs in execution that such division should be made except what was contained in the assignment to Semple above referred to; and respondent having fully answered all the paragraphs and interrogatories on said bill contained, prays to be hence discharged with her reasonable costs.

ELMORE AND GUNTER,
Sol's for Respondent Lucy B. Micou.

UNITED STATES OF AMERICA,
Middle District of Alabama:

Before me, J. W. Dimmick, commissioner of the circuit court of the

United States, personally appeared Lucy B. Micou, who, being duly sworn, says that the facts stated in the foregoing answer where stated of her own knowledge are true, and where stated on information and belief she believes them to be true.

LUCY B. MICOU.

Subscribed and sworn to before me this 29th September, A. D. 1877.

J. W. DIMMICK,

264 *U. S. Com'r Circuit Court for Middle District of Alabama.*

Filed the 29th day of Sept., A. D. 1877.

J. W. DIMMICK, *Clerk.*

Replication of complaint.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } In equity.

The replication of the First National Bank of Montgomery, the complainant in the above entitled cause, to the several answers of Benjamin H. Micou, Henry C. Semple, Clara E. Boykin, Frank S. Boykin and Lucy B. Micon, to the bill in this cause.

This repliant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of said several answers, for replication thereunto saith, that it will aver and prove its said bill to be true, certain, and sufficient in law to be answered unto, and that the said several answers of said defendants are uncertain, untrue, and insufficient to be replied to by this repliant, without
265 this, that any other matter or thing whatsoever in said answers contained, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and humbly prays as in and by its said bill it hath already prayed.

CLOPTON, HERBERT AND CHAMBERS,
Compl'ts' Sol'rs.

Filed Nov. 21st, 1877.

J. W. DIMMICK, *Clerk*

266 *Inte'rogatories to Allen D. Sturdevant.*

Circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } In equity.

Inter'ogatories to be propounded to Allen D. Sturdevant, who is a material witness for complainant in this case, and who resides at Dadeville, county of Tallapoosa, State of Alabama, which with the answers thereto will be read in evidence on the trial of this case:

Inter'ogatory 1st. Do you know the said Benjamin H. Micou? What office in said county of Tallapoosa did you hold during the years 1873 and 1874? How long have you held said offices?

Inter'ogatory 2nd. Were you present at the final settlement of said

Micou of his guardianship of his daughter Clara E. Micou, in February, 1874, who was then Clara E. Boykin? Who presided as judge of the probate court of said county of Tallapoosa on said final settlement? State all the parties who were present at said settlement. What attorneys were present and whom did they respectively represent? How long before said final settlement was actually entered upon did said parties and attorneys arrive at Dadeville? When was the account for said final settlement first actually filed in your office? By whom was it thus filed, and how long did it actually remain in your office
267 after being filed? If it was at any time taken out, state by whom, at what time, and when and by whom it was returned?

Inter'ogatory 3rd. How long was your court engaged actively in making said final settlement? About what hour in the day did you commence, and about what hour did you terminate it? What exceptions were filed to said account as first filed by said Micou, and by whom and on what day were they filed? If any exceptions were filed, attach a correct copy of them to your answers. Have you done so; if not, why not? How and when and by whom was the question raised as to charging said Micou as said guardian with the hires of the negroes and the rents of the lands of his said ward? What resistance was made to the same and by whom? What evidence was offered by said Micou or his attorney in relation to the same to show that said Micou ought not to be charged with said hires and rents? If you say it was resisted by the attorney of said Micou, in what way did he resist it? How long was the question argued by said attorneys respectively? State all the facts and circumstances attending said matter of hires and rents, and all which show or tend to show how it was that said Micou as said guardian was charged with said hires and rents? What admissions by said Micou or his attorney in reference to the proper construction of a previous order to keep together the estates of said wards of said Micou? What doubts were expressed, or *or* concessions made in
268 regard to said order, and by whom? State fully and particularly, what efforts were made to defeat said charges for hires and rents being made?

Inter'ogatory 4th. What, if anything, was done in reference to the partial or annual settlements made by said Micou as said guardian? Were they corrected in any respect; if so, in what respects, upon whose motion, and what evidence was offered pro and con? What evidence was offered of any such settlements having been made, and what was done in relation to the same?

Inter'ogatory 5th. What witnesses were examined to prove the values of said hires and rents? By which party were said witnesses called to be examined? In what county were said lands situate? What evidence was introduced as to how many of said negroes were large enough to work and how many were children too small to work? In what way was the value of the hires of the negroes ascertained by the witnesses? At what sum did the witnesses fix the annual value of the hires of average field hands during the years respectively, 1862, 1863, 1864, and 1865?

Inter'ogatory 6. How and why was it that said Micou was charged on said settlement with the value of mules and interest thereon from January 1, 1859? What resistance was offered to this charge? What evidence as to its correctness or incorrectness was introduced,
269 and by which party? What evidence was offered to show what had become of said mules?

Inter'ogatory 7. Upon the testimony of what witnesses was the ac-

count as filed by said Micou surcharged for rents for the years 1866, 1867, 1868, 1869, 1870, 1871, 1872, and 1873? State the name of such witnesses who was examined on this matter. What testimony was offered by said Micou, if any, in support of the value of said rents for said years as stated in the account filed by him, and which were thus surcharged? Were these the same or different lands from those for which he was charged with rent from the years 1859 to 1865, inclusive?

Inter'ogatory 8th. How, and why was it, that said Micou was charged with the sum of $4,320.00 for corn, fodder, pork, hogs, and cattle? How was the quantity and value of said articles ascertained? What witnesses were examined in relation to the same, and by which party were said witnesses called?

Inter'ogatory 9. Was the account of said Micou for the final settlement of his guardianship of Lucy B. Micou filed by him voluntarily or in obedience to a citation? If by citation, who caused it to be issued and when? When was said account actually filed in your office?
270 Which of the parties were present at said final settlement, and which were represented by attorneys, and who were the attorneys? Was the account as finally passed and allowed of his guardianship of said Lucy the same account filed by said Micou as said guardian for said final settlement? If not the same, state in what respects the accounts differ? State particularly. Was said account passed as filed by said Micou or was there a contest.

Inter'ogatory 10th. Who made the calculations and ascertained the amounts as stated and recited in the orders and final decrees rendered on said final settlements with said Clara E. Boykin? Who wrote the original draft from and by which said order and decree were entered by you?

Inter'ogatory 11th. Who procured the issue of the first execution on each of the decrees rendered on said final settlements which were sent to Montgomery County? To whom were said executions delivered, and at what time was each so delivered? Who procured the issue of the executions to the other counties to which executions were sent?

Inter'ogatory 12th. State each and every fact and circumstance prior to and during said final settlements, tending to show that said B. H. Micou was willing that decrees for large amounts might
271 rendered against him, or did not wish in good faith to prevent the rendition of large decrees? Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

CLOPTON, HERBERT & CHAMBERS,
Solicitors for Complainants.

Filed the 30th day of October, 1877.

J. W. DIMMICK, *Clerk.*

Cross-inter'ogatories to Allen D. Sturdevant.

Circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } In equity.

Cross inter'ogatories to be propounded to Allen D. Sturdevant, a witness for the complainant in said cause.

1st X Int. On the final settlement of the account of Benjamin H. Mi-

cou as guardian of his daughter, Clara E. Boykin, formerly Micou, in the probate court of Tallapoosa County, in February, A. D. 1874,
272 was the said Clara or her husband present, or any other party than Benjamin H. Micou? Was not Elmore J. Fitzpatrick, esq., of the city of Montgomery, and an attorney at law, present on said settlement, and did he not represent on said settlement the said Clara E. Boykin as her attorney, and was not David T. Blakey, esq., of Montgomery, and an attorney-at-law, also present, and did he not on said settlement represent said B. H. Micou as his attorney? Did not said Micou, Fitzpatrick, and Blakey arrive at Dadeville in the afternoon or evening of one day, and enter upon the final settlement the next day; do not the records of your court show when his accounts for this final settlement were filed in your office; and is not such entry correct; and when do these records show that said account was filed; and does not your records show by whom the same was filed, and what do they say on this subject? Was said account ever taken out of your office before the day on which the final settlement was entered on, and if so, by whom and when; and when it was returned what changes had been made in it?

2nd X Int'y. Were not you, as the judge and the attorneys of the parties, and Micou engaged several hours on the first day actively on the matters of said settlement; did not Elmore J. Fitzpatrick, as the
273 attorney of Clara E. Boykin, in open court, and in the presence of said Blakey and Micou except orally to various items of credit in said account, and more, also, to surcharge the account with various sums, and among others to strike out all the credits for the expenditures made by Micou on the lands of said Clara E. and her sister Lucy, and also instead of charging Micou with the proceeds and profits of the crops of said lands to charge him with the rents of the lands and heirs of the negroes thereon, for the years beginning in 1859 and running up to 1873, and was not this motion and exception made upon the ground that said Micou had no authority to keep the estate together and run it as a plantation, and was not resistance made to this proceeding by Blakey, as Micou's attorney, who insisted that the estate had been kept together under an order of your court, and was not this order so claimed as such authority produced and read in court, and did not Fitzpatrick and Blakey each argue before you on the construction of this order, Blakey insisting that it was authority for Micou to keep the estate together, and did not both these attorneys in their said arguments read authorities to you on the subject? Are there any other exceptions filed or of record in your office to said account except what appear in the final judgment and entry, and are they not correctly stated
274 therein? On hearing the argument as to the construction of said order, did you not, as presiding judge, decide that said order did not authorize said Micou to keep the estate together, and that he was liable for the rents of the lands and hires of the negroes for said years, and was not this the cause and these the facts and circumstances which show how it was that Micou was charged with said hires and rents? Is that order on which said argument was had, of record in your office? If so, attach a full and complete copy of the same to your answers hereto. If you say that any admissions were expressed by Micou or his attorney in reference to the construction of said order, by which one of them was it made, and was it not made after you, as judge, decided on its construction?

3rd. X Int'y. If the previous annual or partial settlement made by Micou, as said guardian, were corrected were not such corrections made on the motion of said Fitzpatrick as attorney of said Clara E. Boykin,

and based on your decision of the construction of said order, and was not such correction made on the evidence of the settlements themselves, as of record in your office, and upon the evidence of witnesses introduced by Elmore J. Fitzpatrick, esq., as attorney for Clara E. Boykin?

275 4th. X Inter'ogatory. Were not Benjamin H. Micou and said David T. Blakey introduced by said Fitzpatrick to prove the values of the hires of said negroes, and rents of said lands, and of the mules, corn fodder, and other property? Did not said Micou, on his examination by said Fitzpatrick, testify to the number of the negroes each year capable of labor, his or her age, character, and capacity for labor, and what under the circumstances and the condition of things each year each such negroe was worth, and did not said Blakey on his examination as a witness by said Fitzpatrick testify that he was acquainted with the values of the hires for each of said years of negroes of the quality and character of those testified to by said B. H. Micou, and from the testimony of these witnesses, did you not, as judge, ascertain and fix the values of the hires of said negroes for said years as settled in the final decree on said settlement?

5. X Int'y. Was not said Micou charged with the value of mules and interest thereon, from January 1st, 1859, because these were mules which came to his wards, Clara E. Boykin and Lucy Micou, in the distribution of the estates of their grandfather, Thomas M. Barnett, and their mother, the wife of said Benjamin H. Micou, and which was shown by evidence on that settlement to have been converted or applied by

276 said Micou to his own use? Was not said Micou examined by said Fitzpatrick as a witness to prove the correctness of this charge, and was it not in his evidence you, as said judge, decided he was liable for their value and interest on the same?

6. X Int. Did not said Fitzpatrick on said settlement introduce and examine said Micou and Blakey to prove the value of the rents of said lands for the years 1866 to 1873, inclusive?

7. X Int. Was not said Micou charged with $4,320.00 for corn fodder, pork, hogs, and cattle, because these were articles received by him as such guardian, from the estate of their grandfather, Thomas M. Barnett, as from the estate of their mother, and which had been used by him or applied to his own use, and was not the amount and quantity of the same and value thereof ascertained and fixed by you on the testimony of B. H. Micou and David T. Blakey, offered as witnesses by said Fitzpatrick?

8. X Int'y. After you, as judge, had ruled and decided the various questions arising on said settlement, were not the said accounts taken out of your office by said Fitzpatrick and Blakey for the purpose of stating the accounts according to your rulings, and making the

277 calculations therein, and did they not return them into the court with the account as finally made out under your decisions, with the mutual statement that they were correct according to those rulings, and the same are set forth and recited in the final order and decree rendered? Did not said Fitzpatrick make out and prepare the original draft from and by which said final order and decree was entered by you on the records of your court, or did he not examine and approve said original draft?

9. X Int'y. If you say that David T. Blakey procured the issue of the executions inquired of in the 11th direct inter'ogatory, was it not by letter that he requested the issue of the same, and if you have the said letter, attach it to your answer hereto. If you cannot find the same, then

state if he did not in said letter say he wrote to procure the issuance of these executions at the request and direction of Henry C. Semple, esq., and to whom did you deliver said executions or send them?

ELMORE & GUNTER,
Sol's for Frank S. and Clara E. Boykin and Lucy B. Micou.

Filed the 30th day of October, 1877.

J. W. DIMMICK, *Clerk.*

278 *Commission to George F. Moore to take deposition of Allen D. Sturdevant.*

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To George F. Moore, esq., of Montgomery, Alabama:

Know ye, that we, having full faith in your prudence and competency, have appointed you a commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Allen D. Sturdevant, who resides at Dadevill, Tallapoosa County, Alabama, as witness in behalf of plaintiff in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein the First National Bank of Montgomery is plaintiff and Benjamin H. Micou, Lucy B. Micou et al. are defendants, on oath to be by you administered, upon inter'ogatories and cross-inter'ogatories annexed to this commission; to take and certify the deposition of the witness and return the same to our said circuit court, to be holden on the first Monday in November next, under your hands and seals.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of October, A. D. one thousand eight hundred and seventy-seven.

[SEAL OF COURT.]

J. W. DIMMICK,
Clerk U. S. Circuit C't, Mid. Dist. of Alabama.

279 In the circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL. } In equity.

Deposition of Allen D. Sturdivant, a witness in the case now pending in the circuit court of the United States for the middle district of Alabama, between the First National Bank of Montgomery, plaintiff, and Benjamin H. Micou et al., defendants, examined on inter'ogatories and cross-inter'ogatories, by virtue of the commission hereto annexed, issued from the office of the clerk of the circuit court of the United States for the middle district of Alabama.

I, George F. Moore, the commissioner therein named, have called and caused to come before me the said witness, ALLEN D. STURDIVANT (who resides at Dadeville, Tallapoosa County, Alabama), in said commission named, and having duly cautioned and sworn the said witness to speak the truth, the whole truth, and nothing but the truth, the said witness deposeth and saith as follows:

To the first inter'ogatory he says: That he knows the said Benjamin

H. Micou, and that he (witness) held the office of judge of probate of Tallapoosa County during the years 1873 and 1874, and that he has held said office from about the 13th day of May, 1859, up to the present time.

280 To the second inter'ogatory he says: That he was present at the final settlement of said Micou of his guardianship of his daughter Clara E. Micou, who was then Clara E. Boykin, in February, 1874; that he presided as judge of the probate court of Tallapoosa County on said final settlement; that the guardian, Benjamin H. Micou, was present on the settlement as one of the parties; David T. Blakey was present as Micou's attorney, and Elmore J. Fitzpatrick was present representing Clara E. Boykin and husband. My recollection is that all the persons named, Micou, Blakey, and Fitzpatrick, arrived at Dadeville on the evening before the settlement took place. The account for the final settlement of said Micou was filed in his office on the 17th day of January, 1874. It was filed by David T. Blakey, attorney for Micou, and remained in my office from January 17th, 1874, until the 10th day of February, 1874, and was never taken out of the office during the intervening time. The account was not taken out from the time of its filing up to the day set for hearing, February 19th, 1874.

To the third inter'ogatory he says: That his court was actively engaged on said final settlement about two hours and a half; that it then become necessary to restate the account, and Micou and the attorneys, Blakey and Fitzpatrick, took the account and papers

281 in the cause and retired from the court and returned the account restated some time late in the afternoon of that day; that his court commenced on the settlement about nine o'clock in the morning and was engaged on the points raised and in taking down the evidence for about two or two and a half hours. No written exceptions were filed to said account of said Micou, and he cannot therefore attach a copy of them to his answers. The question as to charging said Micou with the hire of the negroes and rent of the lands of his wards was first raised by Elmore J. Fitzpatrick, by oral motion, as the attorney of Clara E. Boykin, on the day of said final settlement, February 10th, 1874. Opposition was made by Col. Blakey, but after a short time and discussion he yielded the point and the charge was made against the guardian Micou. When the motion was made by Col. Fitzpatrick to charge Micou, the legal points raised by the motion was opposed by Col. Blakey in a short argument, but was then yielded by him. The discussion did not occuppy exceeding thirty minutes; that is, the time consumed by both attorneys in discussing the question as to charging Micou with the hire of the negroes and rent of the lands of his wards, not more than thirty minutes. An oral motion was made by Elmore J. Fitz-

282 patrick, as the attorney of Mrs. Clara E. Boykin, to charge her guardian with the rent of lands and the hire of negroes as a conversioner—as having converted them to his (Micou's) own use—on the day of the final settlement, which question was controverted by Col. Blakey, and after a short discussion was yielded by him. Micou was then put on the stand by Fitzpatrick, and fixed the value of the hire of the negroes and the rent of the lands as they now appear of record. He says he has no recollection of any question as to the proper construction of an order to keep the estate together having been raised before him. He cannot state anything as to any doubts expressed or concessions made as to said order, for he has no recollection of any such question having been raised before him. He says he has already stated above all the efforts and by whom made to resist said charge.

To the fourth inter'ogatory he says: That on said final settlement the said Micou charged himself with $9,896.75 in his account, the balance due the said wards on the 18th day of July, 1859, on the annual settlement by said Micou of his guardianship; that as far as witness can state said account has never been disturbed or corrected, and that no evidence was offered of any such settlements having been made save that of Micou's annual account filed in 1859, which appears of record and as stated in his said account for final settlement.

283 To the fifth inter'ogatory he says: That Benjamin H. Micou, the guardian of the wards, was examined as a witness to prove the value of the hire of said negroes and the rents of said lands and none other; said witness was called to be examined by Elmore J. Fitzpatrick, the attorney of Clara E. Boykin and husband; said lands were situated in the county of Montgomery. The witness, Benjamin H. Micou, as he was interrogated, gave the ages of the different negroes and stated the value of the annual hire. The value of the hire of negroes was ascertained from the testimony of Benjamin H. Micou, who stated it from what he said negroes were being hired for during those years; said witness, Benjamin H. Micou, fixed the value of the hire of full field hands at $180 per annum for the years 1859-'60-'61, and for the year 1862 at a sum equal to two thirds of that amount, or for a full field hand about $120 per annum; for 1863 for one-half of that amount or $90 per annum for a full field hand; for 1864, one-third of that amount or $60 for a full field hand; for the year 1865 the value of the hire of all the slaves up to the surrender was charged at $454, and the value of the hire of all the slaves for the years 1859-'60 and '61 was charged at ($6,270) six thousand two hundred and seventy dollars; for the year 1862 the aggregate amount of the value of the hire of all the slaves was charged at four thou-

284 sand one hundred and eighty dollars; for the year 1863 the aggregate amount of the value of the hire of the slaves was charged at ($3,135) three thousand one hundred and thirty-five dollars; for the year 1864 the aggregate amount of the value of the hire of all the slaves was charged at two thousand and ninety dollars ($2,090).

To the sixth inter'ogatory he says: That said Micou was charged with the value of mules and interest thereon from January 1st, 1859, on said oral motion made by Elmore J. Fitzpatrick as the attorney of Clara E. Boykin and husband, on the ground that said Micou had converted said mules to his own use; at the time the motion was made it was controverted by Col. Blakey, but after a short discussion he yielded the point. The only evidence offered was that of Benjamin H. Micou (who was the only witness in the case), which was offered by Elmore J. Fitzpatrick as the attorney of Clara E. Boykin and husband. The evidence of Benjamin H. Micou, and of no one else, was offered to show what had become of said mules.

To the seventh interrogatory he says: That it was upon the evidence of Benjamin H. Micou that the account as filed by him was surcharged for rents for the years 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873. There was but one witness, and his name was Benjamin H. Micou,

285 examined on this subject; said Micou ascertained the value of the rent of land from the value of produce for the respective years according to witness' recollection, but no testimony was offered by him except his oral testimony on the subject; witness' understanding was that it was the same lands as those for which he was charged rent for the years 1859 to 1865, inclusive, that the account was surcharged for the rent of.

To the eighth inter'ogatory he says: That he was charged with said

$4,320 on said motion by said Fitzpatrick to charge him with the value of said corn fodder, &c., for the reason that said Micou had converted them to his own use; Benjamin H. Micou was examined as witness on this subject and was called by Elmore J. Fitzpatrick as attorney for Clara E. Boykin and husband.

To the ninth inter'ogatory he says: That Benjamin H. Micou filed his resignation as guardian of said Lucy B. Micou in the office of the judge of probate of Tallapoosa County, on the 26th day of January, 1874. An order of court was made accepting his resignation on the same day, and the said Micou ordered to file his account and vouchers for a final settlement of his guardianship within thirty days thereafter, and in obedience to this order a citation was issued to said Benjamin H. Micou, to make said settlement, and in obedience to this citation said Micou
286 filed his accounts and vouchers for a final settlement of the guardianship of said Lucy B. Micou on the 3rd day of February, 1874; said account was actually filed in his (witness) office on the 3rd day of February, 1874. Thinks that none of the parties or attorneys were present at the final settlement of Micou's guardianship of Lucy B. Micou; the account was the same when finally passed and allowed as when filed. The account was passed and allowed as it was filed except such modifications as witness made in the correction of small errors in calculations, and no persons were present contesting, and no contest was made except the usual formal contest which was filed by Henry A. Garrett, as guardian ad litem for Lucy B. Micou.

To the tenth inter'ogatory he says: That after the order was made requiring the account to be restated, the attorneys, Col. Blakely and Fitzpatrick, took the papers and went out with them, and Benjamin H. Micou went with them; in the afternoon the accounts was brought back restated and seem to be in the handwriting of Col. Blakely, but witness cannot state who made the calculations as recited in the order made and decree rendered. When the account was taken out of the probate office for restatement a "blank draft" for a final decree was returned along with the papers, but who drew it witness says he does not know.

287 To the eleventh inter'ogatory he says: That his best impression is that instructions were given at the final settlement of said guardianship to issue executions as soon as the papers were properly recorded. His best impression is that the executions on the decree in favor of Clara E. Boykin & husband was forwarded by letter to Major H. C. Semple at Montgomery, and said execution was issued on the 16th day of February, 1874, and that the first execution on the decree in favor of Lucy B. Micou was forwarded by mail to Major Semple at Montgomery, and said execution was issued on the 2nd day of March, 1874. A number of executions were issued on said decrees to other counties, and witness' best impression is that they were issued sometimes through instructions from Major H. C. Semple and sometimes through instructions from Col. David T. Blakey by letter.

To the twelfth inter'ogatory he says: That he has answered fully all he knows in relation to the subject herein inquired of, and cannot state anything which occurred prior to said settlement tending to show that said B. H. Micou was willing that decrees for large amounts might be rendered against him, or that he did not wish to prevent in good faith the rendition of large decrees against him. The only things or facts tending to show that said Micou was willing that large decrees
288 might be rendered against him, or did not in good faith wish to prevent the rendition of large decrees against him, was the liber-

ality of his estimates of the value of the rent of lands, the hire of slaves, and the value of mules, &c., and the fact that in the account as filed by him originally and also as filed after a restatement, he charged no commissions; commissions to the amount of something over nine thousand dollars were due him on said settlements and were included in said accounts by witness; if indeed these facts tend to show such desire or wish that such decrees might be rendered against him. He says he knows nothing further material to the subject of this examination or the matters in question in this case.

ALLEN D. STURDIVANT.

1st cross-int. To the first cross-inter'ogatory he says: That on the final settlement of the account of Benjamin H. Micou as guardian of his daughter, Clara E. Boykin, in February, 1874, that neither was the said Clara nor her husband present; no party was present except Benjamin H. Micou; Elmore J. Fitzpatrick was present on said settlement representing Clara E. Boykin as her attorney, and David T. Blakey was present on said settlement representing said B. H. Micou as his attorney. He says that his impression is that Blakey, Fitzpatrick, and Micou came to Dadeville in the evening of one day and entered upon the settlement the next morning. The witness says that his records do
289 show when said account was filed; that the entry is correct and they show that it was filed on the 17th day of January, 1874, and set for a hearing on the 10th day of February, 1874, and the account was filed by Benjamin H. Micou per his att'y David T. Blakey, as is shown by the record of his court. The account filed for a final settlement of the estate of Clara E. Boykin was not taken out of his office from the time of its filing, January 17, 1874, up to the time set for a hearing, viz, February 10th, 1874, by any one, and no change was made in it up to that time.

To the second cross-int'y he says: That he and the attorneys were actively engaged from two to two and a half hours on the matters of said settlement; that Elmore J. Fitzpatrick, as the attorney of Clara E. Boykin, did in open court and in the presence of Blakey and Micou, move orally to strike out various credits in said account, and among others to strike out all the credits for expenditures for running the farms or lands of Clara E. Boykin and Lucy B. Micou, and to charge Micou with the rents of the lands and hires of the negroes thereon, for the years beginning in 1859 and running up to 1873, and this motion was made on the ground that Micou had no authority to keep the estate together, and because he became thereby a conversioner. The question raised by E.
J. Fitzpatrick was whether Micou had converted the property
290 to his own use, and this was supported by the assertion that he had no authority to keep the estate together. This was controverted by Blakey as Micou's attorney; but, after a short discussion, he yielded the point. Witness thinks that no order in regard to keeping the estate together is of record, and his best impression is that no order, or anything purporting to be an order to keep the estate together, was either read or construed on said final settlement; the whole question turned upon the fact that there was no authority given to Micou to keep the estate together and to run the farm. There are no other exceptions filed or of record in his office to said account except what appears in the final judgment and entry, and they are correctly stated therein. He decided that there was no authority for Micou to keep the estate together and run the farm, and, according to his recollection, no order in regard to keeping the estate together was produced, and that

no order is on record which purports to authorize the keeping together of said estate, and he cannot, therefore, attach a copy of said order to his answers; that he has no knowledge or recollections of any admissions having been made by any one as to the construction of any such order, for, according to his best recollection, no such order was introduced.

To the third cross-inter'ogatory he says: That so far as it appears from the record of his court, and according to his recollection, no cor-
291 rections have been made in the annual settlement of said Micou, as guardian of his said wards, unless probably items charged on the credit side of the annual settlement were brought forward and surcharged in the final settlement.

To the fourth cross-inter'ogatory he says: That no one but B. H. Micou was examined as a witness to prove the value of the mules, of the value of the rent of lands and hires of slaves, according to witness's best recollection. Micou did testify to the number of negroes each year capable of labor, his or her age, character and capacity for labor, and what, under the circumstances and conditions of things, each year each such negroe was worth. Witness has no recollection now of Col. Blakey's having been sworn as a witness in the case at all; but, in determining the value of the hire and rents, Col. Blakey may have expressed his opinion, during the discussion of the question, as to the value of said property. From the testimony of said Micou, the values of the hires of said negroes for said years, as settled in the final decree, was ascertained and fixed.

To the fifth cross inter'ogatory he says: That said Micou was charged with the value of mules, and interest thereon, from January 1st, 1859, because he had converted them to his own use; that said mules came to his possession as guardian of his wards from the estate of their grandfather and their mother, and that said Micou was examined by said Fitzpatrick as a witness to prove the correctness of said charge,
292 and it was on his evidence that witness, as judge, decided that he was liable for their value and interest on the same.

To the sixth cross-inter'ogatory he says: That said Fitzpatrick introduced B. H. Micou as a witness to prove the value of the rent of the lands for the respective years in which he is charged with said rent, but he has no recollection of Col. Blakey's having been examined as a witness on that subject.

To the seventh cross-inter'ogatory he says: That he has no recollection about the item inquired about in this inter'ogatory of $4,320, save that Micou was charged with said amount, but from what source the property came he does not know, and does not remember that any testimony was offered on that subject, so far as the source from which the property came was concerned.

To the eighth cross-inter'ogatory he says: That after the rulings on said account it became necessary to restate the account; the attorneys and Micou took the papers and went out with them; in the afternoon of the same day they returned the papers with the account restated, and among the papers was a draft for a final decree upon which this decree was prepared, except there was a difference as to costs and commissions, but wittness cannot state who prepared said original draft, or by whom it was examined.

293 To the ninth cross-inter'ogatory he says: That he does not say that David T. Blakey procured the issue of the first execution; his best impression is that it was issued in accordance with instructions

given at the time the settlements were made. He says that he has issued some twenty or thirty executions on said decrees, and has issued them sometimes through instructions from Major Semple, and sometimes through instructions from Col. Blakey by letter, but when from him, always purporting to be on behalf of the plaintiffs. He has no copy of Blakey's letter, and cannot, therefore, attach it, and the executions were sent to Major Semple sometimes and sometimes to Col. Blakey, with directions to hand them to the proper parties, and sometimes to the officers directly.

ALLEN D. STURDIVANT.

I, George F. Moore, the commissioner in said commission named, do hereby certify that the foregoing testimony and evidence of the said witness, Allen D. Sturdivant, was taken down under oath; that he assented, swore to, and subscribed the same in my presence on the thirteenth day of November, A. D. 1877, at Dadeville, in the county of Tallapoosa and State of Alabama; that I have personal knowledge of said witness, and that I am not of counsel in said cause or of kin to any of the parties in interest, or in any manner interested in the result thereof.

Given under my hand and seal this the 13th day of November, A. D. 1877.

[L. S.] GEORGE F. MOORE,
Commissioner.

Published by order of the court this 30th day of May, 1878.
J. W. DIMMICK, *Clerk.*

294 *Inter'ogatories to Thomas M. Barnett.*

Circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } In equity.

Inter'ogatories to be propounded to Thomas M. Barnett, who is a material witness for complainant in this cause, and who resides at Tala'ssee, Alabama, which inter'ogatories with the answers thereto will be used in evidence on the trial thereof.

Inter'ogatory 1st. Do you know Benjamin H. Micou, Clara E. Boykin, Frank S. Boykin, and Lucy B. Micou? Did you know Thomas M. Barnett, sr., in his life time? What relation were you to him and what relation were the said Clara E. Boykin and Lucy B. Micou to him?

Inter'ogatory 2nd. How many negroes did the said Clara E. Boykin and Lucy B. Micou receive in the division of the negroes belonging to the estate of said Thomas M. Barnett, sr.? At what time were said negroes received by said Benjamin H. Micou for them? How many said negroes allotted in said division to said Clara E. and Lucy B. were
295 able in 1859 to do fair work, and how many were children? Did you know the negroes which the said Clara E. Boykin and Lucy B. Micou received from the estate of their mother, Lucy A. Micou? When did said Benjamin H. Micou receive said last named negroes for them? How many of said negroes were in 1859 able to do fair work, and how many were children? What was the reasonable value of the aggregate annual hire of all of said negroes, both those received from the estate of Thomas M. Barnett, sr., and the estate of said Lucy A.

Micou, for each year, from the year 1859 to the year 1865, both of said years included? In making this estimate of their annual hire, you will take into consideration the ages and character of said negroes, the state and condition of their families, and that the hirer was to pay the taxes on them, physicians' bills, and feed and clothe them. Have you done so? Were there not during the years 1862, 1863, 1864, and 1865, or some of those years and which, many refugees in this section of Alabama with their negroes? Upon what terms could negroes have been procured during such years? What effect upon the value of the hires of negroes did the condition of the country have during said years? State any facts and circumstances tending to show that during said years, or some of them and which, negroes could have been obtained for their food, clothes, physicians' bills and taxes? In estimating the value of the hire of said negroes during the years 1862, 1863, 1864,
296 and 1865, have you estimated the same in United States currency? If not, you will so estimate and state it.

Inter'ogatory 3rd. Do you know the lands or plantation which was purchased about the last of 1858 or during that year by said Benjamin H. Micou for his said two daughters? Where are said lands situate? How many acres of said plantation were cleared and tillable? What was the annual rental value of said lands for each year, from 1859 to 1865, both of said years included? In estimating the value of said rent you will take into consideration that the rentor keeps the plantation in repair and pays the taxes? What effect upon the rental value of said lands did the condition of the country have during the years 1862, 1863, 1864, and 1865, or any of them and which? Have you estimated the rental value of said lands during said last named years in United States currency? If not, you will do so and state it. What permanent improvements did said Benjamin H. Micou put upon said lands after he purchased them and what was their value? State fully and particularly as to each matter enquired about. For what kind of currency alone could negroes have been hired and lands rented during any of the years 1862, 1863, 1864, and 1865? State for each year. How much would negroes have hired and lands rented for during said last named years if the same had to be paid in good currency, such as United States currency?

297 Inter'ogatory 4th. What plantation have you been cultivating since January 1st, 1875? How long had you been cultivating said plantation, and how long had you owned it prior to August, 1874? By what arrangement or agreement and with whom was said plantation cultivated during the year 1875? What application was it understood between you and said Frank S. Boykin, Lucy B. Micou or H. C. Semple was to be made of your portion of the income from said plantation for 1875? By what agreement or understanding, with any person and whom, have you cultivated said plantation during the years 1876 and 1877, and what application is to be made of the income after paying the expenses? State the terms of each agreement or understanding inquired about in this inter'ogatory fully and particularly. Have you done so?

Inter'ogatory 5th. At what time did you first hear that any proceedings were being instituted or commenced or about to be commenced to make final settlement of said Benjamin H. Micou's guardianship of his said daughters? From whom did you first hear of it? Were you not one of the sureties on the bond of said Benjamin H. Micou, as said guardian? What reason was stated to you at the time for making a final settlement of his guardianship of said Lucy B. Micou? And what promise or assurance was given to you, directly or indirectly, expressly

298 or impliedly, or what understanding was there of any benefit or protection to, or that any provision would be made, if decrees were rendered or suffered to be rendered against said Benjamin H. Micou in said final settlement? Was any such promise or assurance given, or understanding had, either with you personally or any member of your family? If no positive promise or assurance was given or understanding had, then state what was said to you, or any member of your family, to produce an expectation that any benefit or protection would enure to, or any provision be made whatever for, you or your family? If yea, state the same fully and particularly, and all that was said, by whom said, and what time, and the circumstances.

Inter'ogatory 6th. Who was your attorney and professional adviser during the latter part of 1873 and early part and spring of 1874, in the matter of your pecuniary and property difficulties and troubles? Did you have any consultations or conferences with said attorney about said final settlements of said guardianships by said Benjamin H. Micou? Were you or your attorney present at either of said final settlements? If not, why did not one or both of you attend?

Inter'ogatory 7th. What arrangement was made or understanding had with you or any member of your family, or other person for you, either before or after the rendition of said decrees, but before the sale of your property in August, 1874, as to the disposition of your property which might be sold thereafter under executions? With whom
299 was said arrangement made or understanding had? When was about the time such arrangement or understanding began to be talked about or discussed, and when was it consummated, and how? If by any instrument in writing, state the nature of such instrument, and by whom and to whom made. State all the facts and circumstances of any such arrangement or understanding.

Inter'ogatory 8th. Were not said Benjamin H. Micou, Nicholas D. Barnett, and you equally bound upon the debts to Alexander Pitman and James F. D. Lanier, upon both of which judgments were rendered against all of you? If yea, state why and how it was that the burden of paying the entire debt to said Pitman was charged upon certain property which was sold as yours, and had previously been owned by you, and the burden of paying the entire debt of said Lanier was charged upon property which was sold as the property of Nicholas D. Barnett, and had been previously owned by him, and the payment of no portion of either of said debts was charged upon any property which was sold as the property of said Benjamin H. Micou? State fully and particularly the arrangement or understanding by which this was done? Was this in compliance with the terms of such arrangement, agreement, or understanding, or did it vary therefrom in any respect; and, if so, in what respect?

Inter'ogatory 9th. How many mules, horses, head of cattle, and how much corn and fodder did you have on the plantation
300 cultivated by you in 1874? How much of the same was sold by the sheriff, and what time? Was it not sold earlier? What was done with any part thereof which was not sold by the sheriff? At what place was it sold by the sheriff? Was said property present at the place of the sale when sold? To what place was said personal property sent after the sheriff sales, or what was done with it after said sale? How much cotton and corn did you grow during the year 1874?

Inter'ogatory 10th. How many mules, horses, head of cattle, and how much corn and fodder did said Benjamin H. Micou have on the several plantations cultivated by said Benjamin H. Micou in 1874? How

much of the same was sold by the sheriff, and at what times? Was said property present at the place of sale when sold? Where was said property sent or what was done with it after said sale? How much cotton and corn did said Benjamin H. Micou grow on his said plantations during the year 1874? All these questions the witness will answer as well as he can, and state his opportunities of knowing. What plantations has said Benjamin H. Micou been attending to or overlooking since January 1st, 1875? State *by* the names by which they are generally called. Has there been any change in the manner and extent of his attending to or overlooking said plantations since January, 1875? If so, in what respects does it differ?

301 Inter'ogatory 11. State fully and particularly each and every thing which was done either before or after the rendition of said decrees in the probate court of Tallapoosa County, and each and every thing that was said to you, or to any other person, which was communicated to you, and the name of such person, for the purpose or with the intention of getting you to say or do nothing against or acquiesce in the rendition of said decrees, or the sale of your property thereunder, and by whom the same was done or said. State each and every fact and circumstance and everything that was said by any parties, and which of said parties, or by any person representing them or any of them, tending to show that said final settlements of said guardian were to be made and said decrees rendered or be used to secure any benefit whatever to said Benjamin H. Micou or his family, and that said Micou was willing that decrees for a large amount should be rendered against him as said guardian; and state each and every fact and circumstance tending to show that said decrees were for larger sums than said Micou was justly indebted to his said daughters as their guardian, or that any improper charges were made against said Micou in said final settlements.

Inter'ogatory 12th. What became of the mules which said Benjamin H. Micou had in 1859 as guardian of his said daughters? If any of them died state how many, as nearly as you can, and what be-

302 came of those that remained at or just before the close of the war? These questions do not refer to any mules purchased by said Micou. Did any, and, if so, how many, of the negroes die before they were emancipated, and at or about what years? State as nearly as you can.

Inter'ogatory 13th. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

CLOPTON, HERBERT & CHAMBERS,
Solicitors for Complainant.

Circuit court of the United States of America for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL.

The defendants, Frank S. Boykin, Lucy B. Boykin, and Henry C. Semple, each make the following objections to the inter'ogatories propounded to the following witnesses in said cause, and on the hearing will object to the answers thereto as evidence against them.

To the inter'ogatories propounded to Thomas M. Barnett:

303 1. To that portion of the 4th int'y as follows: "By what arrangement or agreement and with whom was said plantation cultivated during the year 1875," unless such arrangement or agreement was made with one of these defendants.

2. To that part of the 4th int'y beginning: "By what agreement," and to the end thereof of said int'y, unless such agreement or understanding was made with one of these defendants.

3. To that portion of the 5th int'y beginning with the words "What reason was stated to you," and down to the end thereof, inclusive of said int'y, unless these matters enquired of therein proceeded from or were made by one of these defendants

4. To that part of the 5th int'y beginning with the words "And what promise," to the end of the int'y inclusive, unless the matters enquired of therein proceeded from or were made by one of these defendants.

5. To that part of the 5th int'y beginning with the words, "If no positive promise," to the end of the int'y inclusive, because the same are unimportant and not evidence against these defendants, being promises, statements, or assurances or understanding with third persons.

6. To that part of the 6th int'y which asks "If not, why did not one or both of you attend," unless the cause of such non-attendance arose from the acts or representations of one of these defendants.

304 7. To the whole of the 7 int'y, unless the matters therein enquired of occurred with one of these defendants.

8. To the whole of the 11th int'y, unless the matters enquired of therein occur'ed with one of these defendants.

9. To that portion of the 11th int'y which says, "Or to any person which was communicated to you."

10. To that portion of the 11th int'y as follows: "Or by any person representing them or any of them."

Because the same and the answers thereto are unimportant as evidence, being the representations or statements of third persons.

And the said defendants also make the following objections to the following questions propounded to Nicholas D. Barnett:

1. To that part of the 4th int'y as follows: "By what arrangement or agreement, and with whom was said plantation cultivated during the year 1875," unless it was with one of these defendants.

2. To that part of the 4th int'y beginning with the words, "By what agreement or understanding," to the end of the int'y, unless it was made with one of these defendants.

3. To that part of the 5th int'y beginning with the words, "What reason was stated," to the end of the inter'ogatory inclusive, unless the matters therein enquired of occurred with one of these defendants.

305 5. To that part of the 5th int'y beginning with the words, "If no positive assurance," to the end of the int'y.

6. To that part of the 6th int'y which asks, "If not, why did not one or both of you attend."

7. To the whole of the 7th int'y, unless the matters therein enquired of occurred with one of these defendants.

8. To the whole of the 11th int'y, unless the matters enquired of occurred with one of these defendants.

9. To that part of the 11th int'y beginning with the words, "And each and every thing," to the end of the int'y inclusive, unless the matters enquired of occurred with one of these defendants.

10. To that part of the 11th int'y as follows: "Or to any other person which was communicated to you."

11. To that part of the 11th int'y as follows: "Or by any other person representing them or any of them."

1. Because the same and answers thereto are incompetent evidence against these defendants.

2. Because the same call for hearsay.

3. Because they call for the declarations, acts, and statements of third persons.

ELMORE & GUNTER,
Solicitors for said Defendants.

306 *Cross-inter'ogatories of Tho's M. Barrett.*

Circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL. } In equity.

Cross-inter'ogatories to be propounded to Thomas M. Barnett, a witness for the complainant in said cause.

1. Cross-inter'ogatory. Do you remember with any certainty the number of negroes that Clara E. Boykin and Lucy B. Micou received on the division of the estate of your father Thomas M. Barnett, sr., or the number of them that were able in 1859 to do fair work, or how many were children; and can you remember with certainty the same matters about the negroes they received from the estate of their mother?

2. Cross-inter'ogatory. In the years 1862-'3-'4, and early part of 1865, was there any United States currency in circulation as a medium of purchase in the country? Was not the notes of the Confederate States the only current circulation in the county of Montgomery in said State and elsewhere in said State? Have you estimated the value of the hires of said negroes and rents of said lands in those years according to the amounts they would have produced in confederate treasury notes?

307 And, if not, then do so. Did not such treasury notes have a value in the purchase of commodities or property in those years? At what price usually before the war could corn have been purchased in said county of Montgomery and in the neighborhood of said lands, and at what price could corn and cotton be then purchased in confederate currency in the several years of 1862, '3, '4, & early part of 1865, and at what price in the subsequent part of 1865 and afterwards, when United States currency and Treasury notes and notes of specie paying banks became the circulating medium in this neighborhood and county, and was there any material difference in those years in the purchasing power of confederate currency or notes when used in purchasing other commodities or property from its value in purchasing cotton or corn; and, if so, to what extent was such difference? If these negroes had been hired in said years the hirer to pay taxes and doctor's bills and clothe & feed them, and pay hire in gold or silver or notes of specie paying banks or Treasury notes of the United States, at what prices could they have been hired—would any person have taken them on such terms? If these negroes in those years had hired at $5,000.00 per annum how much corn or cotton would have paid such hires?

3. Cross int'y. If the rents of lands in said neighborhood and county were worth $1,000.00 per annum in said years, how many bushels of corn or *proceeds* of cotton in each of said years would it have taken to pay

such rents? What was the value of rents of lands of the description of those inquired of in the direct inter'ogatories before the war?
308 What was the value of such rents in each of the years 1861, '2, '3, '4, & '5, as estimated in confederate currency, and what was their value in the years 1866 and subsequently, when United States currency and the notes of specie-paying banks and United States Treasury notes became the circulating medium? If these lands had been offered for rent on the terms that the tenant should pay the taxes and keep and leave the premises in repair and pay the rent in United States currency, how much would they have rented for each year? Were there not many persons who came to Montgomery County during those years as refugees who were wanting lands for rent, and did not this circumstance enhance the rental value of lands in said county and neighborhood?

4. Cross-inter'ogatory. What was the real value of the stock in the Tallassee Manufacturing Company No. 1 on the 22nd day of October, 1873, and was its value then known to B. H. Micou? What position in said company and as what office did said Micou hold on and prior to the 22nd Oct., 1873?

5. Cross-int'y. Did you, in the spring or in the year of 1874, own any plantation or lands, mules, horses, or plantation utensils, or have any crop in Elmore County in said State? Did you not once own a plantation in said county in the fork of the Coosa and Tallapoosa River just below the site of old Fort Jackson, and what was this plantation called? Was it the river plantation? Did you not, before the year 1874,
309 convey this place to your daughter, Mrs. Storrs, and was not her husband, C. S. Storrs, in possession of and cultivating the same in the year 1874, and who owned or held for his wife as her property all the mules, horses, stock, plantation tools, and crops thereon in said year; and did you own any of the same on said place in 1874?

6. Cross-int'y. Did you cultivate any plantation in the year 1874; if so, in what county? What means did you have or procure to make a crop therein that year? Did you receive advances from any and what person to make this crop, and did you not pledge or mortgage the crops of cotton or corn and fodder of that year to pay these advances, and was any and what part of said crops applied to repay said advances, and were they sufficient to repay them, and was not the corn and fodder raised thereon that year sold under executions on the decrees rendered in favor of said Clara E. Boykin and Lucy B. Micou?

9. Cross-int'y. Who has been in possession of and has cultivated the plantation in Montgomery County since 1874 formerly owned by you, since it was sold under executions by the sheriff of said county? Has not Henry C. Semple, and has he not borne all the expenses of cultivating the same and received all the income and profits thereof since said sheriff's sale?

10. Cross-int'y. Did not Frank S. Boykin tell you of Micou's having transferred to his wife $30,000.00 of stock in the Tallassee Manu-
310 facturing Company No 1 as in payment of that much of his indebtedness to her as her guardian, and also that the stock was worthless, and he and his wife would not take it, and they were advised by Mr. Semple, as their attorney, that, under the circumstances, such transfer was void as a payment of so much, and that he had seen Micou about it, and Micou had agreed, if you and Nicholas D. Barnett, who were his sureties on his guardian's bond, were willing that the transfer and receipt should be cancelled, or what did he say to you about this transaction, and did you not agree that the same should be cancelled, and when

did this take place; was it not in the month of October or November, 1873, and before the final settlement of the accounts of Micou as said guardian?

Commission to take the deposition of Thos. M. Barnett.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To George F. Moore, esq., of the city of Montgomery:

Know ye that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Thomas M. Barnett, who resides at Tallassee, Alabama, as witness in behalf of complainant in a cause pending in the circuit
311 court of the United States for the middle district of Alabama, at Montgomery, wherein the First National Bank of Montgomery is plaintiff, and Benjamin H. Micou and others are defendants, on oath to be by you administered, upon intero'gatories and cross-inter'ogatories annexed to this commission, to take and certify the deposition of the witness, and return the same to our said circuit court to be holden on the first Monday in November next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of October, A. D. 1877.

Issued the 30th day of October, 1877.

SEAL OF U. S. CIRCUIT COURT MID. DIST. OF ALA.

J. W. DIMMICK,
Clerk U. S. Circuit Court Middle Dist. of Ala.

Deposition of Thos. M. Barnett.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL.

Deposition of Thomas M. Barnett, witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama in a certain cause therein depending, wherein the First National Bank of Montgomery plaintiff, and Benj. H. Micou et al. defendants.

THOMAS M. BARNETT, of Montgomery, Alabama, being duly
312 sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

To the first inter'ogatory he says: That he knows Benjamin H. Micou, Clara E. Boykin, Frank S. Boykin, and Lucy B. Micou; knew Thomas M. Barnett, sen., in his lifetime; was his son; and Lucy B. Micou and Clara E. Boykin were his grandchildren.

To the second inter'ogatory he says: That he thinks Clara E. Boykin and Lucy B. Micou received about twelve negroes in the division of negroes belonging to the estate of said Thomas M. Barnett, sr., and that Benjamin H. Micou received them some time in the latter part of 1857, or in the early part of 1858; that witness kept the negroes together until the winter of 1857; that his best recollection is that there were about eight of the negroes allotted in said division who were able to do fair

work in 1859; that he knew at the time the negroes that Lucy B. Micou and Clara E. Boykin received from the estate of their mother, Lucy A. Micou, but he cannot name them now as he has forgotten their names; Benjamin H. Micou received said last-named negroes, according to witness' recollection, about 1854; that there were about fifty or sixty negroes who belonged to the estate of his sister, Lucy A. Micou, and there were about thirty who were able to do fair work in 1859; he does not know what proportion of said negroes Lucy B. Micou and Clara E. Boykin received of said lot, whether half of them or the whole; if they received the whole, then their aggregate hire and that of those re-
313 ceived from the estate of T. M. Barnett, sr., for 1859 he supposes would have been $5,500, for 1860 $5,500.00, for 1861 $5,000, for 1862, in confederate currency, the hire would have been $5,500 or $5,700 at least; there was no very great depreciation of confederate money at that time, for 1863, in confederate currency; about 6 or 7,000 dollars for 1864 in confederate currency; he says there were no negroes hiring in his part of the country, and it is hard for him to estimate it, and all these answers are based on an estimate now made by him without proper data to estimate the values upon; for 1865 he thinks that the hire would have been as much as in 1859, estimating the value in accordance with the value of cotton and other products during that year, and that he has estimated the value of said hire under the value rather than above them, and especially as to 1865. In making these estimates the witness has been governed by the intrinsic value of the hire of the negroes, and has taken into consideration the fact that the hirers were to feed and clothe them, and pay the physicians' bills; he has omitted the taxes as he is not sure whether the custom was that the owner or hirer was to pay them; that he never hired a negro, or hired one out, and in making these estimates he has rather under than overrated the value of the hire; that in his section of country the plantations were stocked by their own hands, and there were no refugee negroes there & until 1864; that he knew of no refugee negroes being brought into this section of the
314 country; that he can't state what effect this had on the hire of negroes during 1864; that he thinks it had none previous to 1864; does not know of any facts tending to show that during any of these years negroes could have been hired for their food, clothes, physician's bills, and taxes, and knows of none having been so obtained. In estimating the value of the hire he it at 55 or 57 hundred dollars in 1862; as there was no great depreciation in confederate currency in 1863 he estimated it in Confederate currency; he declined to answer as to the value in 1864, and in 1865 he estimated at the same rate as in 1859 and in "greenbacks." He has estimated the value of the hire of said negroes for said years, except 1863 & 1864, in U. S. currency—he cannot answer as to the value of the hire in 1864 in greenbacks, but estimates the value of such hire in 1863 in greenbacks at $5,000.

To the third inter'ogatory, he says: That he knows the lands purchased in 1858 by said Micou, for his said two daughters; it is situated in Montgomery County; doesn't know how many acres were cleared and tillable, but thinks there was as much as 600 acres; that previous to 1861, and including that year, said land ought to have rented at from four to six dollars per acre; that the rent for said years 1862, 1863, 1864, 1865, estimated in United States currency, was about the same, for the witness says that the value of the products made on the plantations were enhanced in value as Confederate currency depreciated; that
315 taking the rental value on the basis just given, the condition of

the country had no effect on the rental value of said lands during said years; witness has not been on the place, has only passed by it since Micou settled it, and he doesn't know what permanent improvements he has put on it. Negroes could have been hired for Confederate currency alone during the years 1862, 1863, 1864, 1865; that he cannot say as to how much lands would have rented for or negroes hired for in good or U. States currency during said years.

To the fourth inter'ogatory he says: That he has been cultivating the plantation *the plantation* which formerly belonged to him since January, 1875—and he had owned it since about 1844 or 1845—by an agreement with Maj. Semple to cultivate the plantation and turn over the proceeds to him for Pittman, Lanier, and Clara E. Boykin and Lucy B. Micou; his portion of the income of said plantation was to appropriated in the way just stated; the plantation was cultivated during 1876 under the same agreement or understanding, and the proceeds to be appropriated in the way just stated; *the plantation was cultivated during* 1876 *under the same agreement or understanding, and the proceeds to be appropriated in the same way;* there was but one agreement, no annual agreement; he was to cultivate the plantation and the proceeds were to be applied in the same way.

To the fifth inter'ogatory he says: That he first heard of proceedings for final settlement of Micou's guardianship after the final
316 settlement and rendition of the decrees against Micou; thinks it was in the spring of 1874; doesn't re'ollect from whom he first heard it; was a surety on the bond of said Micou as guardian. No reason was stated to him for making final settlement of Micou's guardianship; the settlement was made before he knew of it. No understanding or agreement was made before the decrees were rendered by him, or any promise or assurance of protection, either expressly or impliedly, made to him or to any one for him before such decrees of final settlement; no such assurance was given to him or to any of his friends prior to that time; that before the rendition of said decrees no definite agreement was made or assurance given to him to produce an expectation of benefit to him; he does not recollect any conversation before the final settlement which produced any expectation of any benefit to him or protection to his family.

To the sixth inter'ogatory he says: That Col. D. S. Troy was his attorney and professional adviser during the latter part of 1873 and the early part of 1874; doesn't recollect as to whether he had any conversation with his attorney before said final settlement as to them; the settlement was had before he was informed of it; he was not present at either of said final settlements and does not think his attorney was; he was not advised of the time of the final settlement, and if he had been would not have considered it necessary for either himself or attorney to have been present.

To the seventh inter'ogatory he says: That the only arrange-
317 ment made was that made in a paper which he thinks Maj. Semple has attached to his answer in this cause; the understanding he supposes was made between Col. Troy and Maj. Semple and the daughters of B. H. Micou; he has never read the arrangement or deed of trust, and did not know its contents until the next fall after it was made; knew nothing about it further than what he has been told by Maj. Semple and others; the arrangement was made sometime between the time of the final settlement and the sale of the property; the only arrangement made was that embodied in the paper attached to Maj. Semple's answer, which will explain all witness knows about it.

To the eighth inter'ogatory he says: That he (witness) & B. H. Micou and N. D. Barnett were equally bound on the debts to A. Pittman & J. F. D. Lanier; there was no arrangement or understanding by him by which the lands inquired about were sold to satisfy the debt to Pittman and Lanier, and he is unable to give any reason why it was done; supposes that it was an arrangement made by Maj. Semple with the parties without consulting witness in the matter; he doesn't know whether it was done under any arrangement or not or whether it varied from it or not.

To the ninth inter'ogatory he says: That there about 20 mules and perhaps eight or ten head of cattle, but he cannot state how much corn and fodder was on the place, sold, he thinks, in December, 1874;
318 does not know why it was not sold earlier; it was all sold by the sheriff according to his recollection; the stock was sold in the city of Montgomery, and the corn and fodder he thinks was probably sold at the plantation, but he does not recollect; all the stock was present at the place where sold, and if the corn and fodder was sold on the plantation it was present at the place when sold; said property was returned to the plantation after said sale; that he thinks that he made during the year 1874 about 1,200 or 1,500 bushels of corn and about forty-five bales of cottor.

To the tenth inter'ogatory he says: That he knows nothing about how mules head of cattle Micou had on the several plantations cultivated by him in 1874, nor does he know how much thereof was sold by the sheriff, nor when it was sold; doesn't know whether said property was present at the place of sale when sold or not. Witness was living in a different county, and had no chance of knowing about these matters. He doesn't know how much corn and cotton Micou grew on his plantations during 1874. Ben. H. Micou has been overlooking or attending to the Campbell place, and the Home or Prairie place, since January 1st, 1875. He knows of no change in the manner or extent of Micou's overlooking or attending to said plantations since January 1, 1875. Doesn't know whether Micou or Boykin was attending to the Shorter place in 1875.

To the eleventh inter'ogatory he says: That he knows of no promises made before the rendition of said decrees; that after the rendi-
319 tion of said decrees B. H. Micou told witness and his brother, N. D. Barnett, that his (Micou's) daughters would be liberal with them; that he had signed Micou's bond as guardian of his daughters twenty years before, and thought they had a prior claim on all his property; that it was represented to him that the rendition of the decrees was duly and legally made, and he thought that whatever property he could save would be saved by the liberality of his nieces, Clara E. Boykin and Lucy B. Micou, a concession on their parts to him, as he thought that their claim was for largely more than the property would sell for; that the matter was left with Maj. Semple and witness' attorney, Col. D. S. Troy, and the arrangement made is that embodied in the paper attached to Maj. Semple's answer; this instrument witness did not know the terms of for several months after the rendition of the decrees, and after said decrees were rendered Micou said his daughters would be governed by what he said, and would be liberal to witness and his brother, N. D. Barnett; that he (witness) does not know of any fact tending to show that improper charges were made against Micou as guardian on his final settlement; he knew nothing of the amount of the decrees except as he was told by others, and it was represented to him that they were proper in all respects; the impression made on the——

At this point the examination was adjourned until to-morrow morning at ten o'clock, and the examination of the witness being resumed pursuant to the above adjournment, the witness asked leave to chang' so much of the evidence given by him yesterday as related to the number of negroes owned by Clara E. Boykin & Lucy B. Micou in 1859, and the aggregate value of the annual hire of same for the several years inquired about, and the witness now states that upon reflection, and refreshing his memory by thinking over the matter, his best recollection is that said parties owned in their own right about fifty negroes in said year from the two estates of their mother and grandfather, and that of this number about thirty were able in said year to do full work, and that the aggregate value of the hires of said negroes for the years 1859, 1860, 1861, was about 4,500 dollars for each said years. mind of witness by Micou in the conversation referred to was, that Micou was willing to sacrifice himself, and would sacrifice himself, to enable his daughters to be liberal to witness and his brother.

To the twelfth inter'ogatory he says: That said mules which B. H. Micou had, as the guardian, remained on the plantation; doesn't know how many of said mules died, or what became of them; has no recollection as to whether any of the negroes died or not; they were taken into a different county and he very seldom saw them.

To the thirteenth inter'ogatory he says: That he cannot set forth any other matter which will be a benefit to the parties at issue in this cause, or either of them.

To the first cross-inter'ogatory he says: That he cannot remember with certainty, but only approximately, the number of negroes received by Clara E. Boykin & Lucy B. Micou from the estate of Thomas M. Barnett, sr., and their mother.

To the second cross-inter'ogatory he says: That there was not to his knowledge any United States currency in circulation in this country in 1862, '3, '4, & early part of 1865; thinks Confederate treasury notes were the only current circulation in this State during said year; he has not estimated the value of the rent of lands and the hires of negroes during those years in Confederate currency, and without a table of the values of it it is impossible for him to do so; such notes had a value in the purchase of commodities; corn could have been bought for 50 or 60 cents a bushel, he thinks, before the war, in the neighborhood of said lands, and corn ran in price from one to eight dollars a bushel during the war, and cotton from 8, 10 cents per pound to 1.50, but he is unable to grade it for each year; after the early part of 1865 corn was 75 cts. to $1.00 per bushel, and cotton ranged from 15 to 50 cents per pound; Confederate money was the only currency in circulation, and there was no difference in its purchasing power when used in purchasing corn & cotton, and when used in purchasing other commodities; there was no such currency as gold to be had, and the negroes inquired about could not have been hired for gold; and he doesn't know if any one would have hired them on the terms stated, but thinks it would have been difficult to have done so. If the negroes inquired about had been hired out at $5,000 per annum, the hire would have been paid in cotton and corn in the same proportion that Confederate currency depreciated during the years 1862, '3, '4, & '5.

To the third cross-inter'ogatory he says: That the only answer he can make to the question as to how much corn and cotton it would have taken in each of these years to pay the rent of lands is that as the price of corn and cotton increased, the value of the currency depreciated; as

Confederate currency depreciated the rents of lands increased in value; but witness cannot state as to each of the years as inquired about; that their value from '66 to '70 or '71, the rents would have run from 8 to 10 dollars per acre, that is for about a bale of cotton to ten acres; from '71, about a bale to fifteen or twenty acres; said lands would have rented according to rates already stated by witness; in his portion of the county there was no refugees; there may have been in other portions of the county.

To the 4th cross-inter'ogatory he says: That from developments made subsequently to Oct. 22nd, 1873, the stock in the Tallassee Manufacturing Co. No. 1 was of little or no real value at that time; as to whether Micou knew its real value or not, witness can only say that he
323 had a better opportunity of knowing than any one else. Micou was president of said company on and prior to Oct. 22nd, 1873.

To the fifth cross inter'ogatory he says: That in 1874 he had no crop, mules, &c., in Elmore County; did own a plantation, called the River plantation, of the description inquired about. He deeded said plantation (he thinks in July, 1872) to his daughter, Mrs. Storrs, and he did not own said plantation in 1874. C. B. Storrs was in possession of and cultivating the same in 1874.

To the sixth cross-inter'ogatory he says: He cultivated a plantation in Montgomery County in 1874; that he had no means, and his son-in-law raised the means. He thinks no part of the crop was mortgaged. Thinks the corn and cotton raised on said plantation was sold on execution in favor of Clara E. Boykin & Lucy B. Micou.

To the seventh cross-interrogatory he says: That the said plantation has been in possession of Maj. Semple since 1874, but he does not know whether he bore any of the expenses for 1874; thinks that was done through his son-in-law, Capt. Storrs. Maj. Semple has received all the profits arising from cultivating said lands, and the means were procured to run the plantation by Capt. Storrs, sometimes by a loan and sometimes by a mortgage on the crop, except that Maj. Semple made arrangements during last year to obtain the means to run said plantation.

324 To the tenth cross-inter'ogatory he says: That his best recollection is that Mr. Boykin did tell him that Micou had transferred $30,000 of Tallassee stock to his wife Clara E. Boykin, but doesn't know what he was advised to do in the matter by Major Semple, and does not remember any promises or agreements that the transfer should be cancelled; and he remembers nothing further in regard to these transactions.

T. M. BARNETT.

I, George F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness Thomas M. Barnett was taken down under oath and subscribed by him in my presence on the 26th day of March, 1878, to which day said examination was continued, at Montgomery, in the county of Montgomery, and State of Alabama; that I have personal knowledge of said witness; that I am not of counsel in the case or of kin to any of the parties, or in any manner interested in the result thereof.

Witness my hand and seal this the said 26th of March, 1878.

[L. S.] GEO. F. MOORE,
Commissioner.

Published by order of the court this 30th day of May, A. D. 1878.

J. W. DIMMICK, *Clerk.*

325 Circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } In equity.

Inter'ogatories to Nicholas D. Barnett.

Inter'ogatories to be propounded to Nicholas D. Barnett, who is a material witness for complainant in this cause, and which inter'ogatories, with the answers thereto, will be used in evidence on the trial thereof.

The witness resides in Montgomery County, Alabama.

Inter'ogatory 1st. Do you know Benjamin H. Micou, Clara E. Boykin, Frank S. Boykin, and Lucy B. Micou? Did you know Thomas M. Barnett, sr., in his lifetime? What relation were you to him, and what relation were the said Clara E. Boykin and Lucy B. Micou to him?

Inter'ogatory 2nd. How many negroes did the said Clara E. Boykin and Lucy B. Micou receive in the division of the negroes belonging to the estate of said Thomas M. Barnett, sr.? At what time were said negroes received by said Benjamin H. Micou for them? How many of said negroes allotted in said division to said Clara E. and Lucy B. were able in 1859 to do fair work, and how many were children? Did you know the negroes which the said Clara E. Boykin and Lucy B. Micou received from the estate of their mother, Lucy A. Micou? When did said Benjamin H.
326 Micou receive said last named negroes for them? How many of said negroes were in 1859 able to do fair work, and how many were children? What was the reasonable value of the aggregate annual hire of all of said negroes, both those received from the estate of said Thomas M. Barnett, sr., and the estate of said Lucy A. Micou, for each year from the year 1859 to the year 1865, both of said years included? In making this estimate of their annual hire you will take into consideration the ages and character of said negroes, the state and condition of their families, and that the hirer was to pay the taxes on them, physician's bills, and feed and clothe them. Have you done so? Were there not during the years 1862, 1863, 1864, and 1865, or some of those years, and which, many refugees in this section of Alabama with their negroes? Upon what terms could negroes have been procured during such years? What effect upon the value of the hires of negroes did the condition of the country have during said years? State any facts and circumstances tending to show that during said years, or some of them, and which, negroes could have been obtained for their food, clothes, physician's bills, and taxes. In estimating the value of the hire of said negroes during the years 1862, 1863, 1864, and 1865, have you estimated the same in United States currency? If not, you will so estimate it and state it.

Inter'ogatory 3rd. Do you know the lands or plantation which was purchased about the last of 1858, or during that year, by said
327 Benjamin H. Micou for his said two daughters? Where are said lands situate? How many acres of said plantation were cleared and tillable? What was the annual rental value of said lands for each year from 1859 to 1865, both of said years included? In estimating the value of said rent, you will take into consideration that the rentor keeps the plantation in repair and pays the taxes. What effect upon the rental value of said lands did the condition of the country have during the years 1862, 1863, 1864, and 1865, or any of them, and which? Have

you estimated the rental value of said lands during said last named years in United States currency? If not, you will do so, and state it. What permanent improvements did said Benjamin H. Micou put upon said lands after he purchased them, and what was their value? State fully and particularly as to each matter enquired about. For what kind of currency alone could negroes have been hired and lands rented during any of the years 1862, 1863, 1864, and 1865? State for each year. How much would negroes have hired and lands rented for during said last named years if the same had to be paid in good currency, such as United States currency?

Inter'ogatory 4th. *Int'y 4th.* What plantation have you been cultivating since January 1st, 1875? How long had you been cultivating said plantation, and how low long had you owned it prior to August, 1874? By what arrangement or agreement, and with whom, was said plantation cultivated during the year 1875? What application was it understood between you and said Frank S. Boykin, Lucy B. Micou, or
328 H. C. Semple was to be made of your portion of the income from said plantation for 1875? By what agreement or understanding with any person, and whom, have you cultivated said plantations during the years 1876 and 1877, and what application is to be made of the income after paying the expenses? State the terms of such agreement or understanding inquired about in this inter'ogatory fully and particularly. Have you done so?

Inter'ogatory 5th. At what time did you first hear that any proceedings were being instituted or commenced, or about to be commenced, to make final settlements of said Benjamin H. Micou's guardianship of his said two daughters? From whom did you first hear of it? Were you not one of the sureties on the bond of said Benjamin H. Micou as said guardian? What reason was stated to you at the time for making a final settlement of his guardianship of said Lucy B. Micou? And what promise or assurance was given to you, directly or indirectly, expressly or impliedly, or what understanding was there of any benefit or protection to, or that any provision would be made if decrees were rendered, or suffered to be rendered, against said Benjamin H. Micou on said final settlements? Was any such promise or assurance given or understanding had either with you personally or any member of your family? If no positive promise or assurance was given or understanding had, then state what was said to you or any of member or your family to
329 produce an expectation that any benefit or protection would inure to, or any provision be made whatever for you or your family. If yea, state the same fully and particularly, and all that was said, by whom said, and at what time and the circumstances.

Inter'ogatory 6th. Who was your attorney and professional adviser during the latter part of 1873 and early part and spring of 1874 in the matter of your pecuniary and property difficulties and troubles? Did you have any conversations or conferences with said attorney about said final settlements of his said guardianships by said Benjamin H. Micou? Were you or your attorney present at either of said final settlements? If not, why did not one or both of you attend?

Inter'ogatory 7th. What arrangement was made or understanding had with you or any member of your family, or any other person for you, either before or after the rendition of said decrees, but before the sale of your property in August, 1874, as to the disposition of your property, which might be sold thereafter under executions? With whom was said arrangement made or understanding had? When was about the time such arrangement or understanding began to be talked about or

discussed, and when was it consum'ated, and how? If by any instrument in writing, state the nature of such instrument, and *and* by
330 whom and to whom made. State all the facts and circumstances of such arrangement or understanding.

Inter'ogatory 8th. Were not said Benjamin H. Micou, Thomas M. Barnett, jr., and you equally bound upon the debts to Alexander Pittman and James F. D. Lanier, upon both of which judgments were rendered against all of you? If yea, state why and how it was that the burden of paying the entire debt to said Lanier was charged upon cercertain property which was sold as yours, and had previously been owned by you, and the burden of paying the entire debt of said Pittman was charged upon property which was sold as the property of said Thomas M. Barnett, jr., and had been previously owned by him, and the payment of no portion of either of said debts was charged upon any property which was sold as the property of said Benjamin H. Micou. State fully and particularly the arrangement or understanding by which this was done. Was this in compliance with the terms of such arrangement, agreement or understanding, or did it vary therefrom in any respect, and if so, in what respect?

Inter'ogatory 9th. How many mules, horses, head of cattle, and how much corn and fodder did you have on the plantation cultivated by you in 1874? How much of the same was sold by the sheriff, and at what time; was it not sold earlier; what was done with any part thereof which was not sold by the sheriff; at what place was it sold by the
331 sheriff; was said property present at the place of sale when sold? To what place was said personal property sent after the said sheriff's sale, or what was done with it after said sale? How much cotton and corn did you grow during the year 1874?

Inter'ogatory 10th. How many mules, horses, head of cattle, and how much corn and fodder did said Benjamin H. Micou have on the several plantations cultivated by said Benjamin H. Micou in 1874? How much of the same was sold by the sheriff, and at what time; was said property present at the place of sale when sold? Where was said property sent, or what was done with it after said sale? How much cotton and corn did said Benjamin H. Micou grow on his said plantations during the year 1874? All these questions the witness will answer as well as he can, and state his opportunities of knowing. What plantations has said Benjamin H. Micou been attending to or overlooking since January 1, 1875? State by the names by which they are ordinarily called. Has there been any change in the manner and extent of his attending to or overlooking said plantations since January, 1875? If so, in what respects does it differ?

Inter'ogatory 11th. State fully and particularly each and everything which was done either before or after the rendition of said decrees in, the probate court of Tallapoosa County, and each and everything
332 which was said to you, or to any other person, which was communicated to you, and the name of such person, for the purpose or with the intention of getting you to say or do nothing against, or acquiesce in the rendition of said decrees or the sale of your property thereunder, and by whom the same were done or said. State each and every fact & circumstance and everything that was said by any parties, and which of said parties, or by any person representing them or any of them tending to show that said final settlements of said guardian were to be made, and said decrees rendered, or be used to secure any benefit whatever to said Benjamin H. Micou or his family, and that said

Micou was willing that decrees for a large amount should be rendered against him as said guardian. And state each and every fact and circumstance tending to show that said decrees were for larger sums than said Micou was justly indebted to his said daughters as their guardian, or that any improper charges were made against said Micou in said final settlements.

Inter'ogatory 12th. What became of the mules which said Benjamin H. Micou had in 1859, as guardian of his said daughters? If any of them died, state how many as nearly as you can, and what became of those which remained at or just before the close of the war. These questions do not refer to any mules purchased by said Micou. Did any,
333 and, if so, how many of the negroes die before they were emancipated, and at or about what years? State as nearly as you can.

Inter'ogatory 13th. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

CLOPTON, HERBERT & CHAMBERS,
Solicitors for Complainant.

Cross-int'ys to N. D. Barnett.

Circuit court of the United States for the middle district of Alabama.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } In equity.

Cross-inter'ogatories to be propounded to Nicholas D. Barnett, a witness for the complainant in said cause.

1 cross-int'y. Do you remember with any certainty the number of negroes that Clara E. Boykin and Lucy B. Micou received on the division of the estate of your father, Thomas M. Barnett, sr., or the number of them that were able in 1859 to do fair work, or how many
334 were children? And can you remember with certainty the same matters about the negroes they received from the estate of their mother?

2nd cross-int'y. In the years 1862, '3, '4, and early part of 1865 was there any United States currency in circulation as a medium of purchase in the country? Was not the notes of the Confederate States the only current circulation in the county of Montgomery, in said State, and elsewhere in said State? Have you estimated the value of the hires of said negroes and rents of said lands in those years according to the amounts they would have produced in Confederate treasury notes? and if not, then do so. Did not such treasury notes have a value in the purchase of commodities or property in those years? At what price usually, before the war, could corn or cotton have been purchased in said county of Montgomery and in the neighborhood of said lands, and at what price could corn and cotton be then purchased in Confederate currency in the several years of 1862, '3, '4, and early part of 1865; and at what price in the subsequent part of 1865 and afterwards, when United States currency and Treasury notes and notes of specie-paying banks became the circulating medium in this neighborhood and county, and was there any material difference in those years in the purchasing power of Con-

335 federate currency or notes when used in purchasing other commodities or property from its value in purchasing cotton or corn; and if so, to what extent was such difference? If these negroes had been hired in said years, the hirer to pay taxes and doctors' bills, and clothe and feed them, and pay hire in gold or silver or notes of specie-paying banks or Treasury notes of the United States, at what price could they have been hired? Would any person have taken them on such terms? If these negroes in those years had hired at $5,000.00 per annum, how much corn or cotton would have paid such hire?

3rd cross-int'y. If the rents of lands in said neighborhood and county were worth $1,000.00 per annum in said years, how many bushels of corn or pounds of cotton in each of said years would it have taken to pay such rents? What was the value of such corn or cotton in Confederate currency, and what in gold or United States Treasury notes? Could it have been sold at all for gold or U. S. Treasury notes? Are not lands sometimes rented for a share of the crops to be raised thereon, and what share of the crop is generally in this country deemed an equivalent for the use of the land; is it not one-third to one-half? What amount of corn would said place have produced each of said years if the whole of the tillable land thereon had been planted in corn?

336 What would one-third of said corn crop have been worth in Confederate notes? Answer for each year separately. What was the value of rent of lands of the description of those enquired of in the direct inter'ogatories before the war? What was the value of such rents in each of the years 1861, '2, '3, '4, & '5, as estimated in Confederate currency, and what was their value in the years 1866 and subsequently, when United States currency and the notes of specie-paying banks and United States Treasury notes became the circulating medium? If these lands had been offered for rent on the terms that the tenant should pay the taxes and keep and leave the premises in repair and pay the rent in United States currency, how much would they have rented for each year? Were there not many persons who came to Montgomery County during those years as refugees, who were wanting lands for rent, and did not this circumstance enhance the rental value of lands in said county and neighborhood?

4th cross-int'y. What was the real value of the stock in the Tallassee Manufacturing Company No. 1 on the 22nd day of October, 1873, and was its value then known to B. H. Micou? What position in said company and as what officer did said Micou hold on and prior to the 22nd Oct., 1873?

5th cross-int'y. Who has been in possession and cultivation

337 since 1874 of the plantation in Montgomery County formerly owned by you and sold by the sheriff of said county? Has not Henry C. Semple been in the possession of the same and cultivated it since 1874, and has he not borne all the expenses of cultivating the same, and received all the incomes and profits thereof since 1874?

6th cross-int'y. Did you cultivate said plantation in 1874? Were you indebted to one James Jones, and how much and when did it accrue—before or after the first of January, 1874? Did you not, in 1874, and when in that year or before that time, make an arrangement with said Jones that he should take that plantation and the supplies on it and cultivate it at his expense for that year, and appropriate the cotton made to pay the expenses thereof, and if there was anything left after paying such expenses he should apply the same to the payment of a proper compensation to himself for his services that year and the debt due to him, and the balance to yourself, and leaving the corn and fodder and other

crops to you; or what was the arrangement between you and Jones, and did Jones cultivate said place under said arrangement? Did the cotton made there that year by Jones pay the expenses of the plantation, including compensation to Jones for his services? Was the crop of corn and fodder made there that year large or small, and what became of them? Were they appropriated by you to your use, or were they sold under the execution issued on the decrees rendered in favor of Clara E. Boykin and Lucy B. Micou?

338 7th cross-int'y. Did not Frank S. Boykin tell you of Micou's having transferred to his wife $30,000.00 of stock in the Tallassee Manufacturing Company No. 1, as in payment of that much of his indebtedness to her as her guardian, and also that the stock was worthless, and he and his wife would not take it, and were advised by Mr. Semple as their attorney, under the circumstances, such transfer was void as a payment of so much, and that he had seen Micou about it and Micou had agreed if you and Thomas M. Barnett, who were his sureties on his guardian's bond, were willing, that the transfer and receipt should be cancelled; or what did he say to you about this transaction, and did you not agree that the same should be cancelled; and when did this take place; was it not in the month of October or November, 1873, and before the final settlement of the accounts of Micou as said guardian?

ELMORE & GUNTER,
Solicitors for Francis S. Boykin, Clara E. Boykin, & Lucy B. Micou.

Commission to Geo. F. Moore to take dep. of N. D. Barnett.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To George F. Moore, esq., of the city of Montgomery:

Know ye, that we, having full faith in your prudence and com-
339 petency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Nicholas D. Barnett as witness in behalf of complainant in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein the First National Bank of Montgomery is plaintiff and Benjamin H. Micou and others are defendants, on oath to be by you administered, upon inter'ogatories and cross-inter'ogatories annexed to this commission, to take and certify the deposition of the witness, and return the same to our said circuit court, to be holden on the first Monday in May next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 8th day of January, A. D. 1878.

Issued the 8th day of January, 1878.

[SEAL OF COURT] J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle Dist. of Alabama.

Deposition of N. D. Barnett.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL.

In the circuit court of the United States for middle district of Alabama, in equity.

340 Deposition of Nicholas D. Barnett, witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, plaintiff, and Benjamin H. Micou et al., defendants.

NICHOLAS D. BARNETT, of Montgomery, Alabama, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says as follows, to wit:

To the first inter'ogatory he says: That he knows B. H. Micou, Clara E. Boykin, Frnk S. Boykin, and Lucy B. Micou; knew Thomas M. Barnett in his lifetime; is his son; and Clara E. Boykin and Lucy B. Micou are his grand-daughters.

To the second inter'ogatory he says: That the best of his recollection Clara E. Boykin and Lucy B. Micou received about seven hands and about fourteen negroes from the the estate of their grandfather, T. M. Barnett, sr. Witness' father died in 1857, and his recollection is that said negroes were received shortly after his death by said B. H. Micou; there were about seven hands able to do fair work allotted to said Clara E. Boykin & Lucy B. Micou in said division; that he knew at the time Clara E. Boykin and Lucy B. Micou received them, the negroes they received from their mother's estate; that Benjamin H. Micou received said last named negroes in 1854, altho' witness is not positive; that of said negroes about twenty-three were able to do fair work and
341 witness can't recollect how many children there were in the lot; witness cannot state what the value of the aggregate hire of all the negroes received from the estates of Thomas M. Barnett and Lucy E. Micou by B. H. Micou was for any of said years; witness can't recollect the value of the hire of said negroes nor their ages; don't remember as to the fact that there were many refugee negroes in this section of Alabama during the years 1862, 1863, 1864, 1865, and knows nothing of it personally; negroes hired for a good deal of Confederate money, but he doesn't know what effect the condition of the country had on the value of the hire of negroes during those years; that personally he knows nothing tending to show that negroes could have been hired during those years for their food, clothes, and physicians' bills; and witness cannot recollect or state the value of the hire of negroes during said years in United States currency.

To the third inter'ogatory he says: That he has passed the plantation and knows pretty much the character of the lands, but never examined it, and that said plantation is about five miles southeast of Mt. Meigs; can't say as to the number of acres of said land which were cleared and tillable; can't recollect as to the value of the annual rental of said plantation during the years 1859, 1860, to 1865; does not recollect as to the effect that the condition of the country had upont he value of the rent of said land during said years; can't estimate value of
342 lands inquired about during those years; that he does not know

what permanent improvements B. H. Micou put on said lands; if he put any, witness dosen't know it; that during the years 1862, 1863, 1864 negroes could not have been hired nor land rented for anything but Confederate money, and for 1865, in the commencement of the year, the rent of lands and hire of negroes must have been for Confederate money: witness can't tell as what rents of lands or hires of negroes would have been if hired or rented for good currency.

To the fourth inter'ogatory he says: He has been cultivating the plantation near Pike road, on the Eufaula Railroad, since 1865; had owned said plantation ever since he came of age until 1874; said plantation was cultivated by witness for Maj. Semple during the year 1875, *and* an arrangement with Maj. Semple, trustee for Clara E. Boykin and Lucy B. Micou; that the application of his portion of said income was to pay executions against him in favor of Boykin, Lucy B. Micou, and other parties; that he cultivated the lands mentioned during 1876 and 1877 under the same arrangement with Maj. Semple, and the income derived from such cultivation of said plantation is to be applied to the payment of said executions held by Maj. Semple as trustee for Clara E. Boykin, Lucy B. Micou, and on claims held by Bethea Lanier and others; the terms of the agreement in each case were that witness cul-
tivated said lands and paid the money he made over to Maj. Sem-
343 ple for Clara E. Boykin, Lucy B. Micou, Bethea Lanier, and others.

To the fifth inter'ogatory he says: That he first heard of proceedings for the final settlement of B. H. Micou's guardianship of the estates of his two daughters in the spring of 1874, or sometime in 1874; first heard of it from Maj. Semple; was a surety on the bond of said B. H. Micou as guardian; doesn't recollect what reason was given for making the final settlement of Micou's guardianship of said Lucy B. Micou; at the commencement of said proceedings and before the rendition of said decrees he knows nothing of any provision or promise of protection made to him or any of his family, directly or indirectly; knew nothing about the matter until after the decrees were rendered and Maj. Semple told him about it; Maj. Semple managed it all himself.

To the sixth inter'ogatory he says: Maj. Semple was his professional adviser in 1874, and he doesn't know that he had any occasion for a lawyer in 1873. Had no consultations with his said attorney about Micou's settlement of his guardianships; he was not present at either of said final settlements; can't swear as to whether his attorney was present or not; can't say why he did not attend; he left the matter with his attorney.

To the seventh inter'ogatory he says: He had no arrangement with
any one, but thro' Maj. Semple; that he was to pay a certain
344 amount of money and save part of his property for his children;
this was after the decrees were rendered, but he doesn't know whether it was after the sale or not; this arrangement was made with Maj. Semple; can't recollect the time when such arrangement begun to be talked about, or when it was consum'ated; and it was consum'ated by Maj. Semple's holding the property until he (witness) works the debt out; there such an instrument, but I never read it; has stated all he knows about it.

To the eighth inter'ogatory he says: That B. H. Micou, Thomas M. Barnett, jr., and himself were equally bound (these names were to the paper) for the debts to Alexander Pittman and James F. D. Lanier; witness cannot explain why it was that his property and his brother's was sold to pay said debts; all he can say is that the executions were

levied on his and his brother's property, and it was sold on executions; were against them all; he, B. H. Micou, was on the note; he cannot state whether this was in compliance with any arrangement or variant from it; witness doesn't know as to this.

To the *eighth* inter'ogatory he says: That there was about 1,000 or 1,200 bushels of corn, and as to the fodder he thinks there were about four or five thousand pounds on the plantation owned by him in 1874, but it was not cultivated by him during that year; witness had
345 leased it; can't recollect as to how much was sold by the sheriff; thinks about 1,200 bushels of corn and all the fodder; and he cannot recollect when it was sold, but thinks it was some time in the winter of 1874; does not know why it was not sold earlier; it was all sold by the sheriff, and on the plantation, and the property was present at the place of sale when sold, and after the sheriff's sale it remained on the plantation; he leased the plantation to James Jones during 1874, and he made about 50 odd bales of cotton on it.

To the tenth inter'ogatory he says: That he doesn't know as to the mules, horses, &c., which B. H. Micou had on the several plantations cultivated by him in 1874; nor does he know what portion was sold by the sheriff; can't say as to whether the property was present at the place of sale or not when it was sold; he was not present; thinks it remained on the plantation, but witness says he can't swear to it; doesn't know how much cotton B. H. Micou grew on his plantations during 1874. Witness knew very little about it, and had very little to do with Micou since 1874. B. H. Micou has been overlooking or attending to a plantation which belonged originally to his first wife since January 1st, 1875, known as the "Prairie place" or Micou plantation; has not been any change that witness knows of in Micou's manner of overlook-
346 ing said plantation since January 1st, 1875.

To the eleventh inter'ogatory he says: That he recollects no conversation in reference to his acquiescence in the rendition of said decrees, except with Maj. Semple, nor does he know or recollect of any conversation tending to show that Micou was willing to have large decrees rendered against him, or that said decrees might be used to secure any benefit to B. H. Micou or his family; he knows nothing on this subject, nor does he know of any fact tending to show that improper charges were made against Micou, as guardian of his said daughters, or that decrees were rendered against him for a larger sum than was justly due by him.

To the twelfth inter'ogatory he says: That the mules which Micou had in 1859, as guardian of his daughters, remained on the place owned by his daughters, according to witness' recollection; he doesn't know the number of the mules which remained on the place at the close of the war, but if they have ever been taken from the plantation witness doesn't know it; doesn't know as to the death of any of the negroes before emancipation, and can't testify as to that.

To the thirteenth inter'ogatory he says: That he cannot state anything further of benefit to either of the parties at issue; that
347 he can recollect nothing further of benefit to either of said parties.

Cross-inter'ogatories:

To the first cross inter'ogatory he says: That his rememberance is not very certain as to the exact number of negroes that Clara E. Boykin and Lucy B. Micou received from the estate of their grandfather, nor is his memory exact as to the number who were able to do fair work in 1859, or who were children; and he cannot remember with certainty the same matters about the negroes received from the estate of their mother.

To the second cross-inter'ogatory he says: That there was no United States currency in circulation as a medium of purchase in the country in 1862, 1863, 1864, and the early part of 1865; that he thinks that with the exception perhaps of Central Bank money and some Alabama money, Confererate States notes were the only current circulation in the county of Montgomery and State of Alabama during the latter part of the period named; in the early part of it only Confederate notes were in circulation; witness cannot estimate the hires of negroes and rent of lands at their value in Confederate currency, and he has not estimated them in this; these Treasury notes did have a value in the purchase
348 of property in those years, in the neighborhood of those lands; before the war cotton could have been produced at from 8 to 10 cents, according to witness' recollection, and corn at about an average of 75 cts. a bushel, and in the year 1862 cotton was at about ten cents, according to his recollection, and it increased in price up to the close of the war when it sold for $1.50 a pound, and corn went at from about one dollar a bushel at the commencement of the war to five dollars or more at the close of the war; and after the war, cotton, he thinks, was about twenty cents per pound in United States currency, and corn was, he thinks, about a dollar per bushel, and there was no difference in those years in the purchasing power of Confederate currency when used in purchasing corn and cotton, and when used in purchasing other commodities; witness cannot answer as to the hire of said negroes during the war for gold or silver, and thinks no one would have hired them on those terms; nor can he answer as to how much cotton or corn would have paid the hire of said negroes during those years, if they had been hired at $5,000 per annum.

To the third cross-inter'ogatory he says: That he cannot answer nor tell as to how many bushels of corn or pounds of cotton would have paid the rent of $1,000 per annum during those years; there was no gold or United States Treasury notes in circulation, and witness can't
349 tell as to the value of corn or cotton in gold or U. States currency; thinks corn and cotton could not have been sold for gold or U. S. Treasury notes; lands are rented for a share of the crops to be raised on them, and from one-third to one half of a crop raised is considered fair; doesn't know the amount of tillable land on said plantation; nor can he state how much corn the land would make or how much one-third of it would have been worth during each of said years; he cannot answer positively, but thinks that lands of the description of those inquired about rented at from $2.50 to $3.00 per acre before the war; witness does not recollect that any lands were rented during the war; and after the war a part of the crop was usually taken and other rents also were contracted for which were so various that he can scarcely estimate them, but thinks lands rented at from 2 to 6 dollars per acre; witness cannot answer as to what said lands would have rented for in U. States currency when the rentor paid the taxes and kept the premises in repair, during any of those years; there were a good many refugees in the county, but witness does not recollect the renting of any lands in said neighborhood.

To the fourth cross-inter'ogatory he says: That the value of the stock of the Tallassee Manufacturing Co. No. 1, was nothing on the
350 23rd October, 1873, and he can't say as to whether B. H. Micou knew its value or not, but Micou held the books, and that he had the opportunity of knowing; that Micou was president of said company on and prior to October 22nd, 1873.

To the fifth cross-inter'ogatory he says: That he has cultivated said

plantation for Maj. H. C. Semple since 1874; that Maj. Semple has received all the income and profits of said plantation and borne all the expenses of cultivating the same since 1874.

To the sixth cross-inter'ogatory he says: That he did not cultivate said plantation in 1874; that he owed James Jones 1,500 as back wages, and it accrued two years before January 1st, 1874; that Jones did cultivate said plantation during the year 1874 under the arrangement such as is inquired about in this inter'ogatory; that the cotton made on said plantation by Jones during said year did not quite pay the expenses of the plantation; the crop of corn and fodder was small, and Jones returned it to witness in place of what he had used; and said corn and fodder was sold on execution in favor of Clara E. Boykin and Lucy B. Micou.

To the seventh cross inter'ogatory he says: That Boykin did tell him that Micou had transferred $3,000.00 of said stock to his wife in payment of his indebtedness to her as her guardian; that he, Boykin,
351 would not take said stock, but has no recollection that he said Maj. Semple told him not to do so; that he does not recollect that Boykin said he had seen Micou about it, and that the latter had said if witness and T. M. Barnett, jr., were willing that the transfer should be canceled; he had a conversation with Boykin, but what arrangement they made he does not recollect; and he thinks it was before the final settlements of Micou as guardian took place, but doesn't recollect as to the month when the conversation took place.

N. D. BARNETT.

I, George F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness, N. D. Barnett, was taken down under oath and subscribed by him in my presence on the 18th day of December, 1877, at my office, in the city of Montgomery and in the county of Montgomery and State of Alabama; that I have personal knowledge of said witness; that I am not of counsel in the cause or kin to any of the parties in interest or in any manner interested in the result thereof.

Witness my hand and seal this 3rd day of January, 1878.

[L. S.] GEO. F. MOORE,
Commissioner.

Received & filed the 9th day of Jan., 1878.

I. W. DIMMICK, *Clerk.*

Published by order of the court this 30th day of May, A. D. 1878.

I. W. DIMMICK, *Clerk.*

352 *Inter'ogatories to Bernard Young, William H. Smith, Adam C. Felder, J. C. Nicholson, Dr. A. A. Wilson.*

Circuit court of the United States for the middle district of Alabama.
In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS.

Inter'ogatories to be propounded to Bernard Young, William H. Smith, Adam C. Felder, Dr. J. C. Nicholson, and Dr. A. A. Wilson, who are material witnesses for complainant in this cause, and reside in the county of Montgomery, Alabama, which inter'ogatories, with the answers thereto, will be read in evidence at the trial of this cause.

Inter'ogatory 1st. Where do you reside and how long have been

residing there? What was your occupation prior to 1862, and from that time to 1865, inclusive? What were your opportunities of knowing the value of the hire of negroes and rent of land in this section of Alabama during the years 1862, 1863, 1864, and 1865?

Inter'ogatory 2nd. If you or either of you had the hiring out of negroes and renting out of lands during said years, or any of them, as guardian, executor, administrator, agent, or in any other capacity, set forth the facts and extent and manner of hiring or renting.
353 Were there not during said years, or some of them, and which, persons refugeeing in this part of the State with their negroes? If so, what effect did this have upon the value of the hire of negroes during said years? Upon what terms could negroes have been obtained by way of hire during such years? State any facts and circumstances tending to show that during the years 1862, 1863, 1864, and 1865, or some of them, and which, negroes could have been hired for their food, clothes, physicians' bills and taxes, and that they were so hired.

Inter'ogatory 3rd. What effect did the condition of the country have upon the value of the hire of negroes and the rent of plantations during the years 1862, 1863, 1864, and 1865? State fully and particularly.

Inter'ogatory 4th. For what kind of currency alone could negroes have been hired and plantations rented during the years 1862, 1863, 1864, and 1865? State as to each of said years. What was the market value during each of said years of the hire of avarage field hands—men and women—estimated in good currency? In answering this question, the witness will take into consideration that the hirer paid the taxes and physicians' bills and fed and clothed them. What would have been the aggregate amount of the reasonable value during each of said years, in good currency, of the hire of about fifty-one negroes kept
354 on the same plantation, considering them to be average hands, and of the ages, sizes, and families usually kept on the same plantation in Montgomery County, and the hirer to pay the taxes and physicians' bill and feed and clothe them? Did you know the plantation in said county of Montgomery, and the negroes thereon, which belonged to Clara E. Micou and Lucy B. Micou, daughters of Benjamin H. Micou? If yea, state the annual rental value of said plantation, and the annual value of the hire of said negroes for each year from and including the year 1859 to and including the year 1865, considering that the person renting the lands and hiring the negroes was to pay the taxes on both and physicians' bills, and feed and clothe the negroes, and keep the plantation in repair.

Inter'ogatory 5th. What kinds of crops were grown, and to what extent was cotton raised in Alabama, during each of the years 1862, 1863, 1864 and 1865, and what effect did this have upon the value of the hire of farm hands and rent of plantations?

Inter'ogatory 6th. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of your examination or the matters in question in this cause? If
355 yea, set forth the same fully and at large in your answers.

CLOPTON, HERBERT & CHAMBERS,
Solicitors for Complainants.

Cross-int'ys to Bernard Young, Wm. H. Smith, A. C. Felder, J. C. Nicholson, A. A. Wilson.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
B. H. MICOU ET AL.

Cross-inter'ogatories to Bernard Young, William H. Smith, Adam C. Felder, Dr. J. C. Nicholson, and Dr. A. A. Wilson.

1st cross-int'y. Were you engaged in farming during the years 1862, '3, '4, '5; and, if yea, to what extent?

2nd cross-int'y. According to your best judgment, how much did the value of the hires of negroes diminish each year during the war; that is, at what per centum did the value of the hire decrease? Thus: If a hand was worth $100.00 in 1861, what would his value have been in 1862 & 186 & 1864 & up to May, 1865?

3rd cross-int'y. Were not negroes worth largely more on a place where they had been settled and managed in a body for a long time, and with all the usual appliances and arrangements for farming & raising stock, &c., for a number of years at a time, than they would have been if hired out at public auction each year; and how much more in your opinion would they have been worth under the circum-
356 stances first mentioned than under the last?

Cross-int'y 4th. Did not the cotton in the country after the war command a very high price? How much per bale? Did not meat and lard and all kinds of farm produce command very high prices during the war? Was there not a great deal of cotton in the country on the close of the war? And did not Micou have a great deal? And was not Micou engaged in raising cotton and manufacturing cotton cloth during the war? And did not yarns & cotton cloth sell high during the war, and higher in proportion than other property? How many bales of cotton, under favorable circumstances, would a hand as a slave produce, and how many as a freedman under the same circumstances?

5th cross-int'y. What was the value of average good field hands of average age in gold in 1860 and 1859? What did money readily bring in the way of interest per annum on undoubted security during those years? What was the highest interest it would readily bring per annum during those years on good security?

Cross-int'y 6th. Are not lands in said neighborhood & county often rented for a share of the crop produced, and what share is considered fair pay for the use of land? Is it not from half to a third of the crop raised? Are not laborers to cultivate lands often paid for such cultivation by a share in the crops raised, and what share is con-
357 sidered an equivalent for such labor? Is it worth a third or a half, according to whether the laborer finds himself or is fed?

ELMORE & GUNTER,
Solicitors for Frank S. Boykin, Clara E. Boykin and Lucy B. Micou.

Commission to *Deposition of Bernard Young & others.*

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To George F. Moore, esq., of Montgomery, Ala.:

Know ye that we, having full faith in your prudence and competency,

I, George F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness, Adam C. Felder, was taken down under oath, subscribed by him in my presence on the 22nd day of December, 1877, at Montgomery, in the county of Montgomery, and State of Alabama; that I have personal knowledge of said witness, and that I am not of counsel in the case, or of kin to any of the parties, or in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GEORGE F. MOORE,
Commissioner.

363 *Deposition of Dr. J. C. Nicholson.*

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
BENJAMIN H. MICOU ET AL. }

Depositition and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, plaintiff, and B. H. Micou et al., defendants.

JNO. C. NICHOLSON, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says as follows:

To the first inter'ogatory he says: That he resides about thirteen miles out of Montgomery, and has been residing there since 1856; that his occupation prior to 1862 was a physician and farmer, and from 1862 to 1865, inclusive, that his opportunities for knowing the value of the hire of negroes and rent of land during 1862, 1863, 1864, 1865, were not good.

To the second inter'ogatory he says: That he did not have the hiring out of negroes in any capacity during 1862, 1863, 1864, or 1865; that he was absent in the Army during those years, and he cannot state from personal knowledge as to whether there were refugee negroes in this section of Alabama or not; that this would have had the effect of
364 making labor cheaper; witness had some negroes which belonged to an estate which he kept during 1862, 1863, 1864, & 1865 for which he paid nothing, or next to nothing.

To the third inter'ogatory he says: That the condition of the country lowered the value of the hire of negroes and the rent of plantations during 1862, 1863, 1864, & 1865.

To the fourth inter'ogatory he says: That negroes could only have been hired or plantations rented during 1862, 1863, 1864, and 1865 for Confederate currency or crops in kind (barter); that the value of field-hands (average) in good currency during said years, the hirer paying taxes and physicians' bills, and feeding and clothing them, was very little, if anything; that the value of the hire of fifty-one negroes under the circumstances stated in this inter'ogatory would not have been anything at all unless the hirer had planted cotton in violation of public opinion on that subject, which forbad planting cotton during those years, and had kept the cotton and sold it after the war; and in that case something handsome might have been realized; that he knew the "Prairie" plantation belonging to Lucy B. and Clara E. Micou, but did not know the negroes; that for 1859 & 1860 the said plantation was worth about 2½ dollars per acre, and the value of the hire of the

negroes was about 100 dollars for a field hand; for 1861 probably
365 it was worth one-fourth of that amount, and the value of the hire of the negroes was about one-fourth as much as in 1859 & 1860, and from that time to 1865, inclusive, it would not have been worth anything more than a good living for the planter and the negroes; it would not have been worth anything, except as stated above, about raising cotton and retaining it after the war.

To the fifth inter'ogatory he says: That food crops were principally grown in Alabama during those years; cotton was not much planted, and the effect was to make the value of the hire of negroes and the rent of lands merely nominal, the idea being to keep the negroes together until the result of the war was ascertained.

To the sixth inter'ogatory he says: He cannot state anything further which will be of benefit to either of the parties to the cause.

To the first cross inter'ogatory he says: That he had a plantation which was under the management of overseers in 1862, 1863, 1864, & 1865; that witness was absent from home in the Army, and that he was working about twenty hands on his plantation.

To the second cross-inter'ogatory he says: That there was no great deal of difference in the value of the hire of negroes during those
366 years; that a mere living for the negroes and the man who managed them was all that was expected during any of them, e'cept in special cases, where cotton was retained and sold during the war by running the blockade, or sold after the war.

To the third cross-inter'ogatory he says: That it did not make much difference, in witness' opinion, whether the negroes were kept together as stated in this inter'ogatory or not, as a living was all that could have been realized; the negroes could have been managed somewhat easier when kept together, as stated, than when rented at public auction.

To the fourth cross-inter'ogatory he says: That the cotton in the count'y after the war did command a very high price, from two to three hundred dollars a bale; that meat, lard, &c., did command very high prices during the war in Confederate money; that he doesn't know about the quantity of cotton in the country at the close of the war, but a good deal was burnt up through his section of the country. Nor does he know as to the amount Micou had; that to the best of my knowledge and belief Micou was engaged in raising cotton and manufacturing cotton cloth during the war; that he doesn't know as to the price of yarns and cotton cloth during the war; that a hand or a slave, under favorable circumstances, would have produced about from four to five bales of cotton, and as a freedman under the same circumstances about from two to three.

367 To the fifth cross-inter'ogatory he says: That the value of average field hands in gold in 1859 & 1860 was about 1,200 dollars; that money brought from 8 to 16 % during those years; generally about 12 % per annum; the highest was about sixteen %.

To the sixth cross-inter'ogatory he says: That lands are often rented for a half of the cotton and a third of the corn, or a fourth of anything that is made on the land; laborers are hired for one-half when they feed themselves, & pay half of other expenses, the planter furnishing the lands and mules, and sometimes the negroes gets one-third of the crop raised and 100 pounds of meat; sometimes the planters furnishing everything, including the food of the laborer, who then gets one fourth of everything grown.

JNO. C. NICHOLSON.

I, George F. Moore, the commissioner of said commission named, do hereby certify, that the evidence of the writness, Jno. C. Nicholson, was taken down under oath, and subscribed by him in my presence, on the 22nd day of December, 1877, at Montgomery, in the county of Montgomery and State of Alabama; that I have personal knowledge of said witness; that I am not of counsel in the cause, or of kin to any of the parties, or in any manner interested in the result thereof. Witness my hand and seal.

[L. S.] GEO. F. MOORE,
Commissioner.

368 I, George F. Moore, said commissioner, do further certify, that said witness, John C. Nicholson, claims compensation for his attendance as witness for one day in this cause.

GEO. F. MOORE,
Commissioner.

Deposition of B. W. Young.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL.

Deposition of B. W. Young, witness, sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, plaintiff, and B. H. Micou et al., defendants.

B. W. YOUNG, of Montgomery, Alabama, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

To the first inter'ogatory he says: That he resides in the city of Montgomery, and has been residing there about twenty-one years; that his occupation prior to 1862 was a farmer and marble dealer; from that time up to 1865 was that of a dealer in marble; that his opportunities for knowing the value of the hire of negroes and the rent of lands during the years 1862, 1863, 1864, 1865 were good.

To the second inter'ogatory he says: That he had no lands to
369 rent, but he hired some negroes as agent during 1863; there were about five or six men whom he hired out, and they were hired for $12½ to 15 dollars per month; this was in 1863; there were persons refugeeing here in this section of Alabama with their negroes, and those just mentioned were refugee negroes, and this had the effect of depreciating the value of the hire of negroes during those years; that when negroes were hired in families, as an average lot of them, that their food, clothes & physicians' bills and taxes would have been ample pay for them. That he doesn't know personally of any having been hired out on these terms, for that he (witness) would not have hired them on these terms for his own use.

To the third inter'ogatory he says: That the condition of the country had the effect to depreciate very much the value of the hire of negroes and the rent of plantations during the years 1862, 1863, 1864, 1865.

To the fourth inter'ogatory he says: That negroes could have been hired and lands rented only for Confederate money during 1862, 1863, 1864, 1865; that in 1862 there may have been some bank bills in circu-

lation, but he doubts whether negroes could have been hired for that sort of currency; that paying the physicians' bills, feeding them, clothing them, and paying taxes would have been ample pay for the hire of average field hands with their families; that feeding, paying clothing the taxes and physicians' bills would have been ample pay for the hire of
370 fifty-one hands under the circumstances stated in this inter'ogatory; that he did not know the plantation of Lucy B. and Clara E. Micou, nor the annual value of the rents of that plantation or the hire of said negroes.

To the fifth interrogatory he says: That cotton was not much planted during 1862, 1863, 1864, 1865, and the crops of it were small, and this had the effect of depreciating the value of the hire of negroes and the rent of plantations.

To the sixth interrogatory he says: That he knows nothing further in regard to the matter inquired about.

To the first cross-interrogatory he says: That he was not engaged in farming in either of those years.

To the second cross-interrogatory he says: That he thinks that the value of the hire of negroes—the intrinsic value—decreased at the rate of about 25 per centum, until the close of the war, for each of the years inquired about.

To the third cross-interrogatory he says: That he is not able to answer this question; he thinks that if they were kept together they would have been worth a trifle more, but not enough to enable him to express any opinion about it.

371 To the fourth cross-interrogatory he says: That the cotton in the country after the war did command a very high price; as high as fifty cents a pound, so that a bale weighing 500 lbs. would bring 250 dollars; that meat, lard, and all kinds of farm produce did command very high prices during the war (in Confederate money); that there was a great deal of cotton in the country at the close of the war; but he does not know as to how much Micou had; that, to the best of his knowledge, Micou was engaged in making cotton cloth and raising cotton during the war; that yarns and cotton cloth sold high during the war, and higher in proportion than other property; that a hand, as a slave, under favorable circumstances, he thinks, would make five bales of cotton; a freedman, under the same circumstances, about three.

To the fifth cross interrogatory he says: That he thinks that the value of average field hands, men and women, in gold, in 1859 & 1860 was about 950 dollars; that he thinks money could have been had readily on undoubted security during those years at 8%; the banks were lending it at that rate; and he doesn't know as to the highest value of money during those years, except as he has just stated.

To the sixth cross-interrogatory he says: That he cannot answer as to the custom of renting lands in the neighborhood inquired about. Much depends on the quality of the lands, &c.; that laborers are
372 often hired for a part of the crop raised, and from one-third to a half of such crop is considered a fair equivalent of the labor according as the laborer finds himself or is fed.

B. W. YOUNG.

I, George F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness, B. W. Young, was taken down under oath and subscribed by him in my presence, on the 22nd day of December, 1877, at Montgomery, in the county of Mont-

gomery and State of Alabama; that I have personal knowledge of said witness; that I am not of counsel in the case, or of kin to any of the parties, or in any manner interested in the result thereof. Witness my hand and seal.

[L. S.] GEORGE F. MOORE,
Commissioner.

Published by order of the court this 30th day of May, A. D. 1878.
J. W. DIMMICK, *Clerk.*

Interrogatories to Mason Harwell, John W. Hughes, & Jason Jones.

Circuit court of the United States for the middle district of Alabama.
In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
BENJAMIN H. MICOU ET ALS. }

Interrogatories to be propounded to Mason Harwell, John W. Hughes, and Jason Jones, who are material witnesses for complainant in
373 this cause, and who reside in the county of Montgomery, Alabama, which interrogatories, with the answers thereto, will be read in evidence on the trial of this cause.

Interrogatory 1st. Where do you reside, and how long have been residing there? What was your occupation prior to 1862, and from that time to 1865, inclusive? What were your opportunities of knowing the value of the hire of negroes and rent of lands in this section of Alabama during the years 1862, 1863, 1864, and 1865?

Inter'ogatory 2nd. If you, or either of you, had the hiring out of negroes and renting out of lands during said years, or any of them, as guardian, administrator, executor, agent, or in any other capacity, set forth the facts andextent and manner of hiring or renting. Were there not during said years, or some of them, and which, persons refugeeing in this section of the State with their negroes? If so, what effect did this have upon the value of the hire of negroes during such years? Upon what terms could negroes have been obtained by way of hire during such years? State any facts and circumstances tending to show that during the years 1862, 1863, 1864, and 1865, or some of them, and which, negroes could have been hired for their food, clothes, physicians' bills, and taxes, and that they were so hired?

Inter'ogatory 3rd. What effect did the condition of the country
374 have upon the value of the hire of negroes and of the rent of plantations during the years 1862, 1863, 1864, and 1865? State fully and particularly.

Inter'ogatory 4th. For what kind of currency alone could negroes have been hired and plantations during the years 1862, 1863, 1864, and 1865? State fully and particularly.

Inter'ogatory 4th. For what kind of currency alone could negroes have been hired and plantations rented during the years 1862, 1863, 1864, and 1865? State as to each of said years. What was the market value during each of said years of the hire of average field hands—men and women—estimated in good currency? In answering this question the witnesses will take into consideration that the hirer paid the taxes and physicians' bill and fed and clothed them. What would have been the aggregate amount of the reasonable value during each of said years,

in good currency, of the hire of about fifty-one negroes, kept on the same plantation, considering them to be average hands, and of the ages, sizes, and families usually kept on the same plantation in Montgomery County, and the hirer to pay the taxes and physicians' bills and feed and clothe them? Did you know the plantation in said county of Montgomery and the negroes thereon which belonged to Clara E. Micou and Lucy B. Micou, daughters of Benjamin H. Micou? If yea, state the annual rental value of said plantation and the annual value of the hire of said negroes for each year, in good currency, from and
375 including the year 1859 to and including the year 1865, considering that the person who rented the land and hired the negroes was to pay the taxes on both and physicans' bills, feed and clothe the negroes, and keep the plantations in repair.

Inter'ogatory 5th. What kinds of crops were grown, and to what extent was cotton raised in Alabama during each of the years 1862, 1863, 1864, and 1865, and what effect did this have upon the value of the hire of farm hands and rent of plantations?

Inter'ogatory 6th. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

CLOPTON, HERBERT & CHAMBERS,
Solicitors for Complainant.

Cross inter'ogatories to Mason Harwell, John W. Hughes, & Jason G. Jones.

FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJ. H. MICOU ET ALS.

Cross inter'ogatories to Mason Harwell, John W. Hughes, and Jason G. Jones.

Cross 1st. Were you engaged in farming during the years 1862, '3, '4, '5; and, if yea, to what extent?

Cross 2nd. According to your best judgment, how much did
376 the value of the hires of negroes diminish each year during the war—that is, at what per centum did their value decrease; thus, if a hand was worth $100 in 1861, what would his value have been in 1862 & 1863 & 1864, and up to May, 1865?

Cross 3rd. Were not negroes worth largely more on a place when they had been settled and managed in a body for a long time and with all the usual appliances & arrangements for farming & raising stock & for a number of years at a time than they would have been if hired out at public auction each year, and how much more, in your opinion, would they have been worth under the circumstances first mentioned than under the last?

Cross 4th. Did not the cotton in the country after the war command a very high price; how much per bale? Did not meat and lard and all kinds of farm produce command very high prices during the war? Was there not a great deal of cotton in the country on the close of the war, and did not Micou have a great deal, and was not Micou engaged in raising cotton and manufacturing cotton cloth during the war, and did not yarns and cotton cloth sell high during the war, and higher

in proportion than other property? How many bales of cotton, under favorable circumstances, would a hand, as a slave, produce; and how many, as a freedman, under the same circumstances?

377 Cross 5th. What was the value of average good field hands, of average age, in gold, in 1860 & 1859? What did money readily bring in the way of interest per annum on undoubted security during those years? What was the highest interest it would readily bring per annum during those years on good security.

Cross 6th. Are not lands in said neighborhood often rented for a share of the crops produced, and what share is considered fair pay for the use of land? Is it not from half to a third of the crop raised? Are not laborers to cultivate lands often paid for such cultivation by a share in the crops raised, and what share is considered an equivalent for such labor? Is it not a third or a half, according to whether the laborer feeds himself or is fed.

ELMORE & GUNTER,
Sol's for Frank S. & Clara E. Boykin & Lucy B. Micou.

Commission to deposition of Mason, Harwell, and others.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To George F. Moore, esq., of Montgomery, Alabama:

Know ye that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you at such time and place as you may appoint to call before

378 you and examine Mason Harwell, John W. Hughes, and Jason Jones, as witnesses in behalf of complainant in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein the First National Bank of Montgomery is plaintiff, and Benj. H. Micou et als. are defendants, an oath to be by you administered upon inter'ogatories and cross-inter'ogatories annexed to this commission, to take and certify the deposition of the witnesses, and return the same to our said circuit court, to be holden on the first Monday in November next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of October, A. D. one thousand eight hundred and seventy-seven.

Issued the 30th day of October, 1877.

[SEAL OF COURT.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Ala.

Deposition of Mason Harwell.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL. } In equity.

Deposition of Mason Harwell, witness sworn and examined under and by virtue of a commission issued out of the circuit court of the

379 United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, plaintiff, and Benjamin H. Micou et al., defendants.

MASON HARWELL, of Montgomery, Alabama, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says as follows:

To the first inter'ogatory he says: That he resides near Montgomery, Alabama, and that he has resided near Montgomery for about forty years; that he was engaged in business as an auctioneer prior to 1862 and up to 1865 inclusive; that he hired out a great many negroes privately during the years 1862, 1863, 1864, & 1865; that his opportunities for knowing the value of the hire of negroes during those years were good, but that he has no recollection of the value of the rent during those years.

To the second inter'ogatory he says: That during the years 1862, 1863, 1864, and 1865 he, as agent, had the hiring out of quite a number of negroes; that he hired out one negroe man during the year 1862, at public auction, for $300 per annum, and his recollection is that they were hired out during that year at from $250 to $300 per year; that during 1863 they were hired out at from $300 to $350 a year; that in
1864 they were hired out at from four to five hundred dollars a
380 year; that in 1865 he hired out six or seven good plough boys for five thousand dollars; that these estimates are all in Confederate money; that there were a great many refugee negroes in the county during those years, and that in consequence of this it was hard to hire out negroes for anything; and that the value of the hire of negroes was not equal in proportion to the value of other things; that he does not recollect as to whether negroes could have been hired out during the year' 1862, 1863, 1864, 1865 for their food, clothing, and physicians' bills.

To the third inter'ogatory he says: That the condition of the country brought a good many negroes to the county, and that towards the close of the war they could not be hired to much advantage; but that he has no recollection of having had any plantation in charge, and cannot say as to the value of the rents.

To the fourth inter'ogatory he says: In Confederate currency only; that nothing but Confederate money was paid for the hire of negroes during any of said years; that they couldn't have been hired for good currency at all; that he has no recollection of negroes being hired for physicians' bills, taxes, &c., but this was a matter usually of special contract—they were usually clothed by the hirer; that he did not know of any negroes being hired for good money, and doesn't think they could have been hired for good money; didn't know the plantation & negroes
belonging to Clara & Lucy Micou.

381 To the 5th inter'ogatory he says: His recollection is that there was a good deal of cotton raised during those years, and this caused negroes to be hired out when otherwise they would not have been.

To the 6th int'y he says: That the information as to hiring out of negroes is founded on his recollection and on his auctioneer's book; on that book he only finds the record of the public hiring of one negro during those years; his record of private hiring is lost or mislaid.

To the 1st cross-int'g'y he says: He was not.

To the 2nd cross-int'y he says: That the value of the hire of negroes increased in Confederate money from 1862 to 1865, but he could not state what the decrease would be in Confederate money.

To the 3rd cross int'y he says: They were worth something more, but he has no way of arriving at a correct conclusion as to how much more.

To the 4th cross-int'g'y he says: That commanded a high price after the war—from 200 to 250 per bale; meat, lard, &c., were

pretty high in Confederate money during the war. In 1862 corn was worth $1.50 per bushel; it got up to 5 per bushel before the close of the war. Doesn't know about what cotton or corn Micou had. Understood that Micou was engaged in manufacturing and farming, but had
382 no personal knowledge on the subject. In a good year a hand as a slave would make about four bales; will make as much as a freedman as a slave; it depends entirely on their management.

To the 5th X int'g'y he says: That the value of a No. 1 man in gold in 1859 was about $1,500 or $1,600; of a woman from $1,200 to $1,400; his recollection is that good paper could be discounted at from 1 to 1½ pr. ct. per month.

To the 6th X int'g'y he says: That they are, and that ¼ of the cotton and ⅓ of the corn is considered fair pay; no from ¼ cotton to ⅓ corn; that now freedmen get ⅓ of crop if they feed themselves; where they get rations they get ¼ of the crop.

MASON HARWELL.

I, Geo. F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness, Mason Harwell, was taken down under oath by me at Montgomery, in the county of Montgomery, and State of Alabama, on the 22nd of Jan'y, 1878; that he subscribed the same in my presence; that said evidence was
383 read over to him by me prior to such signing; that I have knowledge of the personal identity of said witness; that I am not of counsel in the cause, nor of kin to any of the parties, nor in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GEO. F. MOORE,
Commissioner.

Deposition of Jason G. Jones.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET AL.

Deposition of Jason G. Jones, witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, plaintiff, and B. H. Micou et al., defendants.

JASON G. JONES, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says as follows:

384 To the first interrogatory he says: That he resides about nine miles southeast of Montgomery, and that he has resided in that neighborbood since 1833; that his occupation prior to 1862 and up to 1865, inclusive, was farming; that he has been employed in farming all his life; that his opportunities for knowing the value of the hire of negroes and rent of lands during 1862, 1863, 1864, & 1865 were good.

To the second interrogatory he says: That he had, as executor, the hiring out of negroes during 1862, 1867, 1864, & 1865, and that there were some thirty or forty of them in all; that there were persons refugeeing in this section of the State during the war—1862, 1863, 1864, 1865—with their negroes; witness had relatives from N. Carolina refugeeing here with their negroes; that this lowered the price of the hire negroes;

that witness got several negroes for taking care of them; he did not care particularly for them, but was willing to take them on those terms; that about 1863, negroes were hired out on the terms of paying physicians' bills, feeding them, clothing them, and paying their taxes;
385 witness got some on these terms himself.

To the third interrogatory he says: That during 1862 the negroes he hired out brought about $150 *dollars* a year; that during 1863 refugee negroes could have been hired for their food and clothes, the hirer paying the taxes and physicians' bills; and that the price increased towards the close of the war, when negroes hired in Confederate money for as much as five hundred dollars a year.

To the fourth interrogatory he says: That there was no currency during those years, except Confederate currency; that he does not recollect the value of Confederate money as compared with good currency, and could not answer as to the value of average field hands during those years except by reducing the value of Confederate money to that of good money; that he cannot answer as to the value of the hire of fifty-one negroes under the circumstances inquired about in this interrogatory, and during the years inquired about; that he knows the plantation belonging to Clara E. Boykin & Lucy B. Micou, but he did
386 not know the negroes; that he thinks said plantation would have rented for an average of 2½ dollars per acre during 1859, 1860, but he cannot estimate its value in good currency during the war, nor the value of the hire of the negroes; but that in 1859 & 1860 he thinks they would have averaged about $100 a year for the workers.

To the fifth interrogatory, he says: That there was very little cotton planted, but that the crops were provision crops, and that this depressed the value of the hire of negroes and rent of lands, according to his recollection.

To the sixth interrogatory, he says: That he knows nothing further of benefit to the parties at issue in this cause.

To the first cross-interrogatory, he says: That he was engaged in farming in 1862, 1863, 1864, 1865; was cultivating some 600 acres of land, and had the management of another place which contained some three or four hundred acres.

To the second cross-interrogatory, he says: That the value of hires of negroes diminished according as the value of Confederate
387 money decreased during 1862, 1863, 1864, and up to May 1865.

To the third cross-interrogatory, he says: That negroes would have been worth something more when kept together, under the circumstances inquired about, and would have been worth probably ten or fifteen per cent. more when kept together, as stated in this interrogatory, than when hired out at public auction.

To the fourth cross-interrogatory, he says: That the cotton in the country after the war did command a very high price, as much as 200 dollars a bale, and even higher; that meat, land, &c., did command very high prices in Confederate money during the war, and he supposes there was a good deal of cotton in the country on the close of the war; that he doesn't know whether Micou was engaged in raising cotton and manufacturing cotton cloth during the war or not; that he thinks yarns and cotton cloth did sell high during the war, and higher in proportion than other property; that a hand as a slave under favorable circumstances would have made about five bales of cotton, and as a
388 freedman will make about three bales.

To the fifth cross-interrogatory, he says: That in 1859 & 1860 the value of average field hands in gold was about 1,200 dollars; that

men who were in the money-lending business let out money at from 12½ to 16 per cent. during those years; that he doesn't know of any being lent for a higher rate than 16 % during those years.

To the sixth X interrogatory, he says: That he rents lands for a third of the cotton and a fourth of the corn crop raised; that laborers are often hired for a share of crop raised, and that a third of the corn and half of the cotton is considered a fair equivalent for such labor if the laborer finds himself, and one-fourth of all the crop raised if he is fed; the contracts, however, are various on this subject.

JASON G. JONES.

I, George F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness Jason G. Jones was taken down under oath and subscribed by him in my pres-
389 ence on the 22nd day of December, 1877, at Montgomery, in the county of Montgomery, and State of Alabama; that I have personal knowledge of said witness; that I am not of counsel in the case or of kin to any of the parties or in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GEO. F. MOORE,
Commissioner.

Deposition of John W. Hughes.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs. }
BENJAMIN H. MICOU ET AL. }

Deposition of John W. Hughes, witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, plaintiff, and Benjamin H. Micou et al., defendants.

JOHN W. HUGHES, of Montgomery, Alabama, being duly sworn to speak the truth, doth depose and say as follows:

390 To the first interrogatory, he says: Near Montgomery, Alabama, and he has been residing there about thirty-one years; that his occupation prior to 1862 was a trader in different ; was a deputy sheriff of Montgomery County, and was engaged in trading up to 1865; that his opportunities for knowing the value of the hire of negroes during the years 1862, 1863, 1864, 1865 were good; that as to the value of the rent of lands his opportunities were not good, and he has no recollection on that subject.

To the 2nd int'g'y he says: That he hired out negroes of his own during those years and knows from his business intercourse the value of their hire. There were a good many refugees with their negroes in this section of the country during those years, and to some extent this depreciated the value of the hire of negroes during those years; his recollection is that the value of their hire ranged from 250 to 500 dollars in Confederate money; doesn't know as to latter part of question.

To the 3d interrogatory he says: That the condition of the coun-
391 try operated against the hiring of negroes and they did not hire in proportion to their value compared with the value of other things; he doesn't know as to the rent of lands.

To the 4th interrogatory he says: That negroes could have been hired for Confederate money only, and that was the only currency of the country during those years; he can't say as to the value of the hire in good currency from the fact that they could not have been hired out for that sort of money; that as to the terms of hiring for payment of doctors' bills, taxes, these were matters left to negotiations between the parties; he can't state as to what the hire would have been in good currency nor does he know the plantation inquired about.

To the 5th interrogatory he says: That cotton & corn were the crops grown during those years, but cotton to a more limited extent than usual, and this may have diminished the value of negro hire, but he can't state as to the rent of lands.

To the 6th interrogatory he says: That he has already answered
392 fully everything he knows in relation to the matters enquired of.

1st X. To the first cross-interrogatory he says: He was not.

To the 2nd X int'y he says: That as he doesn't recollect the depreciation in Confederate money from 1860 to 1865, he is not prepared to answer this question.

To the 3d cross-int'g'y he says: That he is inclined to think they would have been worth something more, but he cannot say how much.

To the 4th X int'g'y he says: That the cotton in the country after the war commanded a very high price, from 200 to 250 dollars per bale; that meat, lard, &c., did command very high prices during the war (in Confederate money); that there was a large amount of cotton in the country at the close of the war, but he doesn't know as to how much Micou had; his understanding was that Micou was engaged in manufacturing and farming during the war; that cotton goods were higher than anything else perhaps in proportion to value during the war; that a hand as a slave would produce about four bales of cotton; as a freedman, about three.

393 To the 5th X int'g'y he says: That the average value for No. 1 men was about $1,600 or $1,700; for women about $1,400 or $1,500; money brought from 1 to 1½ % per month; the highest rate during 1859 was about 2 % per month.

To the 6th X int'g'y he says: That lands are rented, &c., for a share of the crops; that ¼ of the cotton and ⅓ of the corn raised is considered fair pay; doesn't know of any such arrangement as paying ½ of the crop raised; that laborers are hired, &c., and that from ⅓ to ¼ is called a fair price, according as the laborer feeds himself or is fed.

J. W. HUGHES.

I, Geo. F. Moore, the commissioner in said commission named, do hereby certify that the evidence of the witness, John W. Hughes, was taken down under oath by me at Montgomery, in said county and State of Alabama, on the 22 of Jan'y, 1878; that he subscribed the same in my presence; that it was read over to him prior to such signing; that I have personal knowledge of the identity of the witness; that I am not of counsel in the cause nor of kin to any of the parties nor in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GEO. F. MOORE.
Commissioner.

Received and filed this 8th day of May, A. D. 1878.
J. W. DIMMICK, *Clerk.*

Published by order of the court this 30th day of May, A. D. 1878.
J. W. DIMMICK, *Clerk.*

394 *Interrogatories to H. C. Semple.*

In the circuit court of the United States, at Montgomery.

THE FIRST NATIONAL BANK OF MONTGOMERY }
vs.
B. H. MICOU ET ALS. }

Interrogatories propounded to H. C. Semple, a material witness for respondents, residing at Montgomery, Alabama, whose deposition, when taken, will be read on the trial of said cause:

395 Int. 1. Where do you live, what is your business, how long have you been engaged therein, and what is your age?

Int. 2. Do you know the parties to this suit?

Int. 3d. Do you know who represented, as adviser and attorney, Clara E. Boykin and her husband, and Lucy B. Micou, prior to and since the settlement of the accounts of Benjamin H. Micou as guardian of the said Clara E. and Lucy B. Micou, and if yea, who was it that was their counsel and attorney?

Int. 4. If you know how E. J. Fitzpatrick came to represent said Clara E. and Lucy B. on the settlement of their guardian's accounts before the probate court of Tallapoosa County, state all you know about the same. Who employed him, and for whom was he employed, and at whose instance or request was he employed? And if you say you employed him for said Clara and Lucy, state for what purpose he was employed, and why you did not attend to the business yourself.

Int. 5. State all that you know about the transfer of stock in the
396 Tallassee Factory Number 1 by B. H. Micou to his daughter Clara E. Boykin in part of his indebtedness to her as her guardian, and when and by whom you were consulted in reference thereto, and what opinion and advice did you give thereon. And when said transfer was made what was then the actual and substantial condition of said factory, and the value of said stock. And had said Micou then settled his accounts as guardian? And under what circumstances was the said Clara E. made acquainted with said transfer and a receipt taken from her? State anything you know showing or tending to show that the transfer of said stock to said Clara E. was illegal and not binding on her, or a fraud upon her, and that the disallowance of the same to the said Micou on the settlement of his accounts, or omission of the claim thereto by said Micou, was right and proper, and legal, and without fraud or collusion on the part of the parties to said settlement.

Int. 6. State all facts you know concerning the matter of the settlement of B. H. Micou's accounts as guardian for Clara E. Boykin and Lucy B. Micou before or at said settlement, or subsequent thereto,
397 showing or tending to show whether said settlements and the decrees thereon were, in any wise, or as to any item embraced in the accounts passed and allowed on such settlements, fraudulent or collusive, between the parties. State what the said Clara and Lucy did, or Francis S. Boykin, in the matter of said settlements, and what their attorneys did, and whether or not was there any preconcert, or collusion, or agreement, or understanding between the said Clara E. and Lucy, or Francis S. Boykin, or either of them, or of their attorneys, with the said B. H. Micou, or his attorneys, or other person, at or prior to said settlements, for the purpose of having any illegal or improper item of debit or credit inserted or struck from said B. H. Micou's accounts, or allowed

or disallowed by the court of probate before which the settlement was to be made.

Int. 7. State all you know about the matter of the settlement of the accounts of said Micou as guardian as aforesaid, showing or tending to show the bona fides or fraudulent character of the decrees rendered on such settlements.

398 Int. 8. Whether or not did you ask David T. Blakey, at any time, to procure for you executions upon said decrees, and how came you to do so, and in what character and capacity did said Blakey act in doing what you requested?

Int. 9. Give a succinct account of the agreement or arrangement made by said Clara E. Boykin and Lucy B. Micou and Francis S. Boykin or either of them subsequent to the rendition of said decrees in the probate court of Tallapoosa County concerning the proceeds of collections arising from said decrees. State how the same came to be made, under whose advice the same was made, and the entire history of the transaction, and what part, if any, the said B. H. Micou had in the same, or the said Barnetts or either of them.

Int. 10. What, in your opinion, was the comparative value of the hires of slaves during each year of the war with their values before the war; that is, at what per centum on the values for 1859 & 1860 was there an increase or loss for each of the years 1861, 1862, '3, '4, and '5?

Int 11. Whether or not would cotton made during the war and
399 stored away have kept until after the war, and what was the comparative value of cotton in 1859 & '60, and in 1865, after the war, and whether or not did prudent persons during the war store away cotton and keep the same for sale after the war; what amount of cotton did B. H. Micou thus have on hand at the close of the war; what is the average weight of a bale of cotton and the average production per hand during slavery in this country?

Int. 12. State any and all other facts within your knowledge throwing light upon the transactions litigated in this cause and upon the bona fides or fraudulent character of the decrees in the probate court of Tallapoosa County rendered upon the settlement of the accounts of said B. H. Micou as guardian as aforesaid.

Int 13. State how the judgments in favor of Lanier and Pittman came to be paid and satisfied by sales of property of said Micou or said Barnetts; by whose advice and under what arrangement this was done. State the whole transaction fully.

400 Int. 14th. State how and under what circumstances the instrument, a copy of which is attached to your answer in this cause, came to be executed by said Francis S. & Clara E. Boykin and Lucy B. Micou, and what said Benjamin H. Micou or said Barnetts or either of them had to do in the execution of the same or procuring the same to be made.

Int. 15th. State what other, if any, agreement, contract, promise, assurance or inducement of any kind was made or offered to said Micou or Barnetts, or either of them, in relation to said decrees or said property or said executions or sales of property under them, or anything whatever was made by any person than the one, a copy of which is attached to your answer to said bill.

Int. 16. State any other fact known to you which will be material in this cause.

ELMORE AND GUNTER,
For Frank S. and Clara E. Boykin and Henry C. Semple.

401 Complainant objects to so much of the 5th interrogatory in chief as is in these words: "What opinion and advice did you give them?" for the reason that it calls for illegal and irrelevant evidence.

Complainant also objects to so much of the 6th interrogatory in chief as calls for facts subsequent to the settlement of B. H. Micou's accounts as guardian, for the reason that it calls for illegal and irrelevant evidence.

Subject to the foregoing objections, complainant propounds the following cross-interrogatories to the witness:

Cross-interrogatories to H. C. Semple.

Cross-interrogatory 1. With whom, whether the said Clara E. Boykin, Frank S. Boykin or Lucy B. Micou, did you have the first conversation on the subject of B. H. Micou's liability as their guardian? If you say with said Frank S. Boykin, then state if this was not about the time of the meeting of the creditors and stockholders of the Tallassee Manufacturing Company No. 1. Was not that meeting in the early part of
402 January, 1874? Were you not retained as attorney in that first conversation? Was not said meeting of creditors and stockholders called before it was generally known that said Tallassee Manufacturing Company was insolvent, and was not that meeting called about the last of December, 1873?

Cross-interrogatory 2d. Do you personally know anything about the transfer of stock in the said Tallassee Manufacturing Company by said B. H. Micou to said Clara E. Boykin? If you state anything in relation to said transfer of stock, then state what parts of your statements are made on your own knowledge, and what parts on information received from others. If you answer anything as to the substantial and actual condition of said factory and the value of said stock at the time of its said transfer, then state if you had any knowledge of the condition of said factory and the value of said stock in October, 1873, and, if so, how and when you obtained that knowledge? Was not said manufacturing company generally regarded as solvent and its stock as of value during the months of October and November, 1873?

403 Cross-interrogatory 3d. If you answer that there was no preconcert, collusion, agreement or understanding between said Clara E. Boykin, Frank S. Boykin, or Lucy B. Micou and said B. H. Micou, do you mean to say there was none or only none so far as you know? Did you have any interviews or conversations whatever with said B. H. Micou on said matters before said decrees were rendered against him? and did you hear all that ever passed between said persons in regard to said matters? Was there any circumstance or anything said or done by said persons, or any of them, which was calculated to impress you with the belief or suspicion that it was their purpose or intent or desire to obtain early decrees against said B. H. Micou for the purpose of defeating or hindering other creditors of said B. H. Micou or Barnett, Micou & Co.? What were the reasons for such haste in obtaining said decrees?

Cross-interrogatory 4th. Were you present at the settlement of the accounts of said B. H. Micou, and do you know anything in rela-
404 tion to said settlements, except what you have heard from others? Did you have any particular information or knowledge of the state of said accounts before said decrees were rendered? If yea, from whom, and when did you procure it?

Cross-interrogatory 5th. What relationship exists between said B. H. Micou and David T. Blakey? and was not said Blakey the attorney of said B. H. Micou in making said settlements as said guardian? In whose handwriting is the answer of said B. H. Micou to the bill filed in this cause? When and from whom did you first ascertain that said B. H. Micou had filed his accounts for settlement as said guardian? How and where did you ascertain the day set for said settlement? Was not his settlement as guardian of said Clara E. Boykin made first, and afterwards his settlement as guardian of said Lucy B. Micou? Was the said Lucy B. Micou or B. H. Micou represented by an attorney at the time of and on his settlement as her guardian? If yea, by what attorney was each of them represented? As an application was then pend-
405 ing to relieve said Lucy B. Micou from the disabilities of nonage, why was said settlement made before said application was acted upon by the court?

Cross-interrogatory 6th. Were you not engaged in military service during the late war, and absent from home nearly all the time? What were your opportunities for knowing the values of the hires of slaves during that time? Did not the legislature of Alabama enact during that time laws taxing cotton grown in the State to such an extent as to prohibit its cultivation except to a limited quantity? Did not these laws and other circumstances incidental to or growing out of the war seriously affect the value of the hires of slaves? Were not many slaves brought from other parts of the Southern States to Alabama by refugees? Could slaves have been hired during the war for any other kind of currency than Confederate currency? Could they have been hired at all for what is now called good currency? If so, for what kind, and for how much? Did not the banks suspend specie payments and pay out only Confederate currency? Would they pay depositors in any other currency?

406 Cross-interrogatory 7th. Did not said B. H. Micou, Thomas M. Barnett, and Nicholas D. Barnett compose the firm of Barnett, Micou & Co.? Was not said firm indebted in a very large amount, in the fall of 1873, and was it not known or understood in December, 1873, and January, 1874, that they were insolvent?

Cross-interrogatory 8th. In what year and during what month was the real estate of said B. H. Micou and said Barnetts sold under executions issued on said decrees? In what year and during what month was their personal property sold; and if at different times, what personal property was sold each time, and how much each time? Who purchased said personal property at said sales? If any was purchased by any other persons than yourself, state by whom and for how much? How much money was paid by such purchasers, and in what way, and to what purpose was it applied? If in payment of any claim, demand, or debt, why was it so applied?

Cross-interrogatory 9th. In your answer to the bill in this case,
407 you say that Mrs. Storrs was in possession of the plantation known as the River plantation of Thomas M. Barnett. Please state by what agreement, arrangement, or understanding did Mrs. Storrs continue in the possession of said plantation and the stock and other property thereon after the same were sold under said executions? When was such agreement, arrangement, or understanding first spoken of? What rent did Mrs. Storrs pay, and to whom? Is Mrs. Storrs living or dead? If dead, who has been in the possession and use of said plantation since her death? What relation was Mrs. Storrs to Thomas M. Barnett?

Cross-interrogatory 10th. In what month was the arrangement made between Nicholas Barnett and James Jones for the cultivation, in 1874, of the plantation of said Nicholas Barnett? State particularly the arrangement by which said plantation has been cultivated since 1874. What personal attention has said Nicholas Barnett given to the cultivation and business of said plantation during that time? Who has received the income from said plantation since 1874? How much
408 was the income each year? How much of it did said Nicholas Barnett receive or was applied for his use and benefit, or that of his family, and in what way? If you say you received the income, then state how such income, over what was necessary to pay the expenses thereof, was and has been used and applied. If in payment of any particular claims or demands or debts, what claims, demands, or debts?

Cross-interrogatory 11th. In your answer to the bill, you say you executed mortgages on real estate sold as T. M. Barnett's and Nicholas Barnett's, to secure a loan from the Life Association of America and advances from S. C. Marks. Please state how much money you received on account of said mortgages, and at what time. What use or application was made of said money? If paid on or applied to any particular claims or demands or debts, what claims, demands, or debts?

Cross-interrogatory 12th. In your answer to the bill, you speak of certain interviews between you and Col. Troy and the Barnetts. At what time did said interviews first commence, and during what
409 period of time did they continue? State as nearly as you can recollect. Whom was Col. Troy representing in said interviews, and who represented Nicholas Barnett? Was the matter of the liability of said Barnetts as sureties of said B. H. Micou on his bond as said guardian spoken of in said interviews, or any of them? What relationship exists between said Barnetts and said Clara E. Boykin and Lucy B. Micou?

Cross-interrogatory 13th. By whom and at what time was it first mentioned or suggested to you or in your hearing that some provision, in some way, ought to be made for the families of the said Barnetts and B. H. Micou, or of either of them, or for the said Barnetts and said Micou, or either of them? At what time and to whom did you first mention or suggest that some such provision ought or could be made, or that you would advise such provision?

Cross-interrogatory 14th. At what time and between whom was the matter first mentioned or alluded to which resulted in the execution of the assignment of said decrees to you, a copy of which is annexed
410 to your answer to the bill? This interrogatory you will answer not merely in reference to said assignment itself or the particular details thereof, but also in reference to any preliminary or previous suggestion or allusion or conversation in relation to said subject-matter. What has been done by you in carrying out the trusts of said assignment? Who wrote or drafted the original assignment of which the copy is attached to your answer to the bill, and by whom and when was it executed? Is said copy a correct copy?

Interrogatory 15th. What, at the date of said assignment, was the value of the property mentioned in the first clause to be secured to said Clara E. Boykin and Lucy B. Micou? What was the then value of all the stock owned by the defendants mentioned in the second clause of said assignment, one-sixth of which was to be secured to each, the said Clara E. Boykin and Lucy B. Micou? And what was the value of the remainder of the property held and owned by the said B. H. Micou, Thomas M. Barnett, and Nicholas Barnett, respectively, mentioned and

referred to in the third clause of said assignment? Did you not
411 purchase the property sold under said executions with the intent and for the purpose of carrying into effect the provisions of said assignment; and have you not accordingly managed and controlled it ever since? Was not all the property mentioned in the first clause of said assignment owned, before sold under said executions, by said B. H. Micou? If not, by whom? Was it not sold under said executions as his property?

Cross-interrogatory 16th. How much of the said sums charged by said assignment upon the property to be settled on the families of said Thomas M. Barnett and Nicholas Barnett, respectively, has been paid? How was the same paid, and in what way and from what sources was the money derived or obtained to pay the same? State fully and particularly as to each payment of any part of said sums. What were the arrangements made in reference to the judgments in favor of Lanier and Pittman, and what were the reasons for making such arrangements? State in reference to each of said judgments.

412 Cross interrogatory 17th. Did not said B. H. Micou come to your office, or to some other place, to see said assignment? Did he see it? Did he not take a copy of it? When and from whom did he first learn that said assignment had been executed? Answer from your own knowledge.

Cross-interrogatory 18th. In what business has said B. H. Micou been engaged since 1874? Has he not been giving personal attention to the business of the plantations in Montgomery County, which were sold under said executions as his property? Where are said plantations situated? And where is the plantation situated which was purchased by said B. H. Micou as guardian for said Clara E. Boykin and Lucy B. Micou? Were not said plantations of said B. H. Micou in Montgomery County a portion of the property provided by said assignment to be settled on the wife and children of said B. H. Micou? Has all or any, and how much, of the property provided by said assignment to be settled on the families of said B. Micou and the Barnetts been so settled? If not, why not?

CLOPTON, HERBERT AND CHAMBERS,
413 *Sol'c'rs for Compl't.*

Filed April 18th, 1878.

J. W. DIMMICK, *Clerk.*

Commission to take deposition.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To Gordon McDonald, esq., of Montgomery, Ala.:

Know ye that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Henry C. Semple, esq., as witness in behalf of respondents in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein The First National Bank of Montgomery is complainant, and B. H. Micou and others are respondents, on oath to be by you administered, upon interrogatories and cross-interrogatories annexed to this commission, to take and certify
414 the deposition of the witness, and return the same to our said cir-

cuit court to be holden on the first Monday in May next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of April, A. D. one thousand eight hundred and seventy-eight.

Issued the 18th day of April, 1878.

[SEAL.] J. W. DIMMICK,
Clk U. S. Cir. Court, Mid. Dist. of Ala.

Directions.

1. If the time and place of executing the commission are not named therein, the commissioners will subpœna the witnesses to appear before them at such time and place as they may appoint and administer the oath to witnesses.

2. Either the commissioner, witness, or some impartial person must reduce the answers of witnesses to writing as near as may be in the language of the witness.

3. The heading or title of the depositions should be in this form:

"Deposition of A. B., witness, sworn (or affirmed) and examined
415 under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between C. D., plaintiff, and E. F., defendant.

"A. B., of , being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

"1st. To the first interrogatory he saith:

"2d. To the second interrogatory he saith:

"1st. To the first cross-interrogatory he saith:"

When the deposition is finished it must be subscribed by the witness.

(Witness' name) A. B.

And certified as follows:

"We, the commissioners (if all act, or I, one of the commissioners, as the case may be) in said commission named, do hereby certify that the evidence of the witness A. B. was taken down under oath and subscribed by him in our presence on the day of , 187 , at , in the county of , State of , and that we have personal knowledge of said witness or (if unacquainted with the witness) that proof has been made before us of the personal identity of said witness, and that we are (or I am) not of counsel in the cause nor of kin to any
416 of the parties interested therein or in any manner interested in the result thereof.

"Witness our hands and seals (or my hand and seal).

"G. H. [SEAL.]
"L. K. [SEAL.]
"*Commissioners.*"

4. The commissioners will fold the commission, interrogatories, answers and any document deposed to by the witness in a packet sealed. They will write their names across the seals and direct it thus:

"C. D. vs. E. F. Deposition of A. B., witness for pl'ff (or def't). To J. W. Dimmick, esq., clerk of the circuit court of the United States, middle district of Alabama, Montgomery, Alabama."

The package may be sent by mail or private conveyance. If sent by mail, on back take receipt of P. M. thus:

"Received this package of G. H., commissioner, to be forwarded by due course of mail.

"Date.

"E. G., *Postmaster.*"

417 *Deposition of Henry C. Semple.*

Deposition of Henry C. Semple, a witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, complainant, and Benjamin H. Micou and others, respondents.

HENRY C. SEMPLE, of Montgomery, Alabama, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first interrogatory he saith: I am a lawyer and reside at Montgomery, Alabama, where I have resided and practiced my profession for about thirty years.

To the second he saith: I know the parties to this suit.

To the third he saith: In the fall of 1873, some time in the month of November, I was consulted by Francis S. Boykin as to a payment made by Benjamin H. Micou, the guardian of his wife, Clara E. Boykin. I advised with him as his counsel in relation to that matter, and
418 inquired at the time whether Micou had ever settled his account as guardian. Within a week or two, early in December, his wife's sister, Miss Lucy Micou, requested to see me, and I saw her, and Mr. and Mrs. Boykin, in relation to the state of affairs as between Micou, the guardian, and his daughters, Lucy and Clara. From that time I was their legal adviser and counsellor. I had told Mr. Boykin in my first interview with him that in my judgment Micou's condition was very unsatisfactory; that I knew of his having a heavy load of debt in connection with the Tallassee Factory, and that he and the factory were both greatly embarrassed.

To the fourth he saith: I employed E. J. Fitzpatrick to represent them in the settlement of their guardian's accounts in the court of probate of Tallapoosa County. After advising my clients through Mr. Boykin that it was proper to have a settlement of accounts with the court, I learned from Mr. Blakey that Mr. Micou had furnished him the data to file his accounts for settlement some time before that, probably six
419 months. Blakey had represented and advised with Micou in relation to some efforts which were contemplated or being made by which it was hoped that by the disposition of the whole or a large amount of the stock in the Tallassee Factory, owned by him and Thomas M. and Nicholas Barnett, they could relieve themselves of the heavy liabilities which rested on them, as members of the firm of Barnett, Micou & Co., and when it became apparent that this could not be effected, I urged the speedy settlement of Micou's accounts as guardian; he, Blakey, then told me that Micou had a long time before given him the papers to make up his accounts, and I being called off suddenly to the city of Washington, called upon E. J. Fitzpatrick to attend to the settlement, as I could not do it in person.

To the fifth he saith: I know nothing of my own knowledge. When

Mr. Boykin first consulted me about the matter he told me that on the day of his marriage, and just before it, Mr. Micou had handed his daughter Clara a certificate of 300 shares Tallassee stock with a letter
420 stating that it was in part payment of what he owed her as her guardian, and a receipt for $30,000 dollars to be signed by her, which she had signed and given him a few minutes afterwards; he inquired whether Mr. Micou could claim that it was a valid payment. My opinion was that he could not. The fact known to me that the factory was greatly in debt at the time; that she was a young woman ignorant of business; that his accounts were unsettled, and the relation of confidence between them rendered the transaction one which neither the court of probate or the chancery court would recognize; that he occupied a delicate position, but that his duty required of him that he should at once demand of Mr. Micou that the transaction should be cancelled. The actual and substantial condition of the Tallassee Factory at the time was insolvency, though it was not generally thought to be so. Most people thought it was embarrassed only by the stringency of the times. I knew that it had an enormous amount of paper outstanding and much of it past due and protested or held over by
421 sufferance. The above circumstances satisfied me that neither Micou or his sureties could claim it as a payment, and I so advised Boykin. I was so well satisfied of it that I never even consulted any authority, but answered and advised him promptly as above stated, at my house when he called in the night time to advise with me. Boykin told me soon after my first interview with him that Micou and the Barnetts had agreed to hold the transfer and receipt for naught, and I was so well satisfied that it was just and proper that I did not even think of mentioning it to Mr. Fitzpatrick when I employed him.

To the sixth he saith: I know nothing whatever, and knew at the time nothing whatever to show that there was any fraud or collusion in the settlement of Micou's accounts and the decrees rendered against him. I never saw or spoke to or corresponded with Micou on the subject directly or indirectly, except as to the agreement to set aside the receipt, which I have above explained. I don't know of Clara or Francis Boykin or Lucy Micou having done anything whatever in re-
422 lation to the said accounts or procuring the said decrees, except to employ me to have the accounts settled, and this was only in the most general way and without any information or instructions. They all seemed totally ignorant.

To the seventh he saith: I know nothing about the settlement except as it was reported to me by Mr. Fitzpatrick on my return from Washington. I employed him and told him at the time that the embarrassments of Micou for the factory and as a member of Barnett, Micou & Co. made it important that the settlement should not only be fairly made, but that nothing should be done which could be thought of doubtful propriety.

To the eighth he saith: I did request Mr. Blakey to send up for executions for me, I think, for two or three counties, and perhaps to see when they were returnable, so as to have others in their place, because I was either going away or expected to be absent when they came. I have frequently employed Mr. Blakey to attend to a variety of
423 business for me. Our offices are near each other, and we render one another friendly offices in business. He acted for me merely as any other friend would have done for me in that matter, and in no other capacity than as my clerk in the particular transaction.

To the 9th he saith: After the rendition of the decrees I saw Francis

Boykin and talked with him as a friend as well as his attorney; his father and mother were old friends of my youth, and I had known him since he was a child. I told him that the whole property of the guardian, Micou, and his sureties, Tom and Nich. Barnett, would not pay the debt; that they and their families would be left penniless; that it would be a hard course to pursue for him and his wife and Lucy to take everything they had, as by law they could do, and that common justice and common decency demanded that they should, out of the abundance which they would have, make some provision for the wives and families of their father and uncles. Boykin very readily agreed to this, but when
424 it came to putting it in writing he seemed to place an exaggerated estimate on the value of the property and place many difficulties in the way. I told him that it was apparent that the ruin of the Barnetts as copartners in Barnett, Micou & Co. had been caused by the faith, trust, and reliance they had placed in Micou, his wife's father; that neither he or his wife or her sister could ever enjoy the respect or confidence of the community if they did not make some proper provision for the families of Thomas M. and Nicholas Barnett, and as to their father's family, of course, I knew that nature itself would dictate a provision for them. I suggested to him that the whole property which we could reach by execution in fact came directly or indirectly from old Mr. Barnett, the grandfather of his wife and her sister, and how highly he had been esteemed for his sense of justice and honesty; that in my honest judgment he and his wife and her sister ought to consider what Mr. Barnett would do if he were alive and the owner of the prop-
425 erty, and to do it. The young ladies were entirely willing to do whatever I recommended, and Mr. Boykin at last consented to make the provision I incorporated in the assignment, which is copied into my answer. The assignment was made to me as I refused to manage the matter in any other way. Miss Lucy was a minor, but I expected her disabilities of minority to be removed, and she engaged to ratify it when she became of age, which she afterwards did. Mr. Micou, so far as I know or believe, had no part in it and was not informed of it. He was not in town from the time I suggested it till it was executed. I never consulted him directly or indirectly about it, and have no reason to believe he was consulted by any one else on the subject. I never spoke to the Barnetts on the subject or any one else, or suggested the arrangement, or any arrangement for the assignment of the decrees or for any provision to be made for the families of the Barnetts or of Micou until after the decrees were rendered. In saying this I mean to state that I never even spoke to Boykin on the subject of any provision for
426 the families of his wife's father or uncles until after the rendition of the decrees.

To the tenth he saith: I was absent in the army, and knew but little of the comparative value of the hires of slaves during the years 1863, 1864, and 1865 with the periods before the war. In 1861 and 1862, I think, there was no great difference. Our currency in 1861 and up to the period of annual hiring in 1862, the first of January, was not greatly disturbed, not more than on several occasions from 1855 to 1861, and I think slaves hired about as well in 1861 and 1862 as at any time for several years before.

To the eleventh he saith: Cotton is more easily and cheaply stored or kept either in the seed or in the ginned and baled condition than any other agricultural product I know of. I know of some made in 1861 and 1862 and later during the war that was kept by its owner and sold in 1865, after the war, for as much as forty or fifty cents per pound. It

sold about as well as that made in 1865. In 1859 & 1860 my rec-
427 ollection is that cotton was not worth more than ten cents. In 1865 after the war, it ranged from 15 to fifty cents per pound. Some far-seeing people did make cotton during the war which they kept till 1865, and then sold for very high prices. B. H. Micou, either for himself or the Tallassee factory, or both, had several thousand bales of cotton after the war, which was made either by him or them; he got it from 1860 to 1865. The common estimate of weight of cotton in Alabama is 500 pounds; production varied with seasons and the character of land, but average production to the hand throughout the State was about four bales. In the prairie section of land, such as that cultivated by Micou, the average was higher, perhaps about five bales. The prairie lands sometimes made as much as 7 or 8 bales and sometimes as little as two or three bales to the hand.

To the twelfth interrogatory he saith: In answer to this interrogatory I have to say, 1st, if the allegation of the bill in reference to the return made by C. H. Felts, sheriff of Macon County, is correctly
428 stated, he certainly made a great mistake in his return, which is false. The facts in relation to the sale of the Macon County land are as follows: Two executions on the decrees were put in the hands of J. A. Grimmett, sheriff, June 16th, 1874, aliases, I think. On that day he levied them on certain lands described in his deed to me marked G, hereto attached, and after advertisement 30 days in the Tuskegee News he sold them, and I became the purchaser at the price of $5,548.00 *dollars*, and he executed the deed to me, the original of which I attach, marked (G.) I was not present, but wrote or sent a messenger to Mr. Ligon or Mr. McIver, I don't remember which, to bid for me, and I see the deed after being recorded was enclosed in an envelope to Hon. R. F. Ligon at the Exchange Hotel, in this city, in which I found it. I receipted to him for the proceeds of sale as owner of the decrees or attorney, and paid him the commissions and costs of sale through Mr. Ligon, I think, after some discussion about the com'n charged, which was reduced to the
429 legal rate. It may have been Mr. McIver, as I settled the commissions and charges of one sheriff with him, whether Felts or Grimmett I cannot say. After this sale and conveyance I discovered that the lands embraced in the levy, sale, and deed made by Grimmett were not properly described. I got a map of it from Boykin and had another execution or two others issued and sent to the sheriff of Macon County, who was then C. H. Felts. These executions were issued late in 1874. I sent up a correct description of the land to Mr. McIver, I think, and Felts levied it according to this description and advertised the lands for sale on the 1st Monday in February, 1875. When the sale came on I intended to go up, but the railroad was washed up and I sent Mr. Boykin up. I remember I was standing looking at my fine new-born calf, the Princess, when he came to me, and how I stormed out at his making difficulties about crossing a few swimming creeks when he had business to attend to, and sent him off in a hurry. I instructed him to see Mr. McIver, to tell him that the former sale and deed was defective as to a part of the land, and to bid for me at this sale $2,500
430 *dollars*. When the sale was over and within a few days in the month of March, the deed which I hereto attach, marked A (original), was brought to me by Mr. McIver, and I paid the costs and commissions and receipted for the balance of the purchase-money on the executions. The sheriff must have forgotten the transaction when he made his return, if he did make it.

I suppose Mr. McIver learned from Mr. Boykin that I was buying for

his wife and sister, and put the title or addition of trustee for Clara Boykin in, but I did not think it a matter of any consequence, and took the deed as it was and paid the money as stated. 2nd. As to the allegation in relation to the personal property of Micou, on the Macon County place, I learned from Mr. Walker in the winter of 1873-'4, while I was trading with him for a fine cow, and which I wanted to settle with Micou for, as I supposed he and Walker were partners, that he was the lessee of the land, holding it for a term of years, and that the stock belonged to him; that when he leased, he had bought the stock
431 then from Micou, on the agreement to pay him a certain proportion of his profits in cattle trade as rent, and at the end of the term to give him cattle and stock of the appraised value of those sold him. My recollection is, that I learned all this of Walker, but I know he told me of his lease and ownership. When I bought, and his lease terminated the following winter, he did turn over some stock and cattle which went into the possession of Boykin, who agreed to credit Lucy in their settlement with half the value, and to allow a credit to Micou on the decrees of the whole value. He informed me of this. I know nothing personally, except that I agreed to credit the decrees in accordance with Boykin's agreement with Mr. Micou. 3d. As to the allegation in relation to the personal property of Tom Barnett, in Elmore County, I have answered in my answer all I knew of that at the time of the levy and sales by the sheriff of Elmore. In the year 1872, Mr. Barnett (Tom) had conveyed the Elmore County plantation, known as the River Plantation, to Mrs. Storrs; he had also given her some stock
432 and other means of carrying on the place. I know of nothing of the original property remaining, except the land, and believed that to be subject to our executions, as the conveyance was voluntary. The conveyance was made by Tom Barnett and wife to Mrs. Margaret B. Storrs, on the 31st July, 1872, and recorded in volume K, page 104, Elmore County probate court, on the 11th Sept., 1872, but he had given it to her on her marriage and only executed the deed then. I should add that Tom Barnett did have two mules at Tallassee, which I did not know of when the executions were in Elmore, but they were sold by Sheriff Murphy, in Montgomery County, to which place Mr. Tom Barnett had brought them before Murphy's sale. He also adds in answer to this general interrogatory, that he is informed that he was mistaken in thinking that Micou had settled the Dexter House on his wife by conveyance, but the fact is that the Dexter House was conveyed by the vender, Lewis Owen, directly to Mrs. Micou, in the year 1862,
433 Micou, however, paying the purchase-money. The settlement of the residence and Commercial Hall was made on her in 1867 or -'8, or before that time. Then none of these properties were subject to the claims of complainant which originated after these conveyances and settlements which were recorded in this county, though subject to the decrees in favor of Boykin and wife and Lucy Micou. I attach Sheriff Strobach's deed to me, marked C.

To the thirteenth, he saith: After the rendition of the decree, I, by the issuance of executions thereon, obtained prior liens on all the property of the defendants, Micou and the Barnetts, in Montgomery, Elmore, and Macon Counties, over all other creditors except one, a creditor having an execution on the decree of the chancery court of Elmore County or Tallapoosa, against the Barnetts, Micou, and my clients, Lucy Micou and Clara Boykin. The condition of affairs in relation to that decree was such that it was doubtful whether it was binding on Clara Boykin and Lucy Micou, who were infants when *when* it was ren-

434 dered, and in the judgment of learned counsel were not properly before the court when the decree was rendered. The amount of this decree, with interest, was, I think, about 6,500 dollars or $7,000 *dollars.*

Mr. Lanier, of New York, had a claim against Benjamin H. Micou and Thomas and Nich. Barnett for about 5,700 dollars, and Mr. Pittman another against the same parties for about the same amount. These were the only claims of any consequence which I know of as existing against those persons individually, or otherwise than as partners of the firm of Barnett, Micou & Co. The claim of complainant against them, and some three, four, or five hundred thousand dollars of other claims, were against them as partners by the name of Barnett, Micou & Co. The firm of Barnett, Micou & Co. had partnership property, and I was satisfied that under the law, in whatever tribunal administered, whether in the State courts of law or chancery, or the United States courts, or the bankrupt courts at law or in equity, the whole individual property of the partners would be applied to their individual debts,
435 until they were satisfied, to the exclusion of the partnership creditors. The only contest which could arise would be with individual creditors.

The debts to Lanier and Pitman had been contracted under such circumstances as to make them of peculiar obligation on Micou and the Barnetts, and I explained all this to Boykin, and advised him that for the several reasons above given it would be prudent and honest not to make any claim for our legal priority by virtue of the liens acquired by the first executions over Lanier and Pitman; he concurred in this, and I then proposed to Mr. Bethea, who acted as agent for Pitman, and to Pettus and Dawson, the counsel for Lanier, that we would waive our priority in their favor if they would allow me time to see their debts paid out of the proceeds of the property if bought by others, or out of the property if bought by me. T. B. Bethea, for Pitman, agreed to this if I would consent to his paying for a designated tract of land, the property of Thomas M. Barnett, with the Pitman execution, he, Pit-
436 man, to hold the title as security for his debt so extinguished or satisfied by the sale, but to allow me two years within which I could purchase the land from him at the price with interest. Lanier's counsel did not wish to buy any of the property, but agreed to allow me to use the execution in his favor in buying any of it I chose to purchase, I to agree to pay the amount of the execution with interest, from all the property so purchased by me. I made use of the Lanier execution thus, and it was satisfied, and so returned from sales of property in Montgomery County made by Sheriff Strobach, and part of the proceeds of sale credited on the execution, so as to satisfy it. I afterwards, to prevent accidents, executed a trust deed on a portion of the property purchased by and conveyed to me to N. H. R. Dawson, one of the firm of Pettus and Dawson, att'ys for Lanier, as trustee, for Lanier's benefit. I append a copy of said deed from the records of the court of probate of Montgomery County, marked A. I have since paid off in full the principal and interest of this debt on execution to Pettus
437 and Dawson. Bethea purchased about 1,000 acres of the Tom Barnett plantation for Pitman, & took the sheriff's deed to Pitman therefor, & his attorney, Graham & Arrington, satisfied the execution, the amount bid being the whole sum due. I paid Pitman through Col. Bethea several payments, and afterwards Pitman, who had been Bethea's overseer, wanted his money, and Colonel Bethea advanced to him the balance and took his quitclaim deed for the land to me. I

agreed, with Colonel Bethea, that if he would do this I would give him my individual note for the balance, and secure it by a mortgage on the land and other land which I agreed to embrace in the mortgage, and I accordingly did so, and this note, by his indulgence, is yet outstanding and in his hands unpaid. The land was quitclaimed by Pitman to me, and in executing the mortgage I omitted one tract of about eighty acres, as well as I recollect, because I had discovered that Barnett, who had been in possession of another tract, the title to which was in Gunter and Hatchett for many years, and Gunter and Hatchett being
438 in possession for the same time by themselves, or those they represented, of about the same quantity & value of land, the title to which was in Barnett, I had arranged with Gunter to settle the trouble by each of us holding on to what we were in possession of, and releasing the other, which we did.

I append a copy of the sheriff's deed to Pitman, marked B, Pitman's deed to me, marked C, the original deed and one of my mortgage to Bethea, marked F, all taken from the court of probate of Montgomery County, where the lands lay. Also deed of Barker, sheriff of Elmore County, marked D, for the Elmore County lands.

To the 14th interrogatory he saith: I have already answered this in my answer to the 9th int'y, and above.

To the 15th int'y he saith: There was no other or any agreement, contract, promise, assurance, or inducement of any kind made or offered to or by said Micou or Barnetts, or either of them, in relation to said decree or said property, or said executions, or sales of property under said executions than as heretofore stated by me.

439 To the 16th int'y he saith: He has answered a similar interrogatory, the 12th.

Answering the cross-interrogatories:

To the first he saith: With Francis S. Boykin. It was before any meeting was called or held, and, as well as I now remember, about the middle of November, 1873. I know that Frank Boykin had not moved to town at the time, for I wanted him to stay with me at my house, which I should not have asked a man not married more than a month to do if his wife had been in the city. I think the first meeting of creditors & stockholders was held either in December or early in January. I was retained or advised with as attorney about one matter—the matter of the transfer of the stock by Micou to Mrs. Boykin and the effect thereof, and how Boykin should act in relation to it, & in the course of the conversation gave the information and advice I have stated in my foregoing answers. The meeting was called, as I
440 think, in December, 1873, and the Tallassee Manufacturing Company was not then generally known or esteemed to be insolvent. The stockholders & directors had left the whole management of its affairs to the president, and none of them seemed to be willing to believe that it was so badly off as they afterwards, after much difficulty and in several weeks, discovered it to be. The first meeting was called and held before it was generally known or believed that the factory was insolvent.

To the second X-int'y he saith: I know of my own knowledge nothing except that the certificate was issued in her name in July, '73, I think. I have seen it. I have answered that the substantial condition of the factory was then one of insolvency, and that the real value of the stock at the time Clara Micou is said to have received it was that it was worthless. I did not fully know it on the 22 October, 1873, or on the 15th November,

1873, but I knew facts which warranted me in believing it. In October and November, 1873, I was much with Mr. Morris, a very well in-
441 formed and shrewd banker in this city; he had just come home during the yellow fever, in consequence of the panic, to attend to his own affairs, which were much embarrassed by his absence. From him, in October and November, I learned of the fact that there was an enormous amount of paper of the factory and of Barnett, Micou & Co., outstanding—much of it which was not provided for, and either under protest or held up by order. I heard application made to him to hold up paper. I had been solicited to take stock in the factory by Mr. Micou, & offered by him the means of doing so, on a credit till the dividends should pay for the stock. I had declined the apparently favorable offer because, as I told Judge Goldthwaite, who urged me to accept it, as he did, I had observed that Mr. Micou was drinking very freely, & I would not risk anything in an enterprise managed exclusively by one who was so inclined. The fact that the factory was so heavily indebted, which was unknown to the directors and stockholders; the fact that it was unknown; the fact that large dividends had been paid with borrowed money; the fact that large sums had been borrowed, and all
442 that could be borrowed was borrowed by the factory; that other extreme means of raising money were resorted to, while the reports showed it to be in a flourishing condition, and making money so rapidly as to warrant the payment of the large dividends which were paid by it, were sufficient to satisfy me that it was unsound. Yet, but for the panic which prevailed in the money market in the fall of 1873, I have no doubt its stock could have been sold for a good price. Many people, up to the time of the reports made to the meeting of stockholders and creditors, believed it to be in a flourishing condition, and that its embarrassments were only such as were incident to the panic then prevailing. I think this was the common belief, but the fact was that it was insolvent, and believed by those who were best informed to be insolvent as early as October 22, 1873. I am satisfied that Josiah Morris would not have given fifty cents on the dollars for its paper at 6 months on the 1st November if he were obliged to hold it to maturity. Yet about that time or later the directors of some of them indorsed its
443 paper for considerable sums, believing it to be solvent. I consider that its stock could have been sold on the 22d October, 1873, if any good stock could have been sold, but that the panic caused such a stringency in the market here, in connection with the yellow fever, that $30,000 in complainant's stock would scarcely have brought 50 cts. on the dollar in Montgomery at that time, the yellow fever & the panic together so greatly deranged all business in said city.

To the third X-int'y he saith: I mean to say that there was none so far as I am informed or believe. I had no interview or conversation with Micou, or any correspondence or communication with him directly or indirectly on the subject, except that I authorized Mr. Boykin to say to him from me that in my opinion the delivery of the certificate of stock to Clara, and the taking her receipt by him for $30,000 *dollars* for it, could not be maintained as just or legal, and that it was his duty to set it aside. Boykin reported to me, as I have stated, that he had agreed to do so, and to treat it as cancelled. This was all that
444 I ever heard of as passing between Micou and either of them; of course they may have entered into any conspiracy without my knowledge, but if they did I never heard of any facts to indicate that they had done so, and I never knew or heard of any circumstance calculate' to create a suspicion, in my mind, that they harbored any design or

hindering, delaying, defeating, or defrauding any of the creditors of Micou or Barnett, Micou & Co., by obtaining early decrees or otherwise. I advised the obtaining early decrees for the pupose of enforcing their own legal and equitable rights, but for no other purpose, & have no reason to suspect or believe that they, or either of them, desired it for any such purpose as is inquired of. In the first place there was no great haste. I did not obtain the decrees until Feb'y, 1874, I think, but I have given the reasons above for obtaining them when they were obtained. Micou and the Barnetts apprehended insolvency or bankruptcy, by reason of their membership of the firm of Barnett, Micou & Co. The right
445 of the daughters to have the individual property of Micou and his sureties on the guardian's bond applied to the satisfaction of the balance due by them to his wards on that bond; the fact that there were partnership creditors, who I supposed would endeavor to subject the individual property of these partners to their partnership debts; the fact that individual creditors to the amt. of some 12 or 16,000 dollars were proceeding, or about to proceed, and a desire to keep even with or get ahead of them in the race of diligence operated on my mind. No other reasons whatever.

To the fourth X-interrogatory, he saith: I was not present and know nothing of it except from others. I heard of it first from Mr. Fitzpatrick, and confess I was surprised at the amount, but one rarely hears of a settlement by the court of the account of a guardian ex'r or adm'r without surprise at the balance found due. The only information I had in relation to the state of his account was contained in and conveyed by his letter to his daughter enclosing the stock certificate, in which letter he had estimated the amount due by him to her as about
446 $35,000 *dollars*. Mr. Fitzpatrick tells me he thinks I communicated to him the information that Micou had proposed to charge himself with the profits of his daughter's lands and slaves instead of rents and hires, but I am absolutely positive that he is mistaken, for I knew nothing whatever of it till after my return from Washington.

To the fifth X-int'y he saith: I have always understood that David T. Blakey and Benjamin H. Micou were related or connected by marriage, but I do not know which or in what degree. I have observed that for many years they have been intimate with each other. He was Micou's attorney in said settlement, as I have heard from Mr. Fitzpatrick and him, and from the bill in this case. The answer to the bill filed by Micou is in Blakey's handwriting and it was prepared by him. I don't remember when I first heard of his having filed his accounts for settlement as guardian. As I have before stated Mr. Blakey had promised me to prepare and file them, saying he had been instructed by Micou
447 to do so some six months before, and I suppose I learned of it about the time they were filed and from Mr. Blakey. I know I never spoke to Micou about it. I learned of the day set about the time it was set, and either from Mr. Blakey or the official notice by the judge. I know personally nothing about the order in which the accounts were settled. I have understood from Mr. Fitzpatrick or Mr. Blakey or gathered from the exhibits to the bill—I don't know which—that the settlement of Clara's account was first made, and that the bond being joint & the estates of the wards joint, that one account actually settled both, & the account for Lucy's guardianship was merely the account for Clara's as settled and stated by the court. Of this I know nothing personally, however. I employed Mr. Fitzpatrick to represent each of them and suppose that he did do so, and have heard and believe that Mr. Blakey represented Mr. Micou. I directed the settlement of Lucy's account be-

fore she became of age and before relieved of the disabilities of non-age for the reasons given by me for proceeding to obtain the decree,
448 and because the chancery court could not act on the petition till its spring term, which I think sits in May or June.

To the 6th (sixth) X-int'y he saith: I was absent from home in military service for part of 1861, and the whole time from March, 1862, except with rare and short visits. My opportunities for knowing the value of the hires of slaves in 1863-'4-'5 were very limited. I know nothing of the matter except what I have since heard; for 1861 & 1862 up to March, they were about as good as those of any lawyer in Montgomery of much practice. I have heard that the policy of the State was to forbid the cultivation of any products not necessary or useful to sustain and support the war, especially cotton, & that its legislation was directed to that end, and that it, or a sense of patriotism, or both together, did limit greatly the production of cotton. There was not more than ¼ as much cotton cultivated during the war after 1861-'2 as before and since, even if so much as that, of which I am very doubtful. I know little about this, however, as I speak from information re-
449 ceived since the war. I know nothing of the hire of slaves after 1862, or of the facts affecting them, except mere opinion from history. I have heard since the war that slaves were brought here by refugees. Have brought suits for their hire, but know nothing about it or the numbers of the slaves or refugees. My own opinion is that after 1862 it would have been difficult to hire slaves or deal in any commodity for any other currency than Confederate money in Alabama to any great extent, but I was not here and know nothing of it. The banks did suspend specie payments before the war. Up to 1862 they dealt in their own paper and that of other banks as well as Confederate notes, which were first issued in 1861, September, 1861, I think, and indifferently, at first preferring Confederate notes, but about Feb'y, 1862, the vast volume of Confederate notes & the reverses in Kentucky & Tennessee made them prefer bank notes, and Confederate notes became almost the only currency.

To the seventh (7th) X-int'y he saith: They did compose that
450 firm. The firm was largely indebted then, several hundred thousand dollars directly and as sureties for the Tallassee factory. Men of business who knew anything of the circumstances in December, 1873, & January, 1874, esteemed the firm as insolvent. Many persons would not then believe it, so high had been their credit.

To the 8th X interrogatory he saith: I have appended to my answers to the direct interrogatories the sheriff's deeds for the lands bought by me at the said sales, and as I bought all the lands so sold they will show the exact dates. The dates are correct as stated in the deeds. I also append an extract from the report of sales by the sheriff of Montgomery County of the sales of personal property by sheriff Murphy, marked 1, the only personal property sold, except a large amount of stock in the Tallassee Manufacturing Company sold by the sheriff of Elmore County (all that was standing in the names of the defendants on the books of the factory) at the time he sold the real estate in his county, and which I bought at the price of $1,000. I think I regarded it as of so little
451 value that I have never applied to the president, Mr. Clopton, to sign the certificate of transfer which I hold under the sheriff's certificate of purchase, though the nominal amount of the stock is $250,000 & upwards; I forget how much. The statement from sheriff Murphy's docket shows the time of sale, amount, price, and name of purchaser of all the personal property sold, except the stock sold by

sheriff Barker, of Elmore. The money paid by the purchasers was applied towards payment of sheriff's commissions and costs, except as to that bought by me, and I, after deducting the balance of costs and commissions which I paid to the sheriff Murphy, satisfied the balance of my purchase by crediting it on the execution by receipting his docket for the amount; the extract from his docket relating to his proceedings on the executions of the two decrees in his hands for execution is a correct statement. I was the att'y of the sheriff (Murphy), and was so careless as not to settle my account with him for a long time. He owed me for professional services more than the commissions due him, and thus the final settlement between us was not made till long after
452 the sale. Parts of the proceeds of sales were applied to pay Pitman's execution and part to Lanier's, as before stated, and for the reasons above given.

To the 9th X int'y he saith: Mrs. Storrs was in possession of the river plantation in Elmore County under a deed from her father and mother, dated July 31, 1872, and had been since the date of said deed and for some time before that. The stock on the place belonged to her, and was not levied on or sold. I left Mrs. Storrs in possession thereof by virtue of the authority of Mr. Boykin and his wife and Miss Lucy Micou to do what I thought best about the whole matter, and never made any arrangement, agreement, or understanding with Mrs. Storrs. Mr. Storrs, Mr. Barnett (Tom), or any one else. Neither she or any one else has ever paid anything. She is lately dead, leaving a child or children. Since her death in November last her husband has been in possession. She was a daughter of Thomas M. Barnett. I had determined, in my own mind, that it would be a reasonable and proper thing for me, as trustee,
453 to convey the real estate, the river place, *the river place*, to Mrs. Storrs when I came to settle up my trust, but never have announced to any of them my intention in this respect or any other, and Clara and Lucy and Mr. Boykin have such perfect confidence in my judgment, discretion, and good feeling towards them that they have never asked any questions, except as to when they could expect money.

To the 10th X interrogatory he saith: The arrangement was made between Mr. Nich. Barnett and Mr. Jones in the month of January or early in February of 1874. Since the year 1874 the plantations known as the Nich. Barnett place and the Tom Barnett place in this county have been cultivated by me on my responsibility and on my credit or with means advanced by me or derived from the proceeds of said places. I borrowed money one year from Lehman, Durr & Co., & pledged them the crops, &, I think, mortgaged them some of the lands and stock. They sold the crops and accounted to me for the proceeds, that year very considerable, 1875. He has directed and managed the
454 cultivation of the Nich. Barnett place for me ever since. The next year, 1876, I did not borrow money, but paid expenses from the proceeds of 1875. In 1877 I borrowed money on a bill or bills made by me as drawer & S. C. Marks as acceptor, discounted by the merchants and planters. S. C. Marks sold the crops & accounted to me for proceeds.

Nich. Barnett also managed the Tom. Barnett place in 1877; before that time I had confided it to Mr. Storrs and Mr. Tom. Barnett as my agents, and the results were not satisfactory, as they lived in town and he, Storrs, was engaged in trade. I borrowed money with which expenses were paid, or else was responsible for the expenses. I am only a fancy farmer and Mr. Nich. Barnett is among the most successful and intelligent planters in the country. I keep an account with a bank and

instruct them to pay checks drawn in my name by him for expenses as incurred, when in funds, and I rarely see the plantation or do anything more than receive the proceeds and look over the accounts furn-
455 ished at the end of the year. The income for the year 1875 was, in gross, about $13,000 dollars; for the year 1876 in gross about $5,000 dollars; for the year 1877, in gross, about $9,500 dollars. The only part of the income applied for the benefit of Nich. Barnett or his family, or received by him, was the sum of $278.85—two hundred and seventy eight $\frac{85}{100}$ dollars which I allowed him to apply to the payment of the premium on the policy of insurance on his wife's life for the benefit of her daughter. His services were cheap at $1,500 per annum if I had engaged to pay for them. The nett incomes except that specified have been applied in paying the debt to Lanier above specified with interest amounting to some 6,800 or $7,000 dollars. About $3,000 or $4,000 on the debt to Pitman. About $3,000 in payment of the compromise I made after a decree against us on a bill for injunction filed by Lucy B. Micou, Clara and Frank Boykin & myself against the complainants in a case called the Tallassee bridge case, the case specified by me herein as the one in which a decree had been rendered
456 against the said Lucy & Clara and others, and in payment of the sums of twenty-five hundred dollars which I have paid to Frank & Clara Boykin and five hundred which I have paid to Lucy B. Micou and the expenses of executing the trust devolved on me by the assignment.

To the 11th X interrogatory he saith: I received on the mortgage to the life association about $5,400 or $5,500 dollars nett. I think of this I used about *about* two thousand dollars in payment of taxes due on the property, about one thousand for Lucy Micou and Clara Boykin, and about two thousand dollars in reimbursing myself for moneys paid to sheriffs and officers of court in securing titles to the property bought by me at the execution sales. It was all consumed in this way; I may be wrong about the proportions; I know I only paid out $1,000 for Lucy & Clara & none of it for any of the other parties named. My recollection is that I received about $5,700 dollars on the mortgage to S. C. Marks; the immediate occasion of the execution of the mortgage was to
457 meet bills to the amount of about three thousand dollars held by the Merchants' and Planters' Bank which I had drawn and accepted to pay the compromise of the Tallassee bridge case before spoken of and to meet a part of the Lanier claim on me and a part of the Pitman claim; about $1,500.00 was so used by me, about three thousand dollars in paying the compromise bills and the remainder in paying the expenses of cultivating the Tom and Nich. Barnett plantations in 1877; the crop of 1877 paid off the bills secured by the S. C. Marks mortgage and the balance of the Lanier claim, and for some mules I bought the year before or in 1877 for the cultivation of those places, and left me with nothing to pay the taxes and cultivate the lands this year, and I have again borrowed money, about $3,000 dollars, on a mortgage & my bills on S. C. Marks to pay said taxes and other expenses and cultivate the lands this year.

To the 12th X interrogatory he saith: Col. Troy represented Tom Barnett and I represented Nich. Barnett in our interviews in relation to their affairs. Our interviews commenced, I think, about
458 the middle or latter part of December, 1873, or perhaps earlier in December.

Our first interviews were mainly on the question as to whether the Barnetts were liable for the debts of Barnett, Micou & Co., and in con-

nection with the hope that was held out by many of the creditors of the factory & of Barnett, Micou & Co., that the release or transfer by the Barnetts and Micou of the whole or a great part of their stock in the factory might be used to procure their discharge from liability for the debts of Barnett, Micou & Co. They seemed, the Barnetts, to be greatly concerned at the idea that they would be suspected of having mislead or abused the confidence of the creditors and stockholders of the factory, and to wish to escape that imputation above all things. They seemed to have no idea of the manner or extent to which their names in the firm of Barnett, Micou & Co. had been used. They spoke harshly of Micou, and the only time they ever mentioned the guardian's bond & their liability thereon was in connection with a complaint that Micou
459 had, with what they supposed and suspected to be a knowledge of the abyss of insolvency on which he stood, conveyed so large a part of his property to his wife. We told them that this could not affect the liability of that property to his debt as guardian, as it was incurred before the conveyance to his wife, and this was all that was said about it. They knew they were ruined, and were duly concerned about their character. If they could get the creditors of Barnett, Micou & Co., and the stockholders of the factory, who insisted that they had been defrauded into subscription to the stock by Micou, to release them, they were willing to give up every dollar of stock in the factory they owned, and which they had esteemed as of great value, and were greatly mortified and distressed to hear spoken of as worthless. The Barnetts are uncles of Clara and Lucy—their mother's brothers.

I never spoke to either of the Barnetts or Troy, or any one else, about any provision for the families of the Barnetts or of Micou until
460 after I had spoken with Boykin & wife, and Lucy Micou, and obtained their consent and they had settled what they would consent to; it was then that I told Troy of it for the first time; this was on the 4th of April, 1874, I think, from the date of the assignment to me, for I prepared it at once after telling him what I had obtained their consent to do, and I advised with Colonel Troy as to the best mode of effecting what they had agreed to do. He said that the girls ought not to think of applying to their own use so large a proportion of the property of their uncles; this was merely as a moral question and not as a question of legal right, which he did not for a moment doubt. He said he had known that it would take everything they had to pay their liability on the guardian's bond, but he never dreamed but that after they, the girls, got it they would not leave their uncles' families poor and distressed. I told him that I had thought I would have obtained the consent of Mr. Boykin and his wife & her sister to a more generous provision, but it was a mere matter of generosity, and they need not look a gift horse too closely in the mouth.

461 Mr. Boykin and myself had prepared a memorandum of what he and Clara and Lucy were willing and intended to do, and it was exactly embraced in the assignment executed to me. The only purpose of my consulting or informing Col. Troy was, that I should have the benefit of his advice as my friend as to the step by which I proposed to secure the rights of my clients Clara and Frank Boykin and Lucy Micou and without any idea of propitiating an adversary or the attorney of an adversary; I believed I knew my clients' rights, and that no one could resist them. In only one interview did I converse with Col. Troy about the provision to be made for the families of Micou & Tom & Nicholas Barnett' families. Tom Barnett married Micou's sister; Micou married as his first wife a sister of the two Barnetts, and the Barnetts

are uncles of Lucy and Clara. The interviews with Troy about the business of the Barnetts continued down to April 4th, 1874. I never had but one with him about a provision for their families.

To the 13th X interrogatory he saith: That it was not suggested
462 to him by any one; that he first suggested it to Frank Boykin. That he did so only a day or two before the 4th of April, 1874; that he talked with him once or twice before he saw the ladies on the subject, and that it was only in relation to making a provision for their families and not for them. That while he knew that anything done to provide for their families would be a great consolation to them in their distress, that it would not be possible to do anything directly for them. That he only mentioned it to Frank, Clara, and Lucy until after they had agreed to it; then, after that, he mentioned it to Troy, as he has above stated, and to no one else until after the assignment had been executed. I had never told any one till then that I would advise it or expected to advise it.

To the 14th X-int'y he saith: A day or two before the 4th of April, 1874, between him and Frank Boykin. I have answered in this deposition and in my answer to the bill everything that has yet been done by me in carrying out the trusts of the assignment.
463 My recollection is that I drafted it; it is in the handwriting of Sam'l D. Hubbard, who copied it for me; the copy attached to my answer is a correct copy; it was executed by the parties whose names are subscribed, Frank & Clara Boykin, and Lucy Micou, and delivered to me on the day it bears date.

To the 15th X-interrogatory he saith: The value that Frank Boykin fixed on it was about twenty-five thousand dollars; my own opinion is that all the stock owned by them all was not worth three thousand dollars, or indeed anything, except to sell it out to some one who wished to speculate in a lawsuit; it had no market value. I think the property above mentioned would have been worth perhaps twenty thousand dollars, apart from the stock, though not worth so much now. Micou's property mentioned, it is difficult to estimate. His residence was a costly one; was mortgaged for $10,000 *dollars;* I supposed it would bring more than that, and bid the sum therefor mentioned in the sheriff's deed for the equity of redemption. The mortgagee is not now
464 willing to take it for the debt. Micou's plantation belonged to him only for life; his daughters were the remaindermen, or rather the heirs of their mother, who owned it in fee, and Micou tenant by the curtesy. His life estate would not, in my judgment, have been worth more than was bid for it at the sheriff's sale; I endeavored to bid a fair price for the whole property I purchased. The house at Tallassee is a good one, but of no great market value; the sum bid would probably cover the value of the title, it having then been sold for one of his debts due in the matter of the Tallassee Bridge case. This was all his property sold, as far as I can recollect, except perhaps the mules, stock, and corn, for which a fair price was bid.

I thought the prices bid by me were the fair value of the respective properties at the time of the sheriff sales, and took some pains to get opinions before the sales, but I am satisfied the property was not really worth the amount bid. I did so purchase that which I did buy. I have assumed to manage and control it; have conveyed the stock on
465 the Micou plantation & Campbell place to Lucy Micou, & put such of the property as was mentioned in the 1st clause of the assignment into possession of Clara & Lucy, & controlled the balance as hereinbefore stated. All said property was owned by B. H. Micou, as above

stated. I have stated the matter of the mortgage and of the life estate. His interest was sold under execution. I have heard and believe that just after the war he had settled (Mr. Micou) all his city property on his wife, but I paid no attention to it, as it was a voluntary deed. I mean his residence, the Dexter House, and Commercial Hall, and it was either by deed during the war or just after it.

To the 16th X interrogatory he saith: About twenty-five hundred or three thousand dollars; three thousand, as I now recollect; twenty-five hundred to Clara and five hundred to Lucy; five hundred was borrowed by me from the Life Association & paid to Lucy, and the same sum to Clara; two thousand was paid by me to Clara, from the sales of cotton from the Nich. Barnett place. I have stated fully as to the
466 Lanier and Pitman judgments and the reasons for it.

To the 17th X interrogatory he saith: Micou did come to my office after the sale under the executions by Strobach, and ask about the assignment; he said he had heard of it, and asked me to let him see it. I showed it to him and allowed him to copy it. He did not say from whom he learned it, nor did I inquire; nor do I know nor have I ever heard or inquired.

To the 18th X interrogatory he saith: Micou has been planting or cultivating the Micou place and Campbell place for his daughter Lucy. I know she has borrowed large sums to cultivate it. She got a bill of sale of the stock from me to enable her to mortgage it, as well as the crops, for loan.

The Micou place is near the Pike road station, in this county. The Campbell place is north of it, I think, and in this county; that is the name of the place he purchased as the guardian of the girls. The life estate in the Micou place was to be settled on the wife and chil-
467 dren of Micou; the Campbell place was not. He had no interest in it, and the place was not sold under execution against him. I supposed that Miss Lucy was cultivating it as a provision for the wife and family of Micou. I have not settled anything as yet on any of them, because I thought it best to settle up the Pitman & Lanier matter and all my accounts, including the expenses to me, which will be considerable before making the settlements. I regarded the allowance of the possession of the property occupied by Storrs, and the allowance to Mrs. Nich. Barnett of the enjoyment of the town residence, which had been owned by her husband, and the small sum paid for her life insurance for her daughter, as in the nature of a partial execution of that part of the trust for the families of Nich. and Tom Barnett, and the cultivation of the Micou place by Miss Lucy as part execution of the trust for Mrs. Micou & her child, as also the allowance of the payment of some rents collected for me by Mr. Moses to Mr. Storrs for his mother-in-law and family in the same light as for Mrs. Tom
468 Barnett and family. I was vested with a full discretion as to the members of the family of each, and thought myself acting within the line of my discretion, and no complaint has been made to me by either of those interested.

HENRY C. SEMPLE.

I, the commissioner, in said commission named, do hereby certify that the evidence of the witness Henry C. Semple was taken down under oath, and subscribed by him in my presence on the 29th day of April, 1878, at Montgomery, in the county of Montgomery, State of Alabama, and that I have personal knowledge of said witness, and know him to be the person named in said commission, and that I am not of counsel in

the cause, nor of kin to any of the parties interested therein, or in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GORDON MACDONALD,
Commissioner.

469 A.

Henry C. Semple to Nathaniel H. R. Dawson. Deed of trust.

THE STATE OF ALABAMA,
Montgomery County :

This indenture made and entered into this the 16th day of November, A. D. 1874, by and between Henry C. Semple, party of the first part, James F. D. Lanier, party of the second part, and Nathaniel H. R. Dawson, party of the third part, witnesseth—

That whereas at a sale of property of Nicholas D. Barnett, made under sundry executions by the sheriff of Montgomery County, on the first Monday in August, 1874, being the third day of said month, the said party of the first part became the purchaser of the property hereinafter described and conveyed.

And whereas the purchase thereof was made at the sum of fifteen thousand dollars, and in part paid by an execution duly issued out of the city court of Montgomery County, on a judgment therein rendered, in favor of the party of the second part, and against the said Nicholas D. Barnett, for the sum of six thousand and three and $\frac{17}{100}$ dollars, with interest from the 21st of February, 1874, and amounting of the day
470 of sale to six thousand two hundred and twenty and $\frac{27}{100}$ dollars, which said last-named sum was by agreement between said Semple and said Lanier applied to the payment of said purchase money as aforesaid, the title in and to said property having been conveyed by the sheriff to said Semple, and it was understood by and between the said Semple and the said Lanier that said execution was and should be a first and prior lien on said property for said last-named sum.

And whereas the said Semple further agreed with the said Lanier that he would secure to him by deed of trust, covering the said property, the prompt payment of said sum of six thousand two hundred and twenty and $\frac{27}{100}$ at the dates and in the manner following, that is to say, one half of said sum with interest thereon from the date of said sale to the date of the payment thereon on the 1st of January, 1875, and the balance with interest thereon on the 1st day of January, 1876.

Now, therefore, in pursuance of said agreement, and in consid-
471 eration of the premises and of one dollar in hand paid this day by said party of the third part to the party of the first, the receipt whereof is hereby acknowledged, the said party of the first part has granted, bargained, and sold, and doth hereby grant, bargain, sell, and convey unto the said party of the third part, and his heirs and assigns forever, the following lots or parcels of land lying and being in the city of Montgomery, county and State aforesaid, to wit: Lot number (11) eleven, East Court street, and lot (1) one and (2) two, South Adams street, being the residence of said Barnett in said city, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, to have and to hold to the said Nathaniel H. R. Dawson, his heirs and assigns, forever.

In trust, however, and upon the following terms and conditions: that is to say, if the said Semple shall well and truly pay said sum with in-

terest thereon as the same falls due, to wit, one half with interest thereon, as aforesaid, on the 1st day of January, 1875, and the balance
472 thereof with interest thereon, as aforesaid, on the 1st of January, 1876, this conveyance shall become void and of no effect. But if said Semple shall fail to pay one half of said sum with interest thereon, as aforesaid, on the 1st day of January, 1875, or if he shall fail to pay the balance of said sum with interest thereon, as aforesaid, on the 1st of January, 1876, then and in either event the said party of the third part is hereby authorized and empowered to enter upon and take possession of the above conveyed property, and after giving thirty days' notice of the time and place of such sale in some newspaper published in the city of Montgomery, to sell the same at public outcry to the highest bidder, for cash, in said city, and after paying the expenses of this trust and such sale, to apply the proceeds of such sale to the payment of whatever may remain unpaid of said debt, whether the same be due or not, on the day of such default, and the balance, if any there be, he shall pay over to said party of the first part.

In witness whereof the said party of first part has herewith set
473 his hand and seal on the day and year first above written. The said Semple makes no warranty in this conveyance except against incumbrances created by him.

HENRY C. SEMPLE. [SEAL.]

Test:
JNO. HARALSON.
W. R. C. COCKE.

THE STATE OF ALABAMA,
Montgomery County:

I, George Ely, judge of the probate court of Montgomery County, State aforesaid, hereby certify that Henry C. Semple, whose name is signed to the foregoing conveyance, known to me, acknowledged before me, on this day, that, being informed of the contents of the said instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand this the 6th day of November, A. D. 1874.

GEORGE ELY,
Judge Probate Court Montgomery County.

THE STATE OF ALABAMA,
Montgomery County:

Probate court.

474 I hereby certify the within deed of trust was filed in this office for record on the 6th day November, 1874, at 11 o'clock a. m., and duly recorded in book 6 of deeds, page 475, and examined.

GEORGE ELY,
Judge Probate Court Montgomery County.

B.

Paul Strobach, sheriff, to Alexander Pitman. Sheriff's deed.

THE STATE OF ALABAMA,
Montgomery County:

Know all men by these presents that, whereas James F. D. Lanier re-

covered a judgment against T. M. Barnett in the city court of Montgomery, at the February term thereof, A. D. 1874, for the sum of six thousand and three $\frac{17}{100}$ dollars, and costs of suit; and whereas at the same court, and at the same term thereof, Alexander Pitman recovered a judgment against Benjamin H. Micou, N. D. Barnett, and said T. M. Barnett for the sum of fifty-three hundred and fifty-three $\frac{85}{100}$ dollars, besides costs of suit;

And whereas executions were duly issued on said judgments
475 by the clerk of said court, and placed in the hands of the undersigned, as sheriff of said county, and made returnable to the July term of said city court, A. D. 1874;

And whereas Henry A. Garrett, as guardian ad litem of Lucy B. Micou, recovered a judgment or decree in the probate court of Tallapoosa County, in said State, of the 24th of February, A. D. 1874, against the said Benjamin H. Micou, T. M. Barnett, and N. D. Barnett, for the sum of eighty-eight thousand and thirty-one $\frac{77}{100}$ dollars, besides costs of suit;

And whereas a decree was rendered by said probate court in favor of Clara E. Boykin and F. S. Boykin, on the 10th day of February, 1874, against said Benjamin H. Micou, T. M. Barnett, and N. D. Barnett, for the sum of eighty-eight thousand three hundred dollars, besides costs of suit;

And whereas executions were duly issued by the judge of said court, on and by virtue of said two last-mentioned decrees, and placed by said judge of probate in the hands of the undersigned, as sheriff as aforesaid, and made returnable to the June term of said court;

And whereas each and all of said executions were returned by
476 the undersigned pursuant to the requirements of the same and without any money having been made on the same;

And whereas alias executions were issued by said judge of probate on said two decrees, and the same placed in the hands of undersigned;

And whereas alias executions were issued on and by virtue of said two judgments in said city court by the clerk thereof, and by him placed in the hand of undersigned as said sheriff; and whereas all of said executions were levied by me, Paul Strobach, sheriff of Montgomery County, on the following described property, to wit, the southeast quarter ($\frac{1}{4}$) of section four; the east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section four (4); the south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of section four (4); also, all of section (9) nine; all in township 15, range 20, situated in said county of Montgomery, as the property of the said T. M. Barnett, and of which said levy the said T. M. Barnett was duly notified on the 4th day of May, A. D. 1874; and after giving notice of
the time and place and terms of sale by advertisement for thirty
477 days in the Advertiser and Mail, a newspaper published in the city of Montgomery and State of Alabama, I sold the said lands pursuant to said levy and advertisement and for the satisfaction of said alias executions, at public auction for cash, at the artesian basin, on the first Monday in August, in said city, to wit, on the 3d day of said month, A. D. 1874, at which sale Alexander Pittman became the purchaser of said land at the sum of five thousand five hundred and forty $\frac{77}{100}$ dollars ($5,540.77), he being the highest and best bidder for the same; which said sum has been paid to me by said Pittman and applied by me to the satisfaction of said executions pro tanto:

Now, therefore, in consideration of the premises, and said sum of five thousand five hundred and forty $\frac{17}{100}$ dollars, I, Paul Strobach, as sheriff of said county of Montgomery, have bargained, sold, and conveyed,

and do by these presents bargain, sell, and convey to said Alexander Pittman all the right, title, and interest and estate of the said T. M. or Thomas M. Barnett in and to the said lands and property herein above described.

478 Witness my hand and seal this the 4th day of August, A. D. 1874.

[SEAL.] PAUL STROBACH, *Sh'ff.*

Witness:
M. D. GRAHAM.

THE STATE OF ALABAMA,
Montgomery County:

I, George Ely, judge of probate court in and for said county and State aforesaid, hereby certify that Paul Strobach, sheriff of Montgomery County, who is known to me, and whose name is signed to the foregoing conveyance, acknowledged before me on this day that, being informed of the contents of said conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this the 4th day of August, A. D. 1874.

GEORGE ELY,
Judge Probate Court, Montgomery County.

OFFICE OF THE JUDGE PROBATE COURT.

THE STATE OF ALABAMA,
County of Montgomery:

I hereby certify that the within deed was filed in this office for record on the 10th day of August, 1874, at 2 o'clock p. m., and duly recorded in book of deeds, page 432, and examined.

GEORGE ELY,
Judge Probate Court, Montgomery County.

479 C.

STATE OF ALABAMA,
Marengo County:

Know all men by these presents that I, Alexander Pittman, for and in consideration of the sum of $3,413\frac{88}{100}$ dollars to me paid by Henry C. Semple, of the city of Montgomery, have remised, released, aliened, assigned, and quitclaimed, and do hereby remise, release, alien, assign, and quitclaim to him the said Semple, his heirs and assigns, in his possession now being, all the following described tracts or parcels of land lying in Montgomery, Alabama, and described in the deed of Paul Strobach, as sheriff of said county, executed to me on the 4th August, 1874, as follows: The southeast quarter of section four; the east half of the southwest quarter of section four; the south half of the northwest quarter of section four; and all of section (9) nine, in range twenty, township fifteen, of said range; to have and to hold to him, his heirs and assigns forever. And in consideration of the premises I covenant with the said Semple to warrant and defend the said lands to

480 him, his heirs and assigns, against the claims of all persons claiming by, through, or under me, but against no other claims what-

ever. In witness whereof I hereto set my hand and seal on this the 22d day of January, A. D. 1877.

[SEAL.] ALEX. PITMAN.

Witnesses:
1. H. B. BARKER.
2. T. B. BETHEA.

THE STATE OF ALABAMA,
Montgomery County:

Probate court.

I, Chas. W. Buckley, judge of the probate court in and for the county and State aforesaid, hereby certify that H. B. Barker, a subscribing witness to the foregoing conveyance, known to me, appeared before me on this day, and being sworn, stated that Alex. Pitman, the grantor in the conveyance, voluntar'y executed the same in his presence and in the presence of the other subscribing witness, on the day the same bears date; that he attested the same in the presence of the grantor and of the other witness, and that such other witness subscribed his name as a witness in his presence.

481 Given under my hand this 8th day of February, A. D. 1877.

C. W. BUCKLEY,
Judge Probate Court, Montgomery County.

Alexander Pitman to Henry C. Semple. Quit-claim deed.

THE STATE OF ALABAMA,
Montgomery County:

OFFICE OF THE JUDGE PROBATE COURT.

I hereby certify that the within deed was filed in this office for record on the 8th day of February, 1877, at 9½ o'clock a. m., and duly recorded in book 8 of deeds, page 508, and examined.

C. W. BUCKLEY,
Judge Probate Court, Montgomery Co.

(C) E.

THE STATE OF ALABAMA,
Montgomery County:

Whereas an execution issued from the office of the judge of probate court of Tallapoosa County, on the 11th day of May, 1874, in favor of Clara E. Boykin and Frank Boykin against Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, on a judgment rendered against them on the 10th day of February, 1874, for the sum of eighty-
482 eight thousand three hundred dollars by the consideration of said court.

And whereas another execution issued from the office of said judge of probate court in favor of Henry A. Garrett, as guardian of Lucy B. Micou, against said B. H. Micou, N. D. Barrett and T. M. Barnett, on a judgment rendered against them on the 24th day of February, 1874, for the sum of eighty-eight thousand and thirty-one $\frac{77}{100}$, by the consideration of said court, commanding me, as sheriff of said county, to levy for the same on the goods & chattels, lands and tenements of said defendant, to make said monies, and which said executions came into my hands

as such sheriff on, to wit, the 13th day of May, 1874, and were then and there levied on sundry lands, lots, and parcels of land, which are endorsed on said fi. fa.

And whereas after the levy of said fi. fa., to wit, on the 3d day of August, 1874, there came into my hands sundry other alias fi. fa., issued by the clerk of the city court of Montgomery on the day last aforesaid, to wit, one in favor of Alexander Pitman against Benjamin H. Micou, N. D. Barnett, and T. M. Barnett, for the sum of five thousand three
483 hundred and fifty-two $\frac{88}{100}$ dollars, on a judgment rendered in said court on, to wit, the 25th day of February, 1874, one in favor of James F. D. Lanier against N. D. Barnett, for the sum of six thousand and three $\frac{17}{100}$ dollars, on a judgment rendered in said court on, to wit, the 21st day of February, 1874, one in favor of said James F. D. Lanier against T. M. Barnett, for the sum of six thousand and three $\frac{17}{100}$ dollars, on a judgment rendered in said court on, to wit, the 21st February, 1874, and one in favor of said James F. D. Lanier against Benj. H. Micou, for the sum of six thousand and three $\frac{17}{100}$ dollars, on a judgment rendered in said city court on, to wit, the 21st day of February, 1874.

And whereas after the levy aforesaid, having given defendants notice thereof at the time of making said levy, and after having given notice of the time and place of sale for thirty days, by publication thereof in the Montgomery Advertiser, a paper published in the city of Montgomery, State and county aforesaid, on Monday, the 3d day of August, 1874, I did expose said lands at public sale at the Artesian Basin, in the city of Montgomery, during the legal hours of sale, and at
484 which said sale Henry C. Semple, he being the highest, best, and last bidder therefor, became the purchaser of the following lots and parcels of lands so levied upon, to wit, section 17, the S. $\frac{1}{2}$, the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, sec. 8; the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, sec. 5, in T. 15, R. 20; the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ & the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of sec. 16, T. 15, R. 20, at the sum of $7,000.00; lots 1 & 2, in square 9, Hanrick's plat, at the sum of $4,000.00; part of lot No. 10, in square No. 14, being 26½ feet by 120, on the southeast corner of Bibb & Commerce streets, at the sum of $10,000.00; lots No. 11, South Market street, and lot No. 11, North Washington street, at the sum of $9,000.00; also became the purchaser of section 6, section 7, the N. $\frac{1}{2}$ & the SE. $\frac{1}{4}$ sec. 18; the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, sec. 5; the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, sec. 8; the N. $\frac{1}{2}$ of sec. 5; the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, sec. 4, in T. 15, R. 20; the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, in sec. 32, T. 16, R. 20; the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$, sec. 31, in T. 16, R. 20, at the sum of $20,000.00; also lots 1 & 2, South Adams street, & lot No. 11, East Court street, at the sum of $15,000.00; also the W. $\frac{1}{2}$ & NE. $\frac{1}{4}$ & the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, sec. 15; the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, sec. 4; the NE. $\frac{1}{4}$
485 & the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, sec. 10; the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, sec. 16, in T. 15, R. 20, at the sum of $8,000.00; also part of lot 5, square 8, East Alabama, 80 feet on Commerce street by 100 feet deep, at the sum of $18,000.00; also part of lots Nos. 4 & 5, in square No. 10, East Alabama, measuring 80 feet on Bibb street by 100 feet on Molton street, at the sum of $3,000.00; also the south 44 feet of lot No. 1, whole of lot No. 2, in square No. 8, East Alabama, at the sum of $10,000.00; and the undivided one-fourth (¼) interest of said T. M. Barnett in part of lots No. 9 & 10, in square No. 7, East Alabama, measuring 130 feet on Tallapoosa street, at the sum of twenty-five hundred (2,500.00) dollars, amounting in all to the sum of $106,500.00, all of above mentioned lots being in the city of Montgomery:

Now, therefore, know all men, that for and in consideration of the premises and of the payment of the said sum of one hundred and six

thousand five hundred dollars to me in hand paid, the receipt of which is hereby acknowledged, I, as sheriff of said county of Montgomery, do hereby sell, transfer, and convey unto the said Henry C. Semple, his heirs and assigns, all the right, title, & interest which the said
486 Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, or either of them, had and held in and to the lands and lots of lands herein described and sold as aforesaid to said Henry C. Semple. To have and to hold the aforegranted and sold premises to said Henry C. Semple, his heirs and assigns forever.

In witness whereof I, Paul Strobach, sheriff of said county, do hereunto set my hand and seal this the 10th day of August, A. D. 1874.

[L. S.] PAUL STROBACH,
Sheriff, Montgomery County.

THE STATE OF ALABAMA,
Montgomery County:

I, George Ely, judge of the probate court of said county, hereby certify that Paul Strobach, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me, on this day, that being informed of the contents of *of* the conveyance, he executed the same voluntarily, on the day the same bears date. Given under my hand this the 7 day of November, A. D. 1874.

GEORGE ELY,
Judge Probate Court, Montgomery County.

487 Benj. H. Micou, Nicholas D. Barnett, Thomas M. Barnett, by Paul Strobach, sheriff. Deed to Henry C. Semple.

THE STATE OF ALABAMA,
County of Montgomery:

OFFICE OF THE JUDGE PROBATE COURT.

I hereby certify that the within deed was filed in this office for record on the 7th day of Nov'r, 1874, at 1 o'clock p. m., and duly recorded in book 6 of deeds, page 477, and examined.

GEORGE ELY,
Judge Probate Court, Montgomery County.

D.

E. Barker, sheriff. Deed to Henry C. Semple.

THE STATE OF ALABAMA,
Elmore County:

Whereas two certain executions issued from the probate court of Tallapoosa County, one in favor of Clara E. Boykin and Frank S. Boykin against Benjamin H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, on a judgment rendered in said court, on the 10th day of Feb'ry, A. D. 1874, for the sum of eighty-eight thousand three hundred dollars ($88,300.00), besides costs of suit, and one in favor of Henry A.
488 Garrett, guardian ad litem, against Benj. H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, on a judgment rendered in said court of probate, on the 24th day of Feb'y, A. D. 1874, for the sum of eighty-eight thousand and thirty-one $\frac{77}{100}$ dollars (88,031.77.), besides costs of suit, which said executions came into my hands, as sheriff of

said county of Elmore, on the 20th day of December, A. D. 1874, to execute and return according to law, by virtue of which said executions above recited I did, as sheriff aforesaid, levy upon the following as the property of said Benj. H. Micou, to wit: A certain lot or tract of land, enclosed and used as a residence by B. H. Micou, in the town of Tallassee, designated on John M. Gray's map of the town of Tallassee, made April 18th, 1853, as block No. 2.

Also the following, as the property of Nicholas D. Barnett, to wit: Lot and residence of said N. D. Barnett, in the town of Tallassee, bounded on the east by Ann street, on the north by Phillip street, south by King street, and northwest by T. M. Barnett's lot, being a part of block five (5), according to said John M. Gray's survey of the town
489 of Tallassee. Also the following, as the property of Thomas M. Barnett, to wit: That certain tract of land known as "T. M. Barnett's old place," near Tallassee, beginning at the corner of the centre of street known as extension of Gilmer street, according as said street is laid down on a map of the town of Tallassee drawn by John M. Gray, better known as survey of plank road, said corner being twenty-three hundred and twenty-two (2,322) feet west of corner store, in centre of the street, at northwest corner of lot thirty-one (31); thence south thirty degrees (30°), west twenty (20) chains; thence north sixty (60°) degrees, west fifteen (15) chains; thence north thirty (30°) degrees, east twenty (20) chains; thence south sixty (60°) degrees, east along said street on plank road fifteen (15) chains—containing, after deducting street, thirty (30) acres.

Also residence of Thos. M. Barnett, at Tallassee, western part of block No. five (5), commencing at southwest corner of said block, at intersection of King and DuBois streets, running thence northerly on DuBois street three hundred and fifteen (315) feet to Phillips street;
490 thence easterly along Phillips street three hundred and fifteen (315) feet to the land of Nicholas D. Barnett; thence southerly parallel with DuBois street and along N. D. Barnett's land three hundred and fifteen (315) feet to King street; thence along King street three hundred and fifteen (315) feet to place of beginning—according to said John M. Gray's plat of the town of Tallassee.

Also the following, as the property of Thos. M. Barnett, to wit, fractional sections thirty-two (32), twenty-eight (28), twenty-nine (29), thirty-one (31), twenty (20), and thirty (30), all in township (18) eighteen, range eighteen (18), all lying in the fork of the Tallapoosa and Coosa Rivers, containing nine hundred and thirty-seven acres, more or less.

Also northwest quarter of section thirty-three (33), containing one hundred & sixty acres, and part of fractional section thirty-two (32) adjoining said land, containing two hundred and twenty-five (225) acres, all in township eighteen (18), range eighteen (18), known as "river plantation" of T. M. Barnett, said plantation containing in all thirteen hundred and seventy-two acres (1,372). Of which said
491 levies then and there notice was given each of said defendants personally, and the said property so levied on, after having been duly advertized for sale, by giving thirty (30) days' by previous publication of the time, place, and terms of sale in the , a newspaper published at Wetumpka, in Elmore County, and being official journal of said county, and also by posting at the court-house door of said county an advertisement of said sale for thirty days previous, was offered for sale at Wetumpka, in front of the court-house door, in the county of Elmore, between the legal hours of sale on Monday, the 1st day of Feb'y, A. D. 1875; at which said sale Henry C. Semple became

the purchaser of said property so levied on as aforesaid, for the sum of seven thousand eight hundred and fifty ($7,850.00) dollars, he being the highest, best, and last bidder for the same:

Now, therefore, know all men by these presents, that for and in consideration of the premises and of the payment by said Henry C. Semple of the said sum of seven thousand eight hundred & fifty dol-
492 lars, the receipt of which is hereby acknowledged, I do hereby sell, convey, transfer, and set over to the said Henry C. Semple all the legal right, title, interest, and claim which the said Benj. H. Micou, Nicholas D. Barnett, and Thomas M. Barnett, or either of them, had and held in and to any of the foregoing described premises.

In witness whereof I have hereunto set my hand & seal on this the 13th day of March, A. D. 1875.

[SEAL.] E. BARKER,
Sheriff Elmore County.

Attest:
J. A. LANCASTER.
G. W. BENSON.

F.

Henry C. Semple to T. B. Bethea. Mortgage.

Whereas I, Henry C. Semple, am indebted to T. B. Bethea by my promissory note of this date for the sum of thirty-six hundred $\frac{32}{100}$ dollars, payable to him or his order on the 22d January, 1878, which note was given for the purchase-money of the lands in sections 4 and 9,
493 hereinafter described, which was paid for me at my request by T. B. Bethea to Alexander Pittman, from whom I received a deed therefor, under an engagement that I would convey said lands (or lands of same value in section 4, in case of substitution) and also the lands herein and hereby conveyed, as a security for the payment to said Bethea of the money so advanced by him for me to said Pittman:

Now, therefore, in consideration of the premises, I hereby grant, bargain, sell, and convey and assign to T. B. Bethea, his heirs and assigns, all the following described lands lying in the county of Montgomery, Alabama, namely, the southeast quarter of section four, the west half of the southwest quarter of section four, the south half of the northwest quarter of section four, all of section nine (9), the west half and the northeast quarter and the west half of the northwest quarter of section sixteen (16), all in township fifteen, range twenty, (T. 15, R. 20), to have and to hold, to him and his heirs and assigns forever. But upon the trust, nevertheless, that if I shall pay or cause to be paid said note at maturity that then this conveyance shall become void, but
494 if I fail to pay said note, or any part thereof, the said Bethea is hereby authorized and empowered to sell and convey said lands, or such part thereof as may be necessary to pay said note, with all expenses of sale, having advertised the same for auction, at the Artesian Basin, in the city of Montgomery, for cash, by weekly advertisement in some city newspaper, for at least one month before the day of sale, and the sale may be conducted by him in person or by some agent by him appointed, and after deducting the expense of the advertisement and sale and the amount due on said note for principal and interest, he shall pay the balance, if any, to me.

In witness whereof I hereto set my hand and seal on this the 22d day of January, 1877.

[SEAL.] HENRY C. SEMPLE.

THOS. H. REYNOLDS.
LEVI W. LAWLER.

THE STATE OF ALABAMA,
Montgomery County:

Probate court.

I, C. W. Buckley, judge of the probate court in and for the county and State aforesaid, hereby certify that Henry C. Semple, whose name is signed to the foregoing conveyance, known to me, acknowledged before me this day, that being informed of the contests of said , he executed the same voluntarily on the day the same bears date.

495

Given under my hand this 8th day of February, A. D. 1877.

C. W. BUCKLEY,
Judge Probate Court, Montgomery County.

THE STATE OF ALABAMA,
County of Montgomery:

OFFICE OF THE JUDGE PROBATE COURT.

I hereby certify that the within mortgage was filed in this office for record on the 8th day of February, 1877, at 9½ o'clock a. m., and duly recorded in book 28 of mortgages, page 221.

C. W. BUCKLEY,
Judge Probate Court, Montgomery County.

G.

THE STATE OF ALABAMA,
Macon County:

Whereas an execution issued from the probate court of Tallapoosa County against Benjamin Micou, Nicholas D. Barnett, and Thomas M. Barnett, in favor of Clara E. Boykin and Francis S. Boykin, on a judgment rendered in said court, at the February term thereof, A. D. 1874, on the 10th day of Feb'y, for the sum of eighty-eight thousand three hundred ($88,300.00) dollars, besides costs of suit, which said execution came into my hands, as sheriff of said county, on the 16th day of June, 1874, to execute and return according to law;

496

And whereas also divers other executions, issued from the said court, were also placed in my hands against said defendants, Benjamin H. Micou, Nicholas D. Barnett, & Thomas M. Barnett, to execute and return according to law, as will appear by reference to the records of said court, by virtue of which execution above recited, as also the other said executions, I did, as sheriff aforesaid, levy upon the following as the property of said Benjamin H. Micou, to wit: North half all south of Tallapoosa River, section 21, township 17, range 21; all section 28, T. 17, R. 21; SW. ¼ part S. 22, T. 17, R. 21, all except $72\frac{33}{100}$ acres belonging to Howard and Finlay; section 33, T. 17, R. 21, all except 15 acres belonging to old Cliett place; section 32, T. 17, R. 21, all east of Callabee Creek; section 5, T. 17, R. 21; SW. ¼ part section 3, T. 16, R. 21; 4½

acres in NW. ¼ SW. ¼ corner section 16, T. 17, R. 21, lying in Macon County, Alabama; of which said levy then and there notice was
497 given said defendant personally, and the said property so levied on, after having been duly advertised for sale by giving thirty days' previous publication of the time, place, and terms of sale in the Tuskegee News, a newspaper published in Tuskegee, Macon Co., Alabama, and being the official journal of said county, and also by posting at the court-house door of said county an advertisement of said sale for thirty days previous, was offered for sale at Tuskegee, at public auction before the court-house door of said county, in the said town of Tuskegee, between the legal hours of sale, on the first Monday in November, 1874, at which said sale Henry C. Semple became the purchaser of said property so levied on as aforesaid, for the sum of five thousand five hundred and forty-eight dollars, he being the highest, best, and last bidder for same:

Now, therefore, know all men by these presents, that for and in consideration of the premises, and of the payment by said Henry C. Semple of the said sum of $5,548 *dollars*, the receipt of which is hereby acknowledged, I do hereby sell, convey, transfer, and set over to
498 the said Henry C. Semple all the legal right, title, interest, and claim which the said Benjamin H. Micou had and held in and to the foregoing described premises.

In witness whereof I have hereunto set my hand and seal this second day of November, 1874.

[SEAL.]

J. A. GRIMMETT,
Sheriff of Macon County.

THE STATE OF ALABAMA,
Macon County:

I, Benjamin Thompson, judge of probate, hereby certify that James A. Grimmett, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 29th day of March, A. D. 1875.

BENJAMIN THOMPSON,
Judge of Probate.

J. A. Grimmet, sheriff of Macon County, to Henry C. Semple. Sheriff's deed.

THE STATE OF ALABAMA,
Macon County:

499 Filed in the office of the judge probate court this 29th day of March, 1875, at 6 o'clock p. m., and recorded in Book T of deeds, pages 239 & 240.

BENJAMIN THOMPSON,
Judge Probate Court, Macon County.

H.

THE STATE OF ALABAMA,
Macon County:

Whereas an execution issued from the probate court of Tallapoosa County against Benj. H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, in favor of Clara E. Boykin, E. Boykin, and Frank S. Boykin,

on a judgment rendered in said court at the spring term thereof, A. D. 1874, for the sum of ($88,300.00) eight'-eight thousand three hundred $\frac{00}{000}$ dollars, besides costs of suit, which said execution came into my hands as sheriff of said county on the 28th day of December, 1874, to execute and return according to law;

And whereas, also, one other execution issued from the probate court, Tallapoosa Co., was also placed in my hands against said Benj. H. Micou, Thos. M. Barnett, and Nicholas D. Barnett, to execute and return according to law, as will appear by reference to the records of said
500 court, by virtue of which execution above recited, as also the other said executions, I did, as sheriff aforesaid, levy upon the following as the property of said Benj. H. Micou, Thos. M. Barnett, and Nicholas D. Barnett, to wit: All of S. 21, T. 17, R. 21, south of the Tallapoosa River, about 388 $\frac{80}{100}$ acres; all of S. 22, T. 17, R. 21, south of Tallapoosa River and west of Calebee Creek, about 126 acres; all of S. 3, T. 16, R. 21, north of the road to Tuskegee, about 140 acres; all of S. 5, T. 16, R. 21, north of Calebee Creek, about 300 acres; all of which land is lying and being in Macon County, Ala.; of which said levy then and there notice was given said defendant personally; and the said property so levied on, after having been duly advertised for sale, by giving thirty days' previous publication of the time, place, and terms of sale in the Tuskegee News, a newspaper published in Tuskegee, and being the official journal of said county, and also by posting at the court-house door of said county an advertisement of said sale for thirty days previous, was offered for sale at the court-house door in Tuskegee, in the county of Macon, between the legal hours of sale, on the 1st
501 Monday in February, 1875; at which said sale Henry C. Semple, trustee of Clara E. Boykin, became the purchaser of said property so levied on as aforesaid, for the sum of ($2,500.00) twenty-five hundred $\frac{00}{000}$ dollars, he being the highest, best, and last bidder for the same:

Now, therefore, know all men by these presents that for and in consideration of the premises, and of the payment by said Henry C. Semple, trustee of Clara E. Boykin, of the said sum of twenty-five hundred dollars, the receipt of which is hereby acknowledged, I do hereby sell, convey, transfer, and set over to the said Henry C. Semple, trustee of Clara E. Boykin, all the legal right, title, interest, and claim which the said Benj. H. Micou, Thos. M. Barnett, and Nicholas D. Barnett had and held in and to the foregoing described premises.

I' witness whereof I have hereunto set my hand and seal this 15th day of February, 1875.

[SEAL] C. H. FELTS,
Sheriff of Macon County.

THE STATE OF ALABAMA,
Macon County:

I, Benjamin Thompson, judge of probate of Macon Co., hereby
502 certify that C. H. Felts, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this 1st day of March, A. D. 1875.

BENJ. THOMPSON,
Judge of Probate.

C. H. Felts, sheriff of Macon County, to Henry C. Semple, trustee Clara E. Boykin. Sheriff's deed.

THE STATE OF ALABAMA,
Macon County:

Filed in the office of the judge probate court, this 1st day of March, 1875, at 9 o'clock a. m., and recorded in book T of deeds, pages 176 & 177.

BENJAMIN THOMPSON,
Judge Probate Court Macon County.

I.

Tallapoosa Co. probate court.

HENRY A. GARRETT, GUARDIAN AD LITEM,
vs.
BENJAMIN H. MICOU, THOMAS M. BARNETT, Nicholas D. Barnett.

Judgment, $88,031.77; costs, 41.45; interest from 24th day of Feb'ry, 1874.

503 Received in office December 8th, 1874.

JOHN N. MURPHY,
Sheriff Montgomery Co., Ala.

Tallapoosa probate court.

CLARA E. BOYKIN & FRANK S. BOYKIN
vs.
BENJAMIN H. MICOU, THOMAS M. BARNETT, Nicholas D. Barnett.

Judgment, $88,300.00; costs, 38.60; interest from 10th Feb'ry, 1874.
Received in office December 8th, 1874.

JOHN N. MURPHY,
Sheriff Montgomery Co., Alabama.

Levied the above recited fi. fas. on the following described property, to wit: Seven pigs, one red steer, one yellow steer, one black horse mule named Bill, one bay mare mule named Kate, one black horse mule named Roman, one black mare mule named Dove, one mouse-colored mare mule named Sarah, one black horse mule named Stephen, one black horse mule named York, one black mare mule named Mary, one black mare mule named Sarah, one sorrel mare mule named Mat, one bay mare mule named Polly, one sorrel horse mule named Fox, one bay horse mule named Ralleigh, one grey horse mule named Jack, one bay mare mule named Lucy, one dark bay horse mule named John, one light bay horse mule named Jim,
504 one black mare mule named Jane, five wagons and one part of wagon, thirty-three sacks oats, sixty bushels of corn, more or less, one pair scales, one meat knife, two banks of potatoes, two bedsteads, one couch frame, two tables, one lot cotton seed, one gin stand, one lot of cotton seed at Moore's store at Pike Roads, one hundred and twelve plows, some stocked and some not stocked, eleven clevices, one gin band, ten setts wagon gear and one lot of fodder, two sows and eight pigs; the above-described property is on what is known as the Prairie place. Also levied on one lot of cotton seed, one gin stand, one gin band, one lot of fodder, seven hogs, lot of pigs, one cow named Cherry, one calf, one lot of gear and sundries in mill-house; the above-described

property is on what is known as the Wallahatchie place. Also levied on one black horse mule named George, one black mare mule named Queen, one sorrel mare mule named Gin, one sorrel mare mule Kit, one wagon, twenty-seven plows, two hundred bushels of corn, one lot of blacksmith tools, one lot of fodder and hay, one gin band, & one gin stand, on what is known as the Campbell place. Also levied on eight hun-
505 dred bushels of corn, more or less, on Prairie place, and six hundred bushels of corn, more or less, on Wallahatchie place. Also levied on one gray mare mule named Scaldback, one gray mare mule named Chaney, one mouse-colored horse mule named George, one mouse-colored horse mule named Drag, one bay horse mule named Jim, one bay mare named Texas, one sorrel mare mule named Queen, one black mare mule named Milly, one sorrel mare mule named Kit.

December 22nd, 1874, levied upon as the property of Benjamin H. Micou, one of the def'ts. The above-described property, after being duly advertised in the Alabama State Journal, a newspaper published in the city of Montgomery, was sold on Monday, December 28th, 1874, as follows, to wit: The property described as being on the Campbell place was sold to Henry C. Semple, trustee, for the sum of three hundred and sixty-three $\frac{20}{100}$ dollars ($363.20); the property described as being on the Wallahatchie place was sold to Henry C. Semple, trustee, for the sum of two hundred and thirty dollars & twenty-five cents ($230.25); that on the Prairie place was sold to Henry C. Semple, trustee, for the sum of fourteen hundred & fifty-three $\frac{70}{100}$ ($1,453.70).
506 The mules levied upon were not included in the above sales; after having been duly advertised as the law directs, were sold at the Artesian Basin, in the city of Montgomery, on the first Monday in January, 1875, and at said sale Henry C. Semple, trustee, purchased the following named mules at the prices set opposite each, to wit:

One black horse mule named Bill, seventy-five dollars.....	75 00
One bay mare mule named Kate, thirty-five dollars.....	35 00
One black horse mule named Roman, eighty-five dollars....	85 00
One black mare mule named Lizzie, ninety dollars.....	90 00
One mouse-colored mule named Sarah, seventy-four dollars..	74 00
One bl'k horse mule named Stephen, one hundred & fifteen dollars.....	115 00
One black horse mule named York, ninety-five dollars.....	95 00
One black mare mule named Mary, fifty dollars.....	50 00
One black mare mule named Sarah, one hundred dollars....	100 00
One sorrell mare mule named Mat, one hundred dollars.....	100 00
One bay mare mule named Polly, one hundred dollars.....	100 00
One sorrell horse mule named Fox, eighty-seven dollars....	87 00
One bay horse mule named Raleigh, ninety dollars.....	90 00
One gray horse mule named Jack, sixty dollars.....	60 00
One dark bay horse mule named John, sixty dollars.....	60 00
One light bay horse mule named Jim, fifty dollars.....	50 00
One black mare mule named Queen, eighty dollars.....	80 00
One sorrell mare mule named Kit, seventy-two dollars.....	72 00
One gray mare mule named Scaldback, fifty-two dollars....	52 00
One gray mare mule named Chaney, fifty-two dollars.	52 00
507 One bay horse mule named Bill, ninety dollars.....	90 00
One bay mare mule named Texas, fifty-one dollars....	51 00
One black mare mule named Milley, forty-seven dollars....	47 00
One sorrell mare mule named Kit, thirty-two dollars.....	32 00

Also sold to Jas. Fitzpatrick, black mare mule named Lucy, for	55 00
Also sold to Ephraim Bibb, one horse mule named George	24 00
Also sold to John W. Hughes, one mouse-colored mule named Drag	58 00
Also sold to W. F. Ledyard, one sorrell mare mule named Queen	40 00
Also sold Mr. (cash) one sorrell mare mule, Gin	33 00
Total proceeds from sale of mules	$1,952 00
Property sold on Campbell place	$363 20
Property sold on Wallahatchee place	$230 25
Property sold on Prairie place	$1,453 70
Total proceed of sale of personal property of B. H. Micou, one of the def'ts	$3,999 15

Also levied upon the following described property, to wit: Seven head of milch cows, ten head of cows & yearlings, thirty goats, one four-horse wagon, one two-horse wagon, one one-horse spring wagon, one Buckeye reaper and mower, one horse rake, one grain thresher, one grain cleaner of fanning mill, seven pair of plow gears, fifteen
508 double Casey plows, twenty single Carey plows, two double wing Carey plows, eleven double sweeps, twenty-eight single sweeps, four dozen weeding hoes, two spades, six long-handle shovels, thirty single-trees, nine clevises, two two-horse wagons, 1¾ wagon, two six-horse wagons, 1 set of blacksmith tools, one set of plantation carpenter tools, one cotton gin and belt, two corn mills, one corn-sheller, one oat-cutter, two large pots, levied upon as the property of N. D. Barnett, one of the defendants. Also levied on six milch cows, ten yearlings, ten two-horse plows, nineteen single-horse plows, seven two-horse sweeps, eighteen single-horse sweeps, nine double-trees, eighteen single-trees, nineteen p'r of gear, twenty clevises, forty hoes, one harrow, two wagons, one set of blacksmith's tools, one gin and band, one horse mill, one thresher, one wheat fan, one plantation kettle, one large pot, one large oven, ½ doz. scoops, one Fairbanks' scales, and two scythes & blades; levied upon as the property of T. M. Barnett.

The above described property, after being duly advertised, was sold on the 11th day of Jan'y, 1875, to Henry C. Semple, trustee, as follows, to wit:

The property described as on the Barnett home place for	$369 25
That on the Prairie place for	$331 05
509 That on the T. M. Barnett place for	$416 70
Total proceeds of above sale	$1,117 00

Also levied upon the following described property, which, having been duly advertised as the law directs, was sold at the Artesian Basin, in the city of Montgomery, on Jan'y 18th, 1875, to Henry C. Semple, trustee, at prices as follows, to wit:

One sorrell mare mule named Kit, for	$85 00
One mouse-col'd mule named Margaret	85 00
One brown mare mule named Jule	130 00
One bay horse mule named John	85 00
One bay mare mule named Laura	95 00
One bay mare mule named Sal	100 00

	One mule named Raileigh	85 00
	One mule named Henry	95 00
	Celia	80 00
	Mary	95 00
	Taylor	85 00
	Lizzie	125 00
	Puss	85 00
	Wilson	85 00
	Susan	95 00
	Fanney	55 00
	Sallie	100 00
	Sal	90 00
	Dollie	90 00
	Ellen	70 00
510	Pete	105 00
	Mollie	95 00
	Rena	100 00
	Dove	85 00
	Sal	120 00
	Queen	110 00
	Jane	100 00
	Drag	95 00
	Liza	125 00
	Mary	95 00
	Jack	75 00
	Frank	120 00
	Lucy	45 00
	½ interest in jack named Boliver, sold to C. P. Storrs	10 00
	Levied upon as the property of N. D. Barnett	$3,095 00

Also levied upon and sold, at the same time and place, the following described property to Henry C. Semple, trustee, to wit:

	One horse mule named Daniel, for	$60 00
	One horse mule named Dave	85 00
	Jack	85 00
	Kissey	100 00
	Prince	100 00
	Pompey	75 00
	Scott	95 00
	Peggy	75 00
	Jim	95 00
	Sallie	100 00
511	Kit	85 00
	Rube	65 00
	Bill	95 00
	York	75 00
	Buster	70 00
	Jerry	95 00
	Liza	50 00
	Tom	100 00
	Tobe	55 00
	Sue	110 00
	Sold to Rob't Barber black horse mule Frank	85 00
	Sold as property of T. M. Barnett, proceeds of sale	1,755 00

Also levied these fi. fas. on the following described property, to wit: 7,000 pounds fodder, more or less; 1,500 bushels of cotton seed, more or less; 1,000 bushels corn, more or less; levied upon as the property of N. D. Barnett. Also levied upon 7,000 lbs. fodder, more or less; 700 bush. corn, more or less, as the property of T. M. Barnett. The above described property after being duly advertised was sold to H. C. Semple, as trustee, as follows, to wit:

That on the N. D. Barnett plantation for	$1,040 00
That on the T. M. Barnett plantation for	612 50
Total proceeds of the above sale	$1,652 50

512 RECAPITULATION.

Total proceeds of sale of property of B. H. Micou	3,999 15
Total proceeds of sale of the property of N. D. Barnett	4,835 30
Total proceeds of sale of the property of T. M. Barnett	2,784 20
	$11,618 65

The proceeds of the above sales, amounting in the aggregate to the sum of eleven thousand six hundred & eighteen $\frac{65}{100}$, was appropriated as follows:

To sh'ff's commissions, court costs, bailee, & printer's fees.	$511 48
To fi. fa. Henry A. Garrett, guardian ad litem	5,553 58½
To fi. fa. Clara E. Boykin et als	5,553 58½
	$11,618 65

JOHN N. MURPHY,
Sheriff Montgomery County.

Received of John N. Murphy, sheriff, eleven thousand one hundred and seven $\frac{17}{100}$, proceeds of sale herein described.

Montgomery, Jan'y, 1875.

(Signed) HENRY C. SEMPLE,
Pl'ffs' Att'y & Assignee of Judgment.

Published by order of the court this 30th day of May, A. D. 1878.
J. W. DIMMICK, *Clerk.*

513 *Interrogatories to B. H. Micou.*

In the circuit court of the United States, at Montgomery. In equity.

FIRST NATIONAL BANK }
vs.
B. H. MICOU ET ALS. }

Interrogatories propounded to Benjamin H. Micou, who resides at Montgomery, Ala., and who is examined as a witness in behalf of the respondents in said cause.

Int. 1. Are you one of the parties, and are you the B. H. Micou mentioned in the proceedings in this cause?

Int. 2. How long before your settlement in the probate court of Tal-

lapoosa County, of your guardianship of Lucy B. Micou and Clara E. Boykin, had you determined upon making such settlement, & whom had you employed to make out your accounts, & what data did you furnish him with in order to make out the same, & how long was that before your failure in business?

Int. 3. After your failure what, if any, other instruction did you give your said attorney about the making out of your accounts as said guardian?

Int. 4. What was the nature of the several estates of the said
514 Lucy & Clara? How divided? Whether joint or several, & how were they managed by you, if whether jointly or separately? What was your pecuniary condition & ability up to the time of your failure?

Int. 5. What, if any, conversation, or agreement, or understanding, did you have with the said Clara E. Boykin and Lucy B. Micou, or either of them, prior to your settlement, or with any person representing or acting for them, or either of them, of or concerning your said settlement?

Int. 6. Was there any agreement or understanding with any person, or by any person, that your accounts were to be made out so as to bring you in debt to them in a larger amount than your real indebtedness was; or that proper items of credit were to be omitted from your account, or improper items of debit inserted?

Int. 7. Did you have any such purpose or design yourself? And if you did, did you communicate the same to your said daughters, or to any person representing them?

515 Int. 8. Who represented you on said settlement, & who your said daughters; and whether or not were your accounts as filed passed and allowed, or were they changed after you had filed them? And if they were changed, state upon whose motion; and state if you had anything to do with the making of such motion or motions, or had any knowledge that the same was or were to be made; and to what extent did you resist the same, & why you did not carry your resistance further by appeal or otherwise? Was there any agreement or understanding that your resistance was to be simulated and not real, or that you were not to resist? Was there any combination or confederacy whatever having for its purpose or object the enlargement of your debits to your children as guardian beyond the true and absolute amount due to them according to law?

Int. 9. Did you purchase any of the property sold under the executions issued upon the decrees rendered against you on your settlement as guardian as aforesaid? Did you purchase any lands in Macon
516 County sold under said decrees, who did purchase the same, & who has had the possession & control of the same? Did you have anything to do with the purchase of any of the lands sold under said decrees in Macon County?

Int. 10. Who has had the possession & control of all of your property sold under said decrees since the sales thereof? And if you have conducted any farming operations upon any of the lands, for whom have you conducted them, & upon whose account, & in whose name?

Int. 11. What was the average annual capacity of the lands & slaves & personal property (exclusive of money) of Clara E. Boykin & Lucy B. Micou in your hands, as guardian, for the production of cotton from the time you rec'd the same to the end of the war, & what was the value of cotton after the war? What amount did you have on hand? What was an average bale of cotton worth just after the war, and how many

average bales of cotton would the slaves & lands of said minors
517 have produced each year with provisions sufficient for the farm?
Did not many prudent persons, during the war, produce cotton & store the same away for sale after the war? & does not cotton keep well for an indefinite period? And was the capacity of the slaves & lands of said minors for the production of cotton diminished by the pendency of the war; & if cotton had been cultivated & stored until after the war, would not the result have been more profitable than ordinary farming before the war?

Int. 12. Was there any, & if yea, what, difference between the purchasing power of Confederate money & the purchasing power of its relative value in gold during the war?

Int. 13. In estimating the value of the hires & rents of the slaves & lands of said minors, were the amounts placed higher in your account than you truly & honestly believed them to have been? Or, if you were examined as a witness to fix said values, did you testify truly as to your honest belief as to said values?

Int. 14. State the circumstances under which you transferred to
518 your daughter, Clara E. Boykin, 300 shares of the stock of the Tallassee Factory. Did she take any advice or consult any person about said matter prior to your delivery of the stock to her? Was she aware of the value of said stock at that time, or had you made any settlement of your accounts as her guardian? and did you consult her wishes as to the making or acceptance of said transfer of said stock to her? State fully how & when it was done, and why it was that you did not insist upon said transfer of stock to her as a payment of so much of your indebtedness to her, when you made your settlement in the probate court of your accounts as her guardian.

Int. 15. Do you know any other matter or thing touching the matters in question that may tend to the benefit or advantage of the said defendants? If so, declare the same fully and at large as if you had been particularly interrogated thereto.

ELMORE & GUNTER,
Sol's for Respondents.

519 *Cross-interrogatories to B. H. Micou.*

In the circuit court of the United States for middle district of Alabama.
In equity.

FIRST NATIONAL BANK, &c.,
vs.
B. H. MICOU ET ALS.

The complainant makes following objections to the interrogatories and parts of interrogatories in chief propounded to the witness, Benjamin H. Micou, and assigns following grounds of objections:

To the whole of the third interrogatory in chief, because it is leading, illegal and irrelevant.

To the 6th interrogatory in chief, because it is leading, illegal and irrelevant.

To that part of the 6th interrogatory in chief, beginning "was there any understanding or," &c., and ending "than your real indebtedness was," because it is illegal, leading and irrelevant.

To that part of the 6th interrogatory in chief, beginning "or that proper items of credit," &c., and ending "or improper items of debit inserted," because it is leading, illegal and irrelevant.

To that part of the 8th int'y in chief, beginning, "And state if
520 you had anything to do," &c., and ending "the same was or were to be made larger," because it is leading, illegal and irrelevant.

To that part of the 8th int'y in chief, beginning "was there any agreement," &c., and ending "you were not to resist," because it is leading, illegal and irrelevant.

To that part of the 8th int'y in chief, beginning "was there any combination," &c., and ending, "due them accordino to law," because it is leading, illegal, and irrelevant.

To that part of the 9th int'y in chief, beginning, "Did you have anything, &c.," and ending "decrees in Macon County," because it is leading, illegal and irrelevant.

To the whole of the 11th interrogatory in chief, because it is leading, illegal and irrelevant.

To that part of the 11th int'y in chief, beginning, "What was the average," &c., and ending "to the end of the war," because it is illegal, leading and irrelevant.

To that part of the said 11th int'y, reading, "What was the value of cotton after the war," because it is illegal and irrelevant.

521 To that part of the said 11th int'y reading, "What amount did you have on hand," because it is illegal and irrelevant.

To that part of said 11th int'y reading, "What was an average bale of cotton worth just after the war," because it is illegal and irrelevant.

To that part of said 11th int'y beginning "And how many average," &c., and ending "provisions sufficient for the same," because it is leading, illegal and irrelevant.

To that part of said 11th int'y beginning "Did not many prudent persons," and ending "for sale after the war," because it is leading, illegal and irrelevant.

To that part of said 11th int'y reading "& does not cotton keep well for an indefinite period," because it is illegal and irrelevant.

To that part of said 11th int'y beginning "And was the capacity," and ending "by the pendency of the war," because it is leading, illegal and irrelevant.

To that part of said 11th int'y beginning "& if cotton had been," &c., and ending "ordinary farming before the war," because it is illegal, leading and irrelevant.

522 To that part of the 13th int'y in chief, beginning "In estimating the value," &c., and ending "truly and honestly believed," because it is illegal, leading and irrelevant.

To that part of the said 13th int'y beginning "or if you were examined," &c., & ending "honest belief as to said values," because it is leading, illegal, and irrelevant.

Complainant makes the foregoing objections to the interrogatories and parts of interrogatories in chief, and further objects to any and all answers and parts of answers to the same.

Complainant further objects to that part of the 7th int'y-in-chief, reading, "Did you have any such purpose or design yourself?" and to all answers and parts of answers thereto, because it is leading, illegal, & irrelevant.

And to that part of said 7th int'y beginning "and if you did," &c., and ending, "any person representing them," and to all answers and parts of answers thereto, because it is leading, illegal, and irrelevant.

Subject to the foregoing objections, complainant propounds the following cross-interrogatories to witness:

523 Cross-interrogatory 1. If you speak of any data furnished by

you to your attorney, in order to make out your accounts as guardian. state whether said data, so furnished, were in writing; and, if so, attach the same to your answers. Did you furnish said data for the settlement of your accounts as guardian of both the said Clara E. Boykin and Lucy B. Micou? At what time was this, and how old was the said Clara E. Boykin at that time?

Cross-interrogatory 2. Was there nothing said by you to either the said Clara E. Boykin or Lucy B. Micou, or any other person, except to your attorney, concerning or relating to a settlement of your accounts as guardian, at any time before said settlements were made? At the time you furnished said data to your attorney how old was the said Lucy B. Micou? At that time what was the amount of your individual indebtedness, the amount of the indebtedness of Barnett, Micou & Co., and for what amount were Barnett, Micou & Co. liable for the Tallassee Manufacturing Company, No. 1, either as surety, drawer, acceptor,
524 or endorser? State the aggregate amount in each case.

Cross-interrogatory 3d. Was not the first meeting of the creditors and stockholders of the Tallassee Manufacturing Company, No. 1, held about January 5th, 1874? If not, at what time was it held? Was not that meeting called between the middle and last of December, 1873, and at what time in December? At what date do you fix your failure? Did it not first become known or understood about the time said meeting of creditors and stockholders was called? If known previously, state some of the persons to whom known, and how long previously it was known to such persons. At what time did your failure become known to the said Frank S. Boykin, Clara E. Boykin, and Lucy B. Micou, and to either of them?

Cross-interrogatory 4th. At what time did you first make application to have said Lucy B. Micou relieved from the disabilities of nonage? Did she know of your intention to make such application; and, if not,
525 when did she first learn that such application had been made? Who employed counsel for that purpose, and what counsel was employed? Were you not the witness, and the only witness, examined before the chancellor on the hearing of said application? Why was it that you made application at the time you did to have her said disabilities removed? State fully and particularly the reasons for so doing. Did you at that time contemplate insolvency, or have any apprehensions of failure?

Cross-interrogatory 5th. Why were your accounts as guardian of said Lucy B. Micou brought to a final settlement before said application to relieve her from the disabilities of nonage was acted upon by the chancellor, and before she was twenty-one years of age, and without the appointment of another guardian? State the reasons fully and particularly. Why was it that the final settlement of your accounts as guardian of said Clara E. Boykin and Lucy B. Micou were pressed and made so soon after your failure became known? State the reasons fully
526 and particularly. When did the said Lucy B. Micou become twenty-one years old?

Cross-interrogatory 6th. How long was it that you arrived at Dadeville in Tallapoosa County, before the day set for making your final settlement as guardian of said Clara E. Boykin? Who went to Dadeville with you at that time? How long after you arrived at Dadeville before any of the papers connected with your guardianship were examined or looked into, either by yourself, your attorney, or the attorney of your said wards? Were any of said papers carried from the office of the judge of probate to any other place? If yea, to what place

and by whom were they carried? Were said papers examined by your attorney and the attorney of your wards separately or together or both?

Cross-interrogatory 7th. If you say your account as filed by you was changed, state in what respects it was changed. When did you first hear it said or spoken of, that objections would be made to your account as filed by you, and whom did you first hear speak of it? Had
527 Mr. Fitzpatrick seen the account as filed by you before he went to Dadeville? Had any one else besides you and your attorney seen said account before said settlement? If so, who were they? and when and where did they see it? When and from whom did you first learn that any objections whatever would be made to your account as filed by you? Was any bill of exceptions taken by you or your attorney on account of the adverse rulings of the court? If not, why was not one taken when the amount involved was so large?

Cross-interrogatory 8th. If you say you have conducted any farming operations upon any of the lands sold under the said decrees, then state upon what lands. Did you not superintend and manage the farming operations on the Shorter place in Macon County in 1875? Have you not also conducted and managed the farming operations on the plantations in Montgomery County, which were sold as your property under said decrees? By whom have the rents for the Commercial Hall
528 and Dexter House property been collected from the tenants themselves? Were the portions of said rents coming to the said Lucy B. Micou paid into her hands directly and actually by the person who collected said rents from the tenants, or to some other and what person for her? Where has the said Lucy B. Micou been residing since 1873? In whose family?

Cross-interrogatory 9th. When you fixed the values of the hires of the slaves on your said final settlement, state how you did it. Did you do so taking one by one, or did you take them in families? Taking the average during the years for which you were charged with their hires, how many of the slaves of said Clara E. Boykin and Lucy B. Micou were men? how many were women, and how many were children? Give the ages of the oldest and the youngest. Now append to your answers a statement of the names of said slaves and their ages as they were in 1860. Set opposite to each one the value of the hire of such slave for that year. Now append a similar statement for the year 1863. Have you done so for each of said years, and have you given a
529 correct statement of the names of all the slaves young and old? If not, why have you not? Is not your recollection of them as good now as it was in February, 1874? How did you arrive at the value in good money of the hire of slaves during the war? Do you not know that during the war or the greater time of its continuance slaves could not have been hired for any kind of currency other than Confederate currency? Do you not know that the value of the hire of slaves during the war was seriously affected by the fact that numbers of slaves were brought by refugees to Alabama, and other circumstances incidental to the war? Do you not know that many of these refugees were willing and anxious to let their slaves out on terms that they should be taken care of, fed and clothed, and taxes and physicians' bills paid? Were not owners of slaves during the war liable to be called upon and were called upon to send negro men to work upon fortifications at Mobile and elsewhere and do like work? Were not the slaves of
530 the said Clara E. Boykin and Lucy B. Micou kept and worked on the plantation previously purchased by you for them?

Cross-interrogatory 10th. How many mules did said Clara E. Boykin

and Lucy B. Micou own in 1859? How and from what sources did they obtain said mules? Were any of them purchased by you for them? If yea, how many? What became of said mules? If any died, state when and how many. If any were taken by any troops, by what troops, when, and how many? Were not said mules used in cultivating the plantation purchased by you for them?

Cross-interrogatory 11th. When you transferred said 300 shares of the stock of the Tallassee factory to said Clara E. Boykin, did you not do so in good faith? Did you not transfer said stock in the summer of 1873 to her name on the books of the company? In the letter to her enclosing the certificate of said 300 shares (a copy of which you will find annexed to her answer to the bill) you say you estimate the amount due her to about the sum of thirty-five thousand dollars; how did
531 you arrive at that amount at that time? How was it, that in less than four months it increased to more than eighty thousand dollars?

Cross-interrogatory 12th. If you state how much cotton you had on hand after the war, then state how, in what manner, and when did you obtain said cotton? Did said cotton belong to you individually or to said Tallassee factory, or to Barnett, Micou & Co., or to the two Barnetts? Or did some belong to one and some to others? If yea, how much to each? Were not about 1,300 bales of said cotton in Croft's warehouse in West Point, Georgia? To whom did said cotton belong? Was it obtained by purchase or otherwise, and how? At what places was the balance of said cotton? Was not all of said cotton protected in the name of Eben Kirk, or some of it, and how much? Did not J. C. Bradley and J. J. Seibels or one of them, or some one for them, receive sixty thousand dollars for the protection of said cotton?

Cross-interrogatory 13th. Did you not have some stock or other
532 personal property, which was not sold under said executions, amounting to about $2.000.00 which you let said Lucy B. Micou have? Have you been paid for the same? If so, how and when? At what time did you let her have it? To what plantation was said stock or personal property carried? At what place was said stock or personal property before you let said Lucy B. Micou have it?

Cross-interrogatory 14th. What lands have the said Thomas M. Barnett and Nicholas D. Barnett or either of them, in Mississippi, and in what county in that State are they situate? What real or personal property in the State of Alabama, or any other, and what States have you which was not sold under said executions, or is not under mortgage, and in what county or counties in each of said States is said property?

Cross-interrogatory 15th. On what street in the city of Montgomery is situated the property known as the Dexter House? and state the numbers of the lots. On what street in said city is situated the Commercial hall property, and state the numbers of the lots. What was
533 the value in April, 1874, of your one-third interest in the Grenville place in Elmore County? Who owned the other two-thirds interest?

Cross-interrogatory 16th. Have not your present wife and her children used and enjoyed since the same was sold under said executions, or since 1874, the property which was to be settled upon her and said children by said assignment to Henry C. Semple, executed on the 4th April, 1874, and a copy of which is annexed to his answer to the bill? If they have not used and enjoyed all of it, state what portions they have not so used and enjoyed, and why they have not. Did not your present

wife know of said assignment before it was executed, and did she assent to it?

Cross-interrogatory 17th. Have these interrogatories or any parts thereof been shown or read to you before answering the same? If yea, by whom? Who are present at or during your examination? With whom, if any person, have you conversed on the subject of these interrogatories or your answers to the same, before answering?

534 Cross-interrogatory 18th. Did you not hold and own some notes on Robert T. Ashurst given by him on account of some lands purchased from Robert Thompson, or given for bonds? How many such notes did you hold? State the amount of each note and when payable. What have you done with said notes? If you have transferred said notes to any one, state to whom, and when, and upon consideration. State the agreement, arrangement or transaction by which you transferred them fully and particularly.

CLOPTON, HERBERT AND CHAMBERS,
Sol'c't'rs for Compl't.

Filed Apr. 26, 1878.

J. W. DIMMICK, *Clerk.*

Deposition of B. H. Micou.

Deposition of B. H. Micou, a witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama in a certain cause therein depending between the First National Bank of Montgomery,
535 complainants, and B. H. Micou et als., respondents.

B. H. MICOU, of Montgomery, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first interrogatory he saith: I am B. H. Micou, and one of the parties defendant to this, and am the B. H. Micou mentioned in the proceedings in this cause.

2. To the 2d int'y he saith: I think I had determined on making said settlement over a year before it was made. I know it was a considerable time before, and think it was over a year. I had employed Col. D. T. Blakey attorney to make out my accounts. I furnished him various vouchers and all the data I had relating to the estates in question. This was about seven or eight months before my failure in business.

3. To the 3d int'y he saith: I left the matter of making out my accounts almost entirely with the discretion of my attorney, instructing him generally to be very careful and put in no claims except such as would stand fully at law. To make out a complete and full account.

536 4. To the 4th int'y he saith: The estates of the said Lucy and Clara were both personal and real. The estates were derived by inheritance, first from their mother, then from their grandfather, then from their grandmother. It was derived severally, but was managed by me jointly for them. I believed I was entirely solvent until December, 1873.

5. To the 5th int'y he saith: I never had any agreement or consultation with either of them, or with any party representing them, as to the conduct and arrangement of the settlement.

6. To the 6th int'y he saith: There was no such agreement or understanding.

7. To the 7th int'y he saith: I had no such purpose or design myself.

8. To the 8th int'y he saith: D. T. Blakey represented me, and Mr. Elmore Fitzpatrick, I understood as representing my daughters. I cannot answer positively, as I left the matter of my accounts to my attorney, and don't know whether any were filed and withdrawn, or whether there was only one filing. I had no knowledge of any motions.
537 If any were made they were made at the option of my attorney without any especial direction from me. I was governed entirely by the advice of my attorney. There was no such agreement or understanding. There was none that I know of.

9. To the 9th int'y he saith: I purchased none of such property. I have answered none. I don't know by whom said purchase was made. I had as agent of Clara E. Boykin, F. S. Boykin, and Lucy B. Micou, the management of the plantation in Macon County for two year', 1874 and 1875. I had nothing whatever to do with said purchase.

10. To the 10th int'y he saith: I had the management of the Macon County property for two years as stated, and I have had the management of my residence in Montgomery, and the residence at Tallassee, and have had the management of my life interest in my plantation in Montgomery County, of the latter as agent for Lucy B. Micou. I conducted farming operation' for two years on the Shorter plantation in Macon County, for two years as stated, as agent for and on ac-
538 count of Clara E. Boykin, F. S. Boykin, and Lucy B. Micou. I have had the management and conduct of the plantation in Montgomery County near Pike Road station near the M. & E. R. R. for the year 1874 on my own account; for the year 1875, '76, and '77, to the present time, as agent for Lucy B. Micou and on her account.

11. To the 11th int'y he saith: I suppose a fair annual production would be about one hundred and fifty bales of cotton. Cotton, after the war, was worth ten cents to fifty cents a pound. I answer, as guardian, I had in the neighborhood of one hundred bales at the close of the war, having sold several crops during the war. There was a great variation in the value of cotton just after the war. In the course of three months cotton changed from fifty dollars a bale to two hundred and fifty dollars a bale. As I have stated, they would have produced about one hundred and fifty bales. I suppose there were some persons who did so, and cotton keeps well for an indefinite period. There
539 were some circumstances connected with the war which were calculated to diminish production. The result would, I think, have been more profitable.

12. To the 12th int'y he saith: My opinion is that gold was more available as a purchasing power during the war than Confederate money, and that many purchases could be made with gold during the war that could not be made with Confederate money.

13. To the 13th int'y he saith: The amounts were not placed higher. I testified truly as to my honest belief as to said values.

14. To the 14th int'y he saith: The transfer was made, either the day before or the day of her marriage, and was given to her by me as her marriage portion, as a part of her dues, and as part of her estate, without previous consultation with her or any one else about the subject. She consulted no one that I know of. My belief is that she did not. I don't believe she was aware of the value of the stock, and I had made no settlement as her guardian. I did not consult her on
540 the subject at all. I simply had the certificate of stock transferred from my name to the name of Clara E. Micou on the transfer books of the Tallassee M'f'g Company, and inclosed the same in a

recollect whether I was the only witness or not. I made the application because her sister had arrived at twenty-one years of age, and wished to have a settlement with both at the same time. No, I did not.

5. X. To the 5th cross-int'y he saith: I was governed by the advice of my attorney in the entire matter of settlement as to what was best and proper to be done, and had no particular reasons of my own, except to do what was lawful and right. This matter of settlement was
544 in process before my failure, and I desired my attorney to close the matter out as early as possible. Lucy B. Micou became twenty-one years old in October, 1874, I think.

6. X. To the 6th cross-int'y he saith: My recollection is that I arrived there the evening before. My attorney, D. T. Blakey, and I think Mr. Elmore Fitzpatrick. I think it was the morning after my arrival in Dadeville. During the recess of the court some of the papers were carried by the attorneys to the law office of Messrs. Oliver for the purpose of making some calculations directed by the court to be made. I think the papers were examined separately, and by both of the attorneys.

7. X. To the seventh cross-int'y he saith: I previously stated that my attorney had entire charge of making out accounts, and don't know whether any changes were made or not. I never heard any one speak of it except when the objections were made at the time of the court by the opposite attorney. I do not know whether he had seen the account. I had no consultation with Mr. Fitzpatrick at all. I
545 have no knowledge *that* any other person having seen the account. I never received any notice of any objections to be made, except such as were made during the process of court. I do not know whether there was or not. I do not know why.

8. X. To the cross-int'y he saith: I have conducted farming operations on the Shorter place in Macon County, in the year 1875. I have made a mistake in saying that I had conducted the Shorter place for the years 1874 and 1875. For the year 1874 it was conducted by J. W. Walker, under an agreement entered into with me two years before. I conducted the operation of the Prairie place, in Montgomery County, in 1874, on my own account, for the years 1875, '76, and '77, up to the present time. Farming operations have been conducted by me as agent for Lucy B. Micou on the latter place. I have so stated. I have stated my connection with the Montgomery County plantation. I believe they have been collected by Messrs. Moses Bros. The rents were paid to her directly by Messrs. Moses Bros. She has been residing in my family.

546 9. To the 9th cross-int'y he saith: I had a list of the slaves before me, and took them one by one, and estimated, to the best of my judgment and belief, the rate of hire for each one separately, according to his or her capacity and value as laborers. I have not a list in my possession of these slaves; the list is at the court-house in Dadeville, and cannot answer the question intelligently and satisfactorily to myself without I had such list before me. From the reason just stated, I cannot do that on this examination. It is impossible for me to answer this question for the reason stated in my previous answer. *It is impossible for me to answer this question for the reasons stated in my previous answer.* I have not done so for the reasons that I did not have a correct list before me, and the time has been too great for me to depend on my recollection. No; my recollection is not so good. I had that before me to assist my recollection, which I have not got now. I
547 estimated the matter according to my best judgment at the time

note, stating that I considered it good property, and paid it to her as a part of her estate in my hands as guardian. This was done without any previous consultation with her. I was informed that the payment of this stock, under all the circumstances, was not a legal and bona fide payment, and therefore did not insist upon its being so considered.

15. To the 15th int'y he saith: After a few moments' reflection, I do not call to mind anything further that I could state to the benefit or interest of the defendants in this action.

Answer to cross-interrogatories propounded by complainants:

1 X. To the first cross-int'y he saith: A portion of the data furnished by me to my attorney was in writing. What portion I cannot say. The written data, so furnished by me, was handed to my attor-
541 ney, and is not now in my possession, and has not been returned to me. The data furnished had reference to both accounts. I think my daughter Clara became twenty-one year' of age in the month of March, 1873. About the time of her coming of age, it was my desire to have a settlement with herself and her younger sister, who was not then of age. I think at that time, in March, 1873, there was a law by which a minor over a certain age could, by application to the chancery court, be made of age. At that time I consulted with my attorney, D. T. Blakey, about a settlement of both estates, and gave him the data in my possession, with instructions to take measures to get my youngest daughter made of age, and to make up the accounts for a settlement with both.

2 X. To the 2d cross-int'y he saith: I gave both the general information that I was endeavoring to settle their accounts. I had no particular consultation as to the terms of settlement. Lucy B. Micou was about nineteen years and six months of age. As near as I can recollect, it was about twenty thousand dollars. The amount of the
542 indebtedness of Barnett, Micou & Co. was about one hundred thousand dollars. I cannot state the amount on which they were liable as endorser separate from the amount on which they were liable as drawer and acceptor, but the aggregate amount of liability as drawer sometimes, acceptor sometimes, and endorser sometimes, amounted to about three hundred thousand dollars.

3. To the 3d cross-int'y he saith: I believe it was held about that time. It was called, I think, about the last week in December. I cannot fix the exact date. I fix my failure about the time of the call for the meetings of the creditors, the last week in December, 1873. It became known about that time. It was known about the time of the call for the meeting of creditors at a consultation held by me with Messrs. David Clopton, James A. Farley, J. W. Durr, and J. Rhodes Brown, all of whom were directors in the Tallassee Mf'g Company. This was not a regular meeting of the directors, but it was a meeting at my request, for a consultation for the interests of the company. I cannot
543 state exactly the time, but it was generally known in the community about the last of December, 1873.

4. X. To the 4th cross-int'y he saith: I started to Wetumpka about the first meeting of the chancery court, the first of June, 1873, but was met on the way by the chancellor, who had adjourned court; whether a formal application had been made previously by my attorney I cannot say. I told her, as near as I can recollect, in March, 1873, that I would make such application as soon as the court met. I employed D. T. Blakey as counsel for that purpose. I was a witness, but do not

from data collected from recollection of prices and events during the war. I know that Confederate currency was the only currency in circulation, and was used in payment of wages and all other current expenses, and gold and silver treated as a special commodity. As the war progressed, in the latter part the influx of refugee slaves had some effect on the price of hire. I knew of no offer during the war by refugees of that kind. I was hiring some refugee negroes during that time for the business of Barnett, Micou & Co., and paid the same hire for them as I did for others not refugees. Yes, occasionally; not to any great extent. The slaves were so kept and worked.

10. To the 10th cross-int'y he saith: In 1858 I asked an order of court to purchase land, to keep the slaves and property together, belonging to my children, and purchased land under an order of court, mules, and farming provisions necessary for carrying on the farm, supposing that this order of court gave me power to do so, and think the
548 number of mules was usually twenty-five, or perhaps twenty-seven. All the mules on the place were purchased by me, and supposed at the time to be for them, except about seven or eight. I cannot recollect exactly which that came in as their share of the mules of the estate of their grandfather. Supposing I was authorized by court to carry on the farm on their account, I purchased farming implements, and mules, and everything else necessary to carry on said farm, but on settling the estate it was decided by the court that I had received no authority, except to purchase land, and all charges for purchase of mules, plantation implements, and expenses of carrying the farm, were stricken out by order of court, and I made to account for the hire of the slaves. All the mules were taken by the Federal Army in 1865; said mules were used in cultivating said plantation until 1865.

11. X. To the 11th cross int'y he saith: I did so in good faith. I transferred the stock, to my recollection, in October, 1873, the day or
549 the day before her marriage. It was a simple estimate without having figures on it at all. I don't know of any increase. It was the same in October as it was four months afterwards.

12. X. To the 12th cross-int'y he saith: The cotton stated by me as having on hand after the war was an estimate of the balance unsold out of the crops from this plantation which I had been cultivating as guardian of my children, and it was estimated by me to be about one hundred bales. I had other cotton that belonged to me individually and to Barnett, Micou & Co. to a large amount, but suppose that the answers called for were in reference to my guardianship. I have stated that I estimated that of the cotton held by me about one hundred bales was the proceeds of said plantation. I held, at the close of the war, in various places, about two thousand bales of cotton, about one hundred of which belonged to me as guardian, about one hundred and fifty belonged to me individually, about one hundred and fifty belonged to T. M. Barnett individually, about
550 one hundred and fifty belonged to N. D. Barnett individually. The balance of the two thousand bales belonged to Barnett, Micou & Co., having been purchased by them as an investment during the war. Thirteen hundred bales were in said warehouse; said cotton belonged to Barnett, Micou & Co. It was obtained by purchase from the Central Bank of Alabama. A portion of said cotton was in Texas, a portion on the Ware plantation in Montgomery County, and a portion on Saxon plantation in Montgomery County, a portion at the Tallassee factory, and a portion at each of the plantations of T. M. Barnett, N. D. Barnett, B. H. Micou, and B. H. Micou, guardian. It was all protected in the name of

Eben Kirke, J. J. Seibels, and J. C. Bradley, and the executor of J J. Seibels received sixty thousand dollars for the protection of said cotton.

13 X. To the 13th cross-int'y he saith: No, not that I know of; I never let her have it.

14 X. To the 14th cross int'y he saith: Barnett, Micou & Co. owned a tract of land in Hinds Co., Mississippi, and said tract of
551 land was transferred to pay the debt of Barnett, Micou & Co. to Ferdenand Phinizy, early in 1874, before any decree was rendered against them. I have none that I know of. I know of no property that is not under mortgage or execution which has not been sold under that execution, except a few cows and sheep, which were obtained by me, of J. W. Walker, in settlement of the Shorter place, in the fall of 1874; all other property, personal and real, not subject to mortgage, was sold under execution from the decree of the probate court of Tallapoosa County.

15. To the 15th cross-int'y he saith: The house is situated on Market street, but I do not know the number now. The Commercial Hall property is situated on the corner of Commerce and Bibb street, but can't furnish the number of the lots; according to best judgment, my interest in said property was worth about one hundred dollars. T. M. and N. D. Barnett owned the other two-thirds interest.

16. To the 16th cross-int'y he saith: They have so enjoyed it. So far as I know they have used and enjoyed all that was set aside.
552 There has been no regular assignment in writing that I know of, and no written assent by my wife.

17 X. To the 17th cross-int'y he saith: No, they have not. The commissioners and myself, and a part of the time D. T. Blakey. I have conversed with no one.

18 X. To the 18th cross int'y he saith: Yes, I did so hold and own said notes. I do not recollect, but I think there were three. I can't state it now. I have no data to enable me to state. I handed these notes in as part of my property to Major H. C. Semple, to be credited. I transferred them to H. C. Semple trustee, the value of them to be credited on the decree against me, to be held for my children, Clara E. Boykin, F. S. Boykin, and Lucy B. Micou.

BENJ. H. MICOU.

We, the commissioners in said commission named, do hereby certify that the evidence of the witness Benjamin H. Micou was taken down under oath, and subscribed by him in our presence, on the 27th day of April, 1878, at Montgomery, in the County of Montgomery, State
553 of Alabama, and that we have personal knowledge of said witness, and that we are not of counsel in the cause nor of kin to any of the parties in interest, or in any manner interested in the result thereof.

Witness our hands and seals.

GEO. F. MOORE. [L. S.]
GORDON MACDONALD. [L. S.]

Published by order of the court this 30th day of May, A. D. 1878.

J. W. DIMMICK, *Clerk.*

Interrogatories to F. S. Boykin, Clara E. Boykin, & Lucy B. Micou.

Circuit court of the United States for the middle district of Alabama.
In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET. ALS.

Interrogatories to be propounded to Francis S. Boykin, Clara E. Boykin, and Lucy B. Micou, as witnesses in their own behalf in said cause, as defendants therein, the said witnesses residing in the city and County of Montgomery, in said State of Alabama.

1. Int'y. To each of said witnesses: Before the decrees were
554 rendered in the probate court of Tallapoosa County in favor of Clara E. Boykin and Lucy B. Micou, against Benjamin H. Micou, as guardian of said Clara E. and Lucy B., what promise, assurance, agreement, understanding, or inducement was made or held out by you, to said Benjamin H. Micou, or Francis M. Barnett, or Nicholas D. Barnett, as to any benefit or advantage that should or might accrue to them or either of them, or either of their families, in relation to said decrees, or the amounts for which they might be rendered?

2. Int'y. Whom did you employ as your attorney to make said settlement of said guardianship account and what instructions did you give him in relation thereto?

3. Int'y. Did you execute any instrument in writing to Henry C. Semple with any other and what persons, assigning to him the said decrees upon certain trusts, and is the copy of the same attached to the answer of said Semple in this cause—a correct copy of the same?

4. Int'y. Besides said instrument to said Semple, what other
555 contract, promise, agreement, understanding, assurance or inducement was ever made by you to said Micou or Barnetts, or either of them, or any other person, of any benefit or advantage that should or might accrue to them or either of them, or their families or either of their families, or any member thereof, from any use, management, control or direction of the executions that had been or might be issued on said decrees, and the sale of their property under such executions?

5. Int'y. What consideration did you receive or have been promised that you shall receive, and from whom, other than is expressed in said instrument, for having made the same to said Semple? What is the relation between said Micou and Barnetts, and Clara E. Boykin and Lucy B. Micou? What was the inducement or motive on your part for inserting those clauses in said instrument in relation to the wives and children of said Micou and said Barnetts? At whose suggestion and by whose advice were these clauses inserted therein?

556 6. Int'y. To Clara E. Boykin: When were you married? State the day, month, and year. Was it before or after you were married that you received from Benjamin H. Micou a certificate for 300 shares of stock in the Tallassee Manufacturing Company No. 1, and if before, how long before, and was it before or after your marriage, and if before, how long before it did you sign and give him a receipt for $30,000.00 on account of his indebtedness to you as your guardian?

7. Int'y. There is attached to your answer to the bill of complaint in this cause what purports to be a copy of a letter dated 22d October, 1873, and signed by Benjamin H. Micou. Is said copy a true and cor-

rect copy or not of the original? Who delivered you that original letter, and on what day and whether before or after your marriage?

8. Int'y. What was enclosed in said letter when so delivered to you, or what was delivered to you at the same time the letter was delivered to you, and by whom? On receiving said letter and its enclosure,
557 what did you do? If you say there was a receipt in the letter or a receipt was handed to you with the letter, then say what you did with said receipt; did you sign it? If so, did you give it to any one and to whom, and what did the receipt say or express; for how much money and what account; and did this occur before or after you were married?

9. Int'y. At the time of your marriage, what knowledge did you have of the value of the stock of said manufacturing company? Did you know or have any information that its stock was above or below par value, or worth only fifty cents on the dollar or worth nothing, and why did you take that certificate of stock and sign said receipt?

10. Int'y. How long after you were married was it, before you communicated to your husband, Francis S. Boykin, the facts of said certificate having been given to you by your father and your having given him said receipt? Did you communicate these facts to him? When you told him of these facts, what did he say about it and about
558 the value of said stock and about consulting some attorney in relation to it, and what attorney? Did he afterwards tell you he had consulted Henry C. Semple, and did he tell you what said Semple said? And after he so told you what Semple said, what was determined on between you and your husband in relation to this stock and its transfer to you, and your retaining it as a payment of $30,000.00 to you by your father?

To Francis S. Boykin:

11. Int'y. Did your wife, Clara E. Boykin, tell you of the delivery to her by her father of a certificate of stock in said Tallassee Manufacturing Company of 300 shares, and her giving him a receipt for $30,000.00? If so, how long after your marriage was it she first told you of these facts? What did you say about it when she told you this and about the value of the stock and about retaining the certificate as a payment of $30,000.00?

12. Int'y. Did you consult any attorney, and whom, about this
559 certificate of stock and receipt, and how long after your wife told you of it was it before you consulted this attorney? What opinion or advice did this attorney give you, and what did you afterwards say to Benjamin H. Micou about it and about cancelling or holding for naught this transaction between him and your wife, and what did he tell you, and what agreement did he make with you about it in connection with Thomas M. Barnett and Nicholas D. Barnett as his surities on his bond as guardian aforesaid?

13. Int'y. Did you ever see Thomas M. Barnett and Nicholas D. Barnett about this transaction and your agreement with Micou? If so, what did they say, or do, or agree to about it? If you say that they agreed that the transfer or delivery of the certificate for stock and the receipt for $30,000.00 should be considered as cancelled or held for naught, then state how you and your wife have ever since considered and held the same; whether as cancelled or not, or whether you have considered and held said stock as the property of your wife, and state when these conversations and agreements with Micou and said Bar-

560 netts occurred, and whether before or after the said decrees were rendered in said probate court.

ELMORE & GUNTER,
Sol's for Respondents.

Cross-inty's to F. S. Boykin, Clara E. Boykin, & Lucy B. Micou.

Complainant propounds to the witnesses the following cross-interrogatories:

Cross-interrogatory 1 (to each witness). Did you, or either of you, and said Benjamin H. Micou, have any conversation or conversations on the matter of his final settlements as said guardian before said decrees were rendered? How many such conversations did you have, and at what times? Did he make any exhibit or showing to you, or either of you, before said final settlements were made, or give you or either of you, any information of his accounts or transactions as said guardian, or of the amount of his liability as said guardian to you or either of you? What investigation did you, or either of you, make in order to ascertain how his accounts as said guardian stood?

561 Cross-interrogatory 2d. At what time did you, or either of you, first hear that said B. H. Micou was pecuniarily embarrassed, or insolvent or likely to become insolvent? State the year, month, and day of the month, as nearly as you can, and from whom you first heard it. When did you first hear said B. H. Micou speak of it? Where and in whose family did you reside during the year 1873, and particularly during the months of October, November, and December, of that year? How often during said months did you see the said B. H. Micou? Did you see him daily, or weekly, and how many times each week, or monthly, and how many times each month? When you did not see him daily, state why you did not.

Cross-interrogatory 3d. Who resided during the year 1873, and particularly in the months of October, November, and December of that year, in the house on Goldthwaite street, in the city of Montgomery, erected by said B. H. Micou, and then known as his residence? Who has resided in or occupied said house during each year, from 1874, inclusive, to 1877, inclusive? Where did the family of said B. H. Micou reside in 1873? Where has his family resided since January 1,

562 1874? Were the house and lot of land where his family resided sold under executions issued on said decrees in your favor against said B. H. Micou? If yea, when, and who became the purchaser at said sale?

Cross-interrogatory 4th. (To Lucy B. Micou.) State particularly what property was allotted to you, and what to said Clara E. Boykin, in any division of the property of said B. H. Micou and the two Barnetts which was sold under executions on said decrees against said B. H. Micou. Who has since been in possession of the balance of their property sold under said executions? Who has, since said division, managed the said property thus allotted to you? What superintendency or management of the same has said B. H. Micou had? Who has superintended and managed the plantation in Montgomery County? Has there been any other person acting or employed as overseer on said plantation? What amount have you received as proceeds of said property, and at what times and from whom?

563 Cross-interrogatory 5th. (To same.) At what time did you first learn that a petition had been or was to be filed to relieve you from the disabilities of non-age? From whom did you first learn it,

and what reasons were stated to you for having it done? Who had said petition filed, and who employed and paid the attorney for filing it? Who was that attorney? State fully and particularly what changes have taken place in the control and management of the said property allotted to you since the same was sold by the sheriff. State each and every respect in which any change has taken place.

Cross-interrogatory 6th. (To Frank S. Boykin and Clara E. Boykin.) Why was it that the said Clara E. Boykin did not inform, earlier than you have answered you did, said Frank S. Boykin that your father had transferred to you said three hundred shares of the stock of the Tallassee factory? Where is said certificate of stock now? If you, or either of you, ever parted with it, state when, to whom, and in
564 what way. Has said stock ever been transferred by you on the books of the company? If so, when, and to whom?

Cross-interrogatory 7th. (To Frank S. Boykin.) When was it that you first consulted an attorney about said stock? When was it that you saw the said Nicholas D. and Thomas M. Barnett about said stock? State the year, month, and day of the month, as nearly as you can. Did they know that their agreement to consider the transfer of said stock cancelled would, in effect, fix a liability upon them for $30,000.00, and did they consent to this?

Cross-interrogatory 8. (To all the witnesses.) Have these interrogatories, or any parts of them, been shown to you before answering them? If so, by whom? With whom have you conversed in reference to them before you made your answers? Who are present while making your answers? Who assisted you, in any way, in your answers, or gave you any information by which to make your answers? Have these interrogatories, or any parts of them, been read to you before answer-
565 ing them? If yea, by whom?

CLOPTON, HERBERT & CHAMBERS,
Sol'c't'rs for Compl't.

Filed April 12th, 1878.

J. W. DIMMICK, *Clerk.*

Commission to take deposition.

Commission to take deposition of F. S. Boykin, Clara E. Boykin, & Lucy B. Micou.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To Gordon McDonald, esq., of the city of Montgomery:

Know ye, that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Francis S. Boykin, Clara E. Boykin and Lucy B. Micou, as witnesses in behalf of respondents in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein The First National Bank of Montgomery is complainant and B. H. Micou & others are respondents, on oath to be by
566 you administered, upon interrogatories and cross-interrogatories annexed to this commission, to take and certify the deposition of the witnesses, and return the same to our said circuit court to be holden on the first Monday in May next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of April, A. D. one thousand eight hundred and seventy-eight.

Issued the 12th day of April, 1878.

[SEAL.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Ala.

Directions.

1. If the time and place of executing the commission are not named therein, the commissioners will subpœna the witnesses to appear before them at such time and place as they may appoint and administer the oath to witnesses.

2. Either the commissioner, witness, or some impartial person must reduce the answers of witnesses to writing, as near as may be in the language of the witness.

3. The heading or title of the depositions should be in this form:

"Deposition of A. B., witness, sworn (or affirmed) and examined
567 under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending between C. D., pl'ff, and E. F., def't.

"A. B., of , being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

"1st. To the first interrogatory he saith:

"2nd. To the second interrogatory he saith:

"1st. To the first cross-interrogatory he saith:"

When the deposition is finished it must be subscribed by the witness.

(Witness' name.) A. B.

And certified as follows:

"We, the commissioners (if all act, or I, if one of the commissioners, as the case may be) in said commission named, do hereby certify that the evidence of the witness A. B. was taken down under oath and subscribed by him in our presence, on the day of , 187 , at , in the county of , State of , and that we have personal knowledge of said witness, or (if unacquainted with the witness) that proof has been made before us of the personal identity of said witness, and that we are (or I am) not of counsel in the cause, nor of kin to any of the parties interested therein or in any manner interested in
568 the result thereof.

"Witness our hands and seals (or my hand and seal.)

"G. H. [SEAL.]

"I. K. [SEAL.]

"*Commissioners.*"

4. The commissioners will fold the commission, interrogatories, answers, and any document deposed to by the witness in a packet sealed. They will write their names across the seals and direct it thus:

"C. D. vs. E. F. Deposition of A. B., witness for the pl'ff or def't. To J. W. Dimmick, esq., clerk of the circuit court of the United , middle district of Ala., Montgomery, Ala."

The package may be sent by mail or private conveyance. If sent by mail, on back take receipt of p. m., thus:

"Received this package of G. H., commissioner; to be forwarded by due course of mail.

"Date.

"E. G., *Postmaster.*"

Deposition of F. S. Boykin.

Deposition of Francis S. Boykin, a witness sworn and examined under and by virtue of a commission issued out of the circuit court of
569 the United States for the middle district of Alabama, in a certain cause therein depending between the First National Bank of Montgomery, complainant, and B. H. Micou and others, respondents.

FRANCIS S. BOYKIN, of Montgomery, Alabama, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first int'y he saith: There were none whatever.

2. To the 2d int'y he saith: I employed Major H. C. Semple as my attorney on said settlement. I gave him no special instructions. I never saw the accounts of Mr. Micou as guardian of my wife and knew nothing about the status of said accounts, and merely instructed my attorney to have a settlement made for my wife and my sister-in-law.

3. To the 3d int'y he saith: I did execute said instrument together with my wife and her sister, and the copy attached to Major Semple's answer is a correct copy.

4. To the fourth int'y he saith: There was none whatever.

570 5. To the 5th int'y he saith: I received no other consideration. Lucy B. Micou and Clara E. Boykin are sisters; the Barnetts are their uncles; Mr. Micou is their father, their mother having been a sister of the Barnetts. My only motive was to make some provisions for the families of the uncles and father of my wife and her sister. These clauses were inserted by the suggestion and advice of my attorney, Major H. C. Semple, who advised me to make even a much more considerable provision for them than is expressed in said instrument.

11. To the 11th int'y he saith: My wife told me of the delivery of the said shares of stock to her by her father, and of her giving him a receipt for thirty thousand dollars, and I think it was about within a week from my marriage. It was certainly within a week of my marriage. When my wife informed me of said facts, I told her that I did not think the stock was worth a cent. I told my wife when she informed me of these facts that it was a delicate matter, and that I did not like to take any
571 action in the matter until I had consulted a lawyer.

12. To the 12th int'y he saith: I did consult Major H. C. Semple. The yellow fever was prevailing in Montgomery, and I did not come to Montgomery to consult my attorney until about three weeks after my wife informed me of these facts. My attorney told me that he did not think that any court in the world would allow Mr. Micou the stock as a credit on his accounts as guardian of my wife. My attorney directed me to go to Micou and procure a cancellation of the transaction. Mr. Micou, upon my addressing him on this subject, said that he was perfectly willing to cancell the transaction, but that I would have to see the Barnetts, his securities on his bond as guardian of my wife.

13. To the 13th int'y he saith: I did see Mr. Thomas M. and Nicholas D. Barnett about the matter, and they said as honorable men they could not

insist on the stock being considered as a credit, and agreed that the certificate and receipt should be considered as cancelled. Myself
572 and my wife have since always considered the same as cancelled, and when the meeting of the stockholders and creditors of the factory was held, Mr. Durr requested me to be present and represent the thirty thousand dollars of stock. I told him that I would have nothing to do with it, as I did not consider that my wife held any of the stock. These conversations and agreements with the Barnetts and Mr. Micou occurred shortly after my interview with my attorney of which I have spoken. It was a very few days afterwards, and long before said decrees were rendered.

Answer to cross-interrogatories propounded by complainant:

1 X. To the first cross-interrogatory he saith: I never had any conversation with Mr. Micou before said decrees were rendered in reference to his final settlement as said guardian, other than the conversation in reference to the cancellation of said stock. He never said anything to me about said accounts. He never made any exhibit, or showing, or
573 gave any information in reference to his accounts as guardian. I never knew anything of his accounts except as shown in his letter to my wife inclosing the stock. I made no investigation except to employ a lawyer to attend to the settlement of Mr. Micou's guardianship.

2 X. To the 2d cross-int'y he saith: I heard of Mr. Micou's borrowing money at large rates of interest, and of buying meat to sell again to raise money. I was employed at the Western Railroad in Montgomery, and found out there that he was buying large quantities of meat, and made inquiries into it. This was in the fall of 1873; some time in September or October of that year. I cannot specify whom I heard these facts from. I never heard Mr. Micou speak of it til' the day I went to him to get him take back the stock. Mr. Micou then said that he was ruined as well as the factory. This was in November, 1873, but I cannot specify the time more particularly than I have already done. I resided in Montgomery in the year 1873. From the 22d of October,
574 1873, I was at Tallassee until about the 30th of November of the same year. I resided at Tallassee, with Mr. Micou's family at Tallassee.

On or about the 30th of November my wife and myself kept house in Micou's house, in Montgomery, until the summer of the following year. Mr. Micou's family remained at Tallassee. Mr. Micou was very much absorbed in business, and took his meals in his room at the house; I saw him but seldom; I was engaged in business at the Western Railroad, and left the house early in the morning, at daylight, and did not return till about ten or twelve at night. Mr. Micou rarely spoke to his family about matters of business while I was with him. In the early part of the year Mr. Micou resided in said house with his family; in the summer he went with his family to Tallassee. In the latter part of November, 1873, I and my wife kept house in his residence, and Mr. Micou staid there whenever he was in town; my wife's sister Lucy came down early in the summer of 1873, and lived with us until the
575 summer. In the fall of 1874 Mr. Micou came down from Tallassee with his family and kept said house, and I and wife resided with them when in town until November, 1876, when we went to Macon County; his family have resided either at Tallassee or Montgomery since January, 1874. The house and lot was sold in the summer of 1874, and Henry C. Semple became the purchaser.

6. To the 6th int'y he saith: I do not know why my wife did not inform me earlier, except that we were just married; said certificate of stock is in my wife's possession; I told Mr. Micou that he could have it whenever he wanted, and he said he would call for it whenever he could make use of it. The stock has never been transferred on the books of the company by me.

7. X. To the 7th int'y he saith: I consulted an attorney about the middle of November, 1873; I saw the two Barnetts a few days afterwards about said stock; I cannot state the day of the month more particularly; they did know it, and they did consent to it; they
576 said at the time that they hoped to make some use of the stock at the meeting of the creditors of the factory.

8. X. To the 8th cross-int'y he saith: These interrogatories have not been shown to me before answering them. I have not conversed with any one about answering them before answering them. The commissioner and Major Semple are present while making my answers; several persons came in for a short time. No one has assisted me in making my answer. Neither these interrogatories, or any part of them, have been read to me before answering them.

F. S. BOYKIN.

I, the commissioner, in said commission named, hereby certify that the evidence of the witness, Francis S. Boykin, was taken down under oath and subscribed by him in my presence on the 24th day of April, 1878, at Montgomery, in the county of Montgomery, State of Alabama; that I have personal knowledge of said witness, and that I am not of counsel or of kin to any of the parties to this cause, or in any manner interested in the result thereof.

577 Witness my hand and seal.

[L. S.] GORDON McDONALD,
Commissioner.

Deposition of Clara E. Boykin.

Deposition of Clara E. Boykin, witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein pending between the First National Bank of Montgomery, complainants, and Benjamin H. Micou et als., respondents.

CLARA E. BOYKIN, of Montgomery, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first interrogatory she saith: There were none.

2. To the 2d int'y she saith: I employed Major Semple, and I gave him no instructions.

3. Int'y she saith: I executed the said assignment to Major H. C. Semple, assigning to him the decrees, and the copy attached to
578 his said answer is a correct copy, and sets out the persons interested therein.

4. To the 4th int'y she saith: There were none.

5. To the 5th int'y she saith: There was no other consideration. Mr. Micou is my father, and the two Barnetts are my uncles, brothers of my deceased mother, and Lucy Micou is my sister. My motive was a desire to provide for the wives and children of Micou and Barnett. These clauses were inserted by the advice of Major H. C. Semple and on his suggestion.

6. To the 6th int'y she saith: I was married on the 22d day of October, 1873; I received said certificate on the day of my marriage, a few hours before I was married. I signed and gave him such receipt.

7. To the 7th int'y she saith: The letter is a true and correct copy. My father handed me the letter the day of my marriage and before my marriage.

8. To the 8th int'y she saith: There was a certificate of three hundred shares of the Tallassee Manufacturing Company stock enclosed in
579 the letter, also a receipt to be signed by me. This receipt was for thirty thousand dollars. I went to my room and signed it and carried it back to my father. The receipt was on account of his indebtedness to me as my guardian; the whole of this occurred before I was married.

9. To the 9th she saith: I thought that said stock was good. I had no special information as to the value of the stock. My father's letter contained the only information I had on the subject. I took said receipt because I thought the stock was good, and signed the receipt for that reason.

10. To the 10th int'y she saith: I communicated these facts a few days after my marriage—certainly within a week—to my husband. My husband said when I communicated these facts to him that the stock was not worth anything, and that he would consult as an attorney Major H. C. Semple in regard to the matter. He afterwards told me that he had consulted Major Semple, and that Major Semple said that this stock could not be claimed as a payment. Mr. Boykin said that
580 he would see my father and try and get him to take the stock back; to this I agreed, and he informed me afterwards that he, my father, had taken it back.

Cross-interrogatories propounded by complainants:

1. X. To the 1st cross int'y she saith: We had no conversation with my father before the decrees were rendered. He gave me no account of his liability to me, except in the letter mentioned in my answers to the direct interrogatories, and no information in regard thereto. We made no investigations nor took any steps, except by employing a lawyer.

2. X. To the 2d cross int'y she saith: In the latter part of 1873, or in the early part of 1874, before I had any information in regard to my father's likely to become insolvent; I cannot state more particularly, I heard this first from Mr. Boykin. I think it was just about in the month of December, 1873, as I came to the city of Montgomery in that month, and it was about then that I heard it—in the latter part of De-
581 cember. I never heard *of* my father speak of it. I resided with my father's family at Tallassee during 1873, till the month of December of that year, when I came to Montgomery and kept house, at his residence in Montgomery. I saw my father frequently during said months. I saw my father daily, when he was at home, but he was away from home a good deal of the time.

3. X. To the 3d cross-int'y she saith: My father resided in said house up to the month of May, 1873, when he removed his family to Tallassee, and he would be occasionally in Montgomery, although the house was closed, a servant being in charge. In the month of November I commenced keeping house in said house with my husband, and remained until November, 1874. My father has occupied it from November, 1874, up to the present time, except during the summer months, when he resides with his family at Tallassee. The said house and lot was sold

under said decrees, and Major H. C. Semple became the purchaser; the date I do not remember.

6. X. To the 6th cross-int'y 'he saith: I informed him within a
582 week after my marriage, and I thought that was soon enough to talk about business. I have said certificate of stock now. Stock has never been transferred on the books of the company.

8. To the 8th cross-int'y she saith: The interrogatories have not been shown to me before answering them, and I have conversed with no one in reference to them before answering. The commissioner and Major Semple are present with me while making my answers. Except Major Semple producing the letter and paper enquired of, no one assisted me. In most instances the whole interrogatory would be read to me and I would answer it.

CLARA E. BOYKIN.

I, the commissioner in said commission named, hereby certify that the evidence of the witness Clara E. Boykin was taken down under oath and subscribed by her in my presence, on the 15th day of April, 1878, at Montgomery, in the county of Montgomery, State of Alabama. That I have personal knowledge of said witness and that I am not of coun-
sel or of kin to any of the parties to this cause or in any man-
583 ner interested in the result thereof.

Witness my hand and seal this the 15th day of April, 1878.

[L. S.] GORDON MACDONALD.

Deposition of Lucy B. Micou.

Deposition of Lucy B. Micou, witness, sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein depending, between the First National Bank of Montgomery, complainant, and Benjamin H. Micou et als., respondents.

LUCY B. MICOU, of Montgomery, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first interrogatory she saith: I held out no inducement and made no promises, or had any understanding nor gave any assurance.

2. To the 2d int'y she saith: I employed Major H. C. Semple to attend to this settlement, but I gave him no instructions.

3. To the 3d int'y she saith: I executed the said assignment
584 with Frank and Clara Boykin to Major H. C. Semple, and the copy attached to Major Semple's answer is a correct one.

4. To the 4th int'y she saith: There were none whatever.

5. To the 5th int'y she saith: I received no other consideration than the expressed in said assignment. The two Barnetts are my uncles, Mr. Micou is my father, and Mrs. Boykin is my sister. I wished to provide for their families; this was the reason of the clauses in their favor; Major H. C. Semple suggested the way in which this could be done.

Cross-interrogatories propounded by complainant:

1. X. To the first cross int'y she saith: We had no conversations before said decrees were rendered, in reference to my father's accounts as my guardian. I had no discussion with my father on this subject whatever, and never received any information from him. I made no investigation myself, but only employed a lawyer to attend to the whole matter.

585 2. X. To the 2d cross-int'y she saith: About the last of 1873, I

heard of my father's insolvency. It was in the month of December I first heard it, I think from my mother, or some of the family. I do not think I ever heard my father speak of it. I lived with my father's family in Montgomery until the first of May, 1873, and the rest of the year, and the months of October, November, December, in Tallassee. My father spent much of his time in Montgomery during the last-named months, but I always saw him when he was at home. I saw him daily when he was at home. When I did not see him daily it was because he was not at home.

3. X. To the 3d cross-int'y she saith: In the year 1873, until May, my father's residence was in said house in Montgomery; after that, in Tallassee. In October the house was in the charge of servants, and in November and December, and until the next year, in the summer, Mr. & Mrs. Boykin lived in said house. And from the summer of 1874, and to the present time, my father has resided in the house on
586 Goldthwaite street, except in the summer seasons, when he and his family reside at Tallassee. I have heard that said house was sold, and that Major H. C. Semple became the purchaser, but I do not recollect at what time.

4. X. To the 4th cross-int'y she saith: There has been no written division between myself and my sister, but it is understood between us that all of the Shorter place, except five or six hundred acres, is to belong to my sister, Clara Boykin, and this five or six hundred acres, with the Campbell place, is to belong to me. There has been no other agreement for a division. Mr. Moses is in charge of the real estate in the city (except the residence) and rents it out for the benefit of myself and sister. Mr. Storrs has been in possession of the river plantation in Elmore County. Mr. Semple has been cultivating the Tom and the Nick Barnett plantations; Mr. Boykin the Shorter place. My father has been cultivating for me my mother's place, and I have become consid-
587 erably indebted to Mr. Moses on account of the expenses of the last-named place. My father has occupied with his family his old residence in Tallassee, and Mr. Tom Barnett his former residence there; and Mr. Semple has rented out the Nick Barnett residence there, and Mr. Nick Barnett's family have been permitted to occupy his former residence in the city of Montgomery. My father has managed the Montgomery County plantation, which formerly belonged to my mother, for me, and also the Campbell place for me. My father has employed overseers for me. I have received about five or six hundred dollars from Mr. Moses, and not more than two or three hundred from my father. I now speak of cash receipts that came into my hands. The Campbell place is a plantation which was purchased for me and my sister during my minority by my father as our guardian; done under order of court.

X 5. To the fifth cross-int'y she saith: I was of age on the 30th of October, 1874, and I learned of the petition being filed a few
588 months before I came of age; Mr. Boykin informed me that it had been filed. I don't recollect what reasons were given for it. I do not know who had the petition filed, or who paid the attorney, or who the attorney was. No change has taken place in the control and management of the property, but it has been controlled and managed by my father for me. The only change that has taken place is that the business has been conducted in my name and at my responsibility, and that I have become greatly liable in respect to the management thereof. I speak particularly in respect to the plantations.

X 8. To the 8th cross-int'y she saith: None of these interrogatories

have been shown to me before answering them. I have conversed with no one in reference to them. The commissioner, Major Semple, and myself. I have had no other information than the copy of a paper shown to me by Major Semple. The interrogatories, nor a copy of them, have not been read to me before answering them.

LUCY B. MICOU.

589 I, the commissioner in said commission named, hereby certify that the evidence of the witness, Lucy B. Micou, was taken down under oath and subscribed by her in my presence, on the 15th day of April, 1878, at Montgomery, in the county of Montgomery, State of Alabama, and that I have personal knowledge of said witness, and that I am not of counsel or of kin to any of the parties to this suit, or in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GORDON MACDONALD,
Commissioner.

Received and filed this 4th day of May, 1878.
J. W. DIMMICK, *Clerk, &c.*

Published by order of the court this 30th day of May, A. D. 1878.
J. W. DIMMICK, *Clerk.*

590 *Interrogatories to E. J. Fitzpatrick.*

In the circuit court of the United States at Montgomery, Ala.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS.

Interrogatories to be propounded to Elmore J. Fitzpatrick, a material witness for the respondents in said cause, & which interrogatories & answers thereto will be read on the trial of said cause; said witness resides at Montgomery, Alabama:

Int. 1. Do you know the parties; what is your age; what is your business or profession, & how long have you been engaged therein, & at what place; and where do you now reside?

Int. 2. Whether or not were you present upon the settlement of the accounts of Benjamin H. Micou, as guardian of Clara E. Boykin and of Lucy B. Micou, before the probate court of Tallapoosa County? and, if yea, state in what capacity were you present and acting, & if as attorney for any one, state for whom.

Int. 3. If you answer that you represented Clara E. Boykin and Lucy B. Micou, state which of them was then a married woman, &
591 which, if either, or both, were minors, under the age of twenty-one years.

Int. 4. State who represented Benjamin H. Micou on said settlement; whether or not was there any agreement, understanding, or collusion whatever whereby the decrees upon the settlement of the accounts of the said Benjamin H. Micou were to be, or were increased by any improper or illegal items or otherwise made larger against the said Micou than was just, legal, & proper; what, if any, objections were made by any one, & by & for whom, to the accounts as filed by said B. H. Micou for final settlements; were such, or any objections, & what objections to said accounts made by preconcert or collusion with said Benjamin H.

Micou or his attorney or agent, or with any other person, or for the purpose of charging said Micou illegally or improperly for any items or sums; and if not, how came they to be made, & by whom were they made, and at whose instance & for what purpose; and what, if any, motions were made to surcharge the accounts of the said Benjamin H. Micou, and as to what items, & whether or not was there any
592 fraud or collusion, or any agreement or understanding between any one, whereby said motion or motions should be made, or whereby they should not be resisted or resisted imperfectly, or by any means should not be defeated; whether or not were said objections & motions made in good faith; were they made as such motions & objections generally are; was there anything unusual in the way in which they were made, argued, & disposed of; how & to whom were they made; were they argued, & by whom, & before whom; were witnesses, or the records, or both, examined, & for what purpose; and whether or not were the several matters arising on said motions & objections argued by counsel, & by whom, & for whom, & who decided the said matters, & whether or not was the decree or decrees rendered in pursuance of such decision?

Int. 5. On the question of the value of the hires of the negroes of the said Clara & Lucy, who decided what the values were, & whether or not was the decree, or were the decrees, in pursuance of such decision; whether or not were witnesses examined before the court on the
593 amount of the value of such hires, and whether or not there was any agreement or understanding whatever, or any preconcert or collusion whereby said items, or any items, should be conceded, enlarged, or improperly allowed as against said B. H. Micou and in favor of the said Clara & Lucy, or either of them?

Int. 6. By whom were you employed to see to the settlement of said accounts, and in whose behalf; and in conducting said settlements for your clients, or at any time prior thereto, was there any preconcert or collusion with the adverse side, or any suggestion therefrom for your assistance, or any mere pretended or collusive resistance of motions or objections made by you; whether or not was there on your part, or on the part of your clients, or on the part of the adverse party, any want of good faith in the manner & mode of conducting said settlements, or in insisting upon the allowance or disallowance of any item or items of said account, or in inducing or obtaining the decision of the judge of probate thereon; at whose suggestion were the several motions
594 & objections urged by you made; and whether or not was there in said accounts as passed and allowed by the court any, if yea, what, item, which you had reason to believe, or did believe, to be unjust, illegal, or improper?

Int. 7. Give the entire history of the said settlements before the probate court of said county, and your connection therewith, so as to show whether or not there was any fraud or collusion or preconcert between the parties thereto or *or* the attorneys, or any other persons whatever whereby the decrees against said B. H. Micou should be increased illegally or improperly or fraudulently beyond the true amount due upon a fair statement of his accounts. Have you done so?

Int. 8. State any other fact or facts within your knowledge which will be of benefit to the respondents to this cause.

ELMORE & GUNTER,
Sol's for Respondents.

Cross-interrogatories to E. J. Fitzpatrick.

Complainant propounds the following cross-interrogatories to the witness:

595 Cross-interrogatory 1. Were the settlements of B. H. Micou, as guardian of Clara E. Boykin and Lucy B. Micou, made at the same time? If yea, why were the decrees rendered at different times? Did you represent both said Clara E. Boykin and Lucy B. Micou? Did you make more than one visit to Dadeville to attend to said settlements? If yea, at what times?

Cross-interrogatory 2. How long before the day set for said settlement did you arrive at Dadeville? When did you first meet with said Benjamin H. Micou and his attorney? Did you have any interview before going to Dadeville with said Frank S. Boykin, Clara E. Boykin, or Lucy B. Micou, in reference to said business? Did you have any particular information before going to Dadeville touching the matters of said settlement?

Cross-interrogatory 3d. What was first done, after getting to Dadeville, in relation to said settlement? Did you make any examination of the papers or records of said guardianship of said B. H. Micou at any other place than in the court-house; and, if so, what place, and
596 in connection with whom, & who were present? When and where was the matter of charging said B. H. Micou with the hires of negroes and rents of lands first mentioned, and by whom?

Cross-interrogatory 4th. Were the objections to the account of said B. H. Micou made in writing or orally? State particularly what objections were made to said account. What objections or matters were argued? State them specifically as well as you can. What evidence, if any, was offered on behalf of said B. H. Micou in opposition to said objections? What evidence, if any, was offered on behalf of said B. H. Micou in opposition to the motions to surcharge said account? What evidence, if any, was offered on behalf of said B. H. Micou to sustain the account as filed by him?

Cross-interrogatory 5th. Who were the witnesses examined as to the values of the hires of the negroes and rents of lands? Was anything said before their examination in open court as to the amount of these values? If so, when and where? Was anything said before
597 their examination in court in regard to what witnesses would prove the amounts of these values, or by what witnesses you could prove them? By whom were said witnesses called for examination? Were they sworn? How did said witnesses prove the values of the hires of the negroes? Did they prove the value of each negro, or in families or how? Did they prove these values in good currency or in Confederate currency, and then reduce them to good currency? After it was decided to charge said B. H. Micou with said hires and rents, was any postponement or continuance asked by or on behalf of said B H. Micou, with a view to procuring testimony as to such values? Why and how was it that said B. H. Micou and his attorney, alone, were examined? For what currency were negroes hired, and for what kind of currency only could they have been hired during the late war? What circumstances and facts affected the values of the hire of negroes during that time, and how did they affect them?

Cross-interrogatory 6th. As an attorney representing the wards,
598 and without special instructions from them, did you not consider it your duty to procure as large a decree as the evidence authorized, and would you not consider this acting in good faith? On the

contrary, was it not the duty of the said B. H. Micou and his attorney, to produce evidence, if practicable, to reduce the amounts of said values, and to prove the difficulties attending the hiring of negroes during the war, and the facts and circumstances which affected the values of hires during that time?

Cross-interrogatory 7th. What information did you have before going to Dadeville of the transfer by said B. H. Micou to said Clara E. Boykin of three hundred shares of the stock of Tallassee Factory in part payment of his liability to her as guardian? What was said or done about this while in Dadeville? Was this matter brought by said B. H. Micou or his attorney to the attention of the probate court? If yea, in what manner, and what was done about it?

CLOPTON, HERBERT & CHAMBERS,
Sol'c't's for Compl't.

Filed April 12, 1878.

I. W. DIMMICK, *Clerk.*

599 *Commission to take deposition.*

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To Gordon McDonald, esq., of the city of Montgomery:

Know ye, that we, having full faith in your prudence and competency, have appointed you commissioner, and by these presents do authorize you, at such time and place as you may appoint, to call before you and examine Elmore J. Fitzpatrick as witness in behalf of respondents in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein the First National Bank of Montgomery is complainant and B. H. Micou & others are respondents, on oath to be by you administered, upon interrogatories & cross-interrogatories annexed to this commissi on, to take and certify the deposition of the witness, and return the same to our said circuit court, to be holden on the first Monday in May next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-
600 preme Court of the United States, this 12th day of April A. D. one thousand eight hundred and seventy-eight. Issued the 12th day of April, 1878.

[SEAL.] I. W. DIMMICK,
Clerk U. S. Circuit Court Mid. Dist. of Alabama.

Deposition of E. J. Fitzpatrick.

Deposition of E. J. Fitzpatrick, witness, sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein pending between the First National Bank of Montgomery, complainants, and B. H. Micou et als., respondents.

E. J. FITZPATRICK, of Montgomery, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first interrogatory he saith: I am upwards of forty-nine

years of age, am a lawyer by profession, have been practising law about twenty-five years at Montgomery, Alabama, and reside there.

2. To the 2d int'y he saith: I was present at the settlement of the account of B. Micou as guardian of Clara E. Boykin, and was the
601 attorney representing her interest at that settlement. My recollection is that the guardianship of Lucy B. Micou was not settled on the same day, though that account was made out on the same day. I was not present on the day the latter settlement was decreed.

3. To the 3d int'y he saith: I did not and do not know either Clara E. Boykin or Lucy B. Micou, personally, but was informed that the former was a married woman of full age, and the latter a minor at the time of said settlements.

4. To the 4th int'y he saith: On the settlement of Clara E. Boykin, Col. David T. Blakey was the attorney for Benjamin H. Micou. He also made out an account at the same time for the settlement of the guardianship of Lucy B. Micou, which I suppose was the one decreed on by the probate court a few days after. The accounts in both cases embraced, I think, similar, if not exactly the same, items. There was no agreement, no understanding, no collusion of the character inquired about. I, as attorney for Clara E. Boykin, did make objections to the account of the guardian as filed. Such objections were made without any preconcert or collusion
602 with said guardian, or his attorney, or any one for them. I remember distinctly moving to charge said guardian with hire of slaves and rents of land in lieu of the crops, and to disallow his credits for expenses of making said crops and carrying on said plantation. I remember that one other motion was made by me and disallowed by the court, but cannot recall distinctly what it was. I have an impression it was to charge the guardian compound interest, but am not sure. There may have been other motions and objections, but I do not remember that there were.

Both the motions mentioned above were argued by me and counsel for the guardian in good faith, so far as I know or believed. All motions and objections made by me were made of my own accord, without suggestions, understanding, or agreement, or collusion with any one—the guardian, his attorney, or any one else, in his or their interest. Such motions and objections as were made by me were made in good faith and in the usual way, and disposed of in the usual way.
603 They were made to the court, and the two above referred to were argued. I do not remember that Micou made any motions. I examined the records before making the two mentioned, in order to see whether said guardian had been authorized to carry on the plantation. The only witnesses examined, that I remember, were as to the values of hires and rents. The decree rendered was in accordance with the rulings of the court.

5. To the 5th int'y he saith: B. H. Micou, the guardian, and David P. Blakey, his attorney, were the witnesses examined as to the hires and rents. Such examination was made by me, without any agreement, understanding, concert, preconcert, or collusion whatsoever. The court decided the values of the hires and rents on their testimony, and its decree was in accordance with its decision. There was no understanding, agreement, preconcert, or collusion by which any item of charge was increased nor any credit decreased or disallowed.

6. To the 6th int'y he saith: I was employed by H. C. Semple,
604 esq'r., to attend said settlement, in his stead, on behalf of Clara E. Boykin and her husband, Frank Boykin. The answer to the

balance of this interrogatory will be given in my answer to the seventh interrogatory.

7. To the 7th int'y he saith: Major Semple, when he employed me, stated he did so because he had to be absent (on a visit to Washington, to attend the impeachment investigation of Judge Busteed, I think). My recollection is that we talked over the case for a considerable time, two hours or more. He stated to me the general facts, and my recollection is suggested, or it occurred to me from the facts stated, that I should examine into the guardian's authority for carrying on the plantation, with a view to making an election between the profits and the hires and rents. He was anxious to get as large a decree as the law would allow, but was equally anxious not to commit any errors in making charges or in disallowing credits which could be grounds for attacking the decree. There was a race between the creditors of Thomas
605 Barnett, B. H. Micou, and N. D. Barnett, individually and as partners, to get judgments and executions first, and the prime object was to get a first lien on what property there was in sight, as there was thought to be an insufficiency to pay all. Maj. Semple and I agreed that it was better to leave all items that were at all doubtful out of our decree than to risk a reversal and the loss of any lien we might get. The day set for the settlement was just before the February term of the city court of Montgomery, at which we anticipated that there would be judgments rendered against the said parties. With these ideas I went to Dadeville, intending to be careful not to take a decree for any more than would undoubtedly be sustained, in case of an attack. I kept this purpose constantly in mind, and when I left there felt confident that I had accomplished it. I went from Montgomery on the same train with Col. Blakey, Mr. Micou's counsel, and Mr. Micou got on board at Cowles' Station. My intercourse with them was polite, but nothing was said in discussion of our business at Dadeville.
606 They and I knew what we were going for, but we did not talk about the business at all, that I remember. We reached Dadeville in the afternoon, too late to do anything. We went next morning to the office of the probate judge, and I examined the account and the original papers and records in the guardianship, Col. Blakey in the mean time being engaged in looking over the account, and perhaps the other papers and records also.

After satisfying myself that on the record and facts disclosed by it, my clients, Mrs. Boykin and her husband, had a right to elect to ask for hires and rents, I made a motion to do so and made an argument and read several authorities in support of the motion. Col. Blakey replied to my argument as fully, I thought, as any one could, on his side, and with every appearance of good faith and earnestness; so much so that my recollection is that I rejoined and felt by no means certain the court would rule for me, but the court did so rule. I had no wit-
607 nesses, and my recollection is that my opinion was that negro hire and land rents around Dadeville, always were materially lower than in the neighborhood where these hires and rents accrued, and therefore the testimony of persons there would not do justice to my clients. Mr. Micou knew the negroes and the lands, and both he and Col. Blakey had been planters, and I had confidence in the truthfulness of both. I wished to avoid any delay because I wanted an execution and a levy on what property was in sight before some other creditors got ahead of my clients. I therefore examined Messrs. Blakey and Micou, and the court decided the value of the hires and rents on their testimony. I made the other motion mentioned, and, I think, it was argued by both Blakey and my-

self and the court overruled it. I do not remember any other motions or objections.

After the court had ruled on all the qu estions made as to the account, Col. Blakey and myself took it to the law office of the Messrs. Oliver, and there stated it, in accordance with the rulings of the court.

608 My recollection is that we had some discussion and dispute between ourselves, as we were stating it, I claiming and he resisting. No suggestion from him, nor his client, nor any one else was made to me as to how the balance could be increased. I insisted on all that I thought my clients were entitled to, and would not have taken any more if I could have got it. I was anxious to get an execution and a lien and wanted a decree that would stand. I thought it probable that the sureties of the guardian would attack the decree. I was informed before I went there that there was bad feeling between the sureties and Micou. I, of course, knew that, under the circumstances, suspicions of bad faith were very probable. I think Blakey and I, while stating the account, talked of what might be the impressions of the probate judge. I did not know until after the motion to charge hires and rents had been disposed of, what Micou's feelings were, but did ascertain (from Blakey I suppose—certainly not from Micou) before the account was fully stated, that Micou wanted his daughters to have all that they were

609 entitled to, but not that he desired that they should have any more. There was no collusion, concert, preconcert, agreement, nor understanding by which the balance against Micou was illegally or unfairly increased. I have answered this interrogatory as fully as I can.

8. To the 8th int'y he saith: I know no other facts than I have given.

Answers to the cross-interrogatories propounded by complainants:

1. X. To the 1st cross-int'y he saith: I did not represent Lucy B. Micou, according to my recollection; that is, my employment, as I understood it, was to represent Mrs. Boykin. The property of the two in the guardian's hands was joint and belonged in equal shares to each. The settlements were set for different days, that of Lucy's some days after the other. The items of debit and credit, I think, were the same in both, each being entitled to half of the balance on the joint account. I think the account in Lucy's case was made out at the same time as the other.

610 My recollection is that I wrote the form for the decree in her case. The account and decree in her case were written and left there to be acted on when the day set came on. I only went to Dadeville one time.

2. X. To the second cross-int'y he saith: We reached Dadeville late in the afternoon of the day set for the Boykin settlement, or of the day before. Blakey went from Montgomery on the train I did. Micou got aboard that train at Cowles Station, I think. I saw Frank Boykin at the depot on the morning I started, but had no conversation with him beyond receiving a railroad ticket to Opelika, and telling him where and for what I was going, which he seemed to know already. I did not see his wife nor Lucy B. Micou. Maj. Semple had given me some information before I went to Dadeville. The information he gave me was as particular I suppose as he could make. I do not remember all the details he gave me, but I learned from him all I knew up to examining the records.

3. X. To the 3d cross-int'y he saith: The first thing done to

611 wards the settlement was examining the accounts, original papers, minutes and records. I did this in the probate office. The pro-

bate judge, Blakey, Micou, and I were there. I remember no one else being present tho' there may have been others there. I made no examination anywhere else that I remember. The matter of charging hires and rents was first spoken of between me and Maj. Semple at my house in Montgomery, when he employed me. This is my recollection. It was not mentioned anywhere else nor to any one else, until I brought up the matter in the probate judge's office at Dadeville, on the day *of* the settlement was begun, and went to examining the papers and records as above mentioned.

4. X. To the 4th cross-int'y he saith: The motion to charge hires and rents and to disallow expenses of carrying on the plantation, and the other motion mentioned in my direct testimony were the only motions I remember specifically. They were argued. I think they were not in writing. The evidence offered on the motion to charge hires and
612 rents were the original papers and records in the cause. I do not remember that Micou offered any other evidence on that motion, nor do I remember whether he offered any evidence as to other matters or not. My recollection is that the only charges made in the accounts were the result of the ruling on motion for hires and rents and to disallow expenses for carrying on the plantation. I think the guardian was charged with some personal property, mules perhaps, and corn and fodder, and meat, perhaps, used by him in carrying on the plantation, which he had not charged in the original account. Some evidence no doubt was offered as to this, but I don't remember what or by whom offered.

5. X. To the 5th cross-int'y he saith: B. H. Micou and D. T. Blakey were the witnesses as to values of hires and rents. I have no recollection of anything being said before their examination in open court as to the amount of said values, nor as to what witnesses would or could prove said values. If any such things were said it was in the court-
613 room and openly. I had no conversation with either of them about the values of hires and rents or witnesses to prove them, that I remember, and certainly none except openly in the court-room, before the motion to charge hires and rents was made and sustained, and the question of proving said values came up. I called said witnesses for examination. They were sworn, to the best of my recollection. Micou knew the negroes, described each of them and gave his opinion of the value of hires, and Blakey gave his opinion on such value on Micou's description of each negro. I can't recollect whether the hires during the war were proved by them in Confederate money and then reduced to currency or otherwise. My recollection is that no postponement was asked by Micou. The reason that I offered and examined only Micou and Blakey was that I had no other witnesses there who I thought knew the values of hires and rents in the region of country where said hires and rents accrued. My idea was that hires and rents were materially lower about Dadeville than in Montgomery County, where
614 the rents and hires accrued. There was no other person there from Montgomery that I knew of and I wished to get a decree without delay, so as to have an execution and a lien before other judgments were rendered. I thought Micou and Blakey knew the values and testified truthfully. For these reasons I called no other witnesses. Confederate money was the only general currency in Alabama after 1862 to 1865, and so far as I knew hires were contracted for and paid in it. In my opinion negro hire was subject to the same influences that other things were during the war; perhaps the non-production of cotton

reduced it more than other things. In particular localities it may have been further reduced by increased supplies from slaves of refugees.

6 X. To the 6th cross-int'y he saith: Under the circumstances of that settlement, I considered it my duty to get as large a decree as the law would authorize, but I considered that my clients' interest would be best subserved by not taking a decree for any doubtfull matters. If Micou knew or thought he could have reduced the values of hires and rents it was undoubtedly his duty to do so, but I do not think it was his duty to incur the expense and cost of adducing such evidence as this interrogatory mentions, unless he did so know or think, particularly if he thought the values proven were correct. If the values proven were true, it did not matter what were the difficulties or circumstances affecting hires. What I say in answer to this interrogatory as to Micou is matter of opinion. It seems to me the question as to his duty calls for a conclusion of law, and I only give my opinion of the law.

615

7 X. To the 7th cross-int'y he saith: I never heard anything about the three hundred shares of stock in the Tallassee factory until after this suit was commenced.

E. J. FITZPATRICK.

I, the commissioner in said commission named, do hereby certify that the evidence of the witness, Elmore J. Fitzpatrick, was taken down under oath and subscribed by him in my presence on the 18th day of April, 1878, in the city of Montgomery and State of Alabama; that I have personal knowledge of said witness, and that I am not of counsel in the cause, nor of kin to any of the parties interested or in any manner interested in the result thereof.

616

Witness my hand and seal.

[L. S.] GORDON MACDONALD,
Commissioner.

Rec'd & filed April 18th, 1878.

J. W. DIMMICK,
Clerk.

Published by order of the court this 30th day of May, A. D. 1878.

J. W. DIMMICK,
Clerk.

Interrogatories to D. T. Blakey.

In the circuit court of the United States at Montgomery.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS.

Interrogatories propounded to David T. Blakey, who resides at Montgomery, Ala., and who is a material witness for the respondents in said cause, & whose deposition, when taken, will be read on the trial of said cause:

617

Int. 1. Do you know the parties? What is your age & profession, & where do you reside & do business?

Int. 2. Whether or not were you present upon the settlement of the accounts of Benjamin H. Micou, as guardian of Clara E. Boykin and Lucy B. Micou, before the probate court of Tallapoosa County; and, if yea, in what capacity did you act, & for whom, in said matters?

Int. 3. What attorney represented the said Lucy B. Micou and Clara E. Boykin in said settlements? Who made out the accounts of the said guardian for a final settlement as first filed? And if you answer that you did, state whether or not in making out the same any improper or illegal item of debit to the said guardian was inserted in said account or intended to be embraced therein, and whether any just or legal item of credit to the said guardian was omitted therefrom or intended to be omitted therefrom. Was there any preconcert or collusion or agreement or understanding with the adverse interest
618 or opposing side as to the manner of making out said account, or as to any of the items to be embraced therein or omitted therefrom, or as to the making of said settlements?

Int. 4. What objections, if any, to the accounts of said Micou as filed by you were made and by whom & for whom? and what motions were made to change, modify, or enlarge any item or items of said account, and by whom and for whom were such motions made?

Int. 5. How came such objections & motions to be made? Was there any suggestion or assistance given to the party making them by you or the party represented by you? Whether or not were said objections & motions, so far as you know or have reason to believe, made in good faith by the party making the same? And what was the character of the resistance, if any, made thereto? Was the resistance thereto pretended or bona fide? By whom was it made, before whom, & how was it made? Was there argument or not of counsel in said matters before
619 the presiding judge, & who was the presiding judge? And what, if any, influence or influences were used by either side to induce a decision on the part of the judge, and how did said judge decide said motions and objections?

Int. 6. In the matter of settling the value of the rents and hires with which said Micou was finally charged, state what proceedings were had. State whether witnesses were examined before the court & whether the questions were argued pro & con, & whether there was any want of good faith so far as you know on the part of the judge in making the decision which he rendered, or on the part of the witnesses examined in fixing the values, or on the part of the attorneys in conducting the proceedings, or on the part of the parties interested in the final result.

Int. 7. How old was Clara E. Boykin when said settlements were made before the said probate court, & whether or not was she then a married woman, & how old was the said Lucy B. Micou at that time?

Int. 8. State whether or not in the matter of said final settle-
620 ments of said B. H. Micou, as guardian as aforesaid, there was any collusion between the parties or attorneys for any purpose, or any agreement, understanding, or arrangement whereby improper items of debit or credit should be omitted or inserted in the accounts of said Micou, or whereby the decrees against him should in any manner be illegally or improperly enlarged beyond the true and absolute sums due & owing by him, or whereby the opinion or decision of the court upon any item of said account should be made against the interest of one or the other of the parties to said settlements, or in any manner whatever to effect a fraud upon any person or creditor of the said Micou.

Int. 9. Who was the attorney for the said Clara E. Boykin and Lucy B. Micou before and after said settlement? If you had anything to do with the decrees made on said settlement or the executions thereon after said settlements were made, state your entire actings & doings, &

in what character & capacity & for whom did you act & how came you to do so.

621 Int. 10. Whether or not were you examined as a witness in the matter of said settlements as to the value of the rents or hires with which said Micou was charged in his accounts? And were other witnesses examined, and did they, so far as you know, show a competent knowledge & opinion on the matters on which they were examined, & whether or not was their evidence given in good faith?

Int. 11. Have you been a farmer & how long? Were you a farmer in 1858 to 1865, & if yea, in what county? Did you know the plantation & negroes of the said Clara E. Boykin & Lucy B. Micou? Do you know what was the value of the hire of average field hands before the war, & if yea, state it, & what, in your opinion & judgment, was the relative value of the hires of such hands for each year from 1859 & 1860 to & including 1865? That is, at what per centum or proportion on the hires of 1859 & 1860 did such value of hires increase or diminish in good money for the term stated? And what, in your opinion, was the value of the rent of said plantation & hires of said slaves for the year

622 1859 & the years 1860, 1861, 1862, 1863, 1864, & 1865?

Int. 12. What business was said Micou engaged in during the late war, and, if you say in the spinning of thread and weaving of cloth, state whether or not said plantation of said Lucy & Clara is & was not situated so as to have supplied or to have assisted in supplying the factory which said Micou was conducting with provisions & with cotton, and whether or not said plantation & negroes were or could have been used for the purpose aforesaid, & whether profitably or not?

Int. 13. Whether or not is there or was there any of the usual crops cultivated during the war in this country & by said Micou, which did or would keep without material damage or injury for an indefinite period; and, if yea, what is that crop, and state the average price of such crop per pound for the years 1859 & 1860? and state the price at which it could have easily have been sold in 1865, after the close of the war, and state what amount of such crop did said Micou have on hand at the close of the war.

623 Int. 14. Whether or not did prudent farmers or persons during the war store away cotton raised during the war to be sold after it was over? whether or not did said Micou do so?

Int. 15. How was this country supplied with wheat & meat before the war? Was this supply from the west continued after the war commenced, & if not, why not? And was there any new & large demand for provisions created in this country by the war, & if yea, what & how?

Int. 16. What was the result of cutting off the source of supply & the creation of the new demand for provisions; and if you say it was to advance the relative price of provisions & to divert the industry of the country into supplying this new demand, state the effect on the value of the hires of slaves & the value of the rents of plantations in the neighborhood of the plantation of said Clara & Lucy.

Int. 17. What was the purchasing power of confederate money during the war as compared with its relative value by bankers' tables in

624 gold; was it greater or less than its corresponding value in gold?

Int. 18. State all you know about the matter of the transfer of certain stock by B. H. Micou, while guardian of Clara E. Boykin to the said Clara, in part payment of his indebtedness to her, and how came the same not to be credited to the said Micou on his settlement in said probate court; state all you know about this transaction, and state what was the actual & substantial value of said stock at the time said Clara

received & receipted for the same, and the circumstances under which said transfer was made & receipt taken, & what, if any, advice was given to said Micou & by whom as to his right to claim said transfer as a credit.

Int. 19. State any other fact within your knowledge which will be of benefit to the respondents.

ELMORE & GUNTER,
Sols. for Respondents.

Cross-interrogatories to D. T. Blakey.

Cross-interrogatories.

The complainant propounds the following cross interrogatories
625 to the witness, David T. Blakey, witness on behalf of defendants:

Cross-interrogatory 1. At what time did you first make out the account of said B. H. Micou, for final settlement, as such guardian? Was not said account made out upon the basis of charging said Micou with the proceeds of the plantation and negroes, and not with rents and hires? Why did you so make it out? Was there no item of credit to which said Micou was legally entitled omitted from said account, both as first made out and as finally passed by the court? Was there no conversation with the opposing interest or side out of the court as to the manner in which said account should be made out, or as to the items of debit or credit, either before said final settlement was commenced, or whilst it was being made?

Cross-interrogatory 2. Were the objections to said account as made out by you made in writing or orally? Were the motions to change, modify, or enlarge said account made in writing or orally? If in writing were they filed in court?

Cross-interrogatory 3. State in what way and from whom did
626 you obtain your information of the transfer of any stock to Clara E. Boykin by said B. H. Micou? Were you present when it was transferred? Have you stated anything in reference to it from information from others, and which you did not know personally? If yea, what? Was the fact of the transfer of said stock brought to the attention of said probate court in any way on said final settlement? Suppos you had been asked on the day said stock was transferred what its value was at that time, what would have been your answer as to its value, and why would you have so answered? Was not the Tallassee Manufacturing Company No. 1, considered solvent and profitable at that time?

Cross-interrogatory 4th. If you say you were examined as a witness in the matters of rents and hires, were you sworn; and, if so, by whom? What other witness or witnesses were examined? When you ascertained that said Micou was to be charged with rents and hires, was any application made to postpone the settlement for the purpose of getting witnesses as to the value of such rents and hires? If not, why
627 not? In what way did the witnesses ascertain or fix the amount of said rents and hires for each year?

Cross-interrogatory 5th. How many of the negroes of said Clara E. Boykin and Lucy B. Micou were field hands? How many of them were men and how many women? How many of them were children? State these facts as to each year, for which you estimated their hires. Where was said plantation situated? In what county? How far from Tallas-

see where said factory was located was said plantation, both by wagon road and railroad?

Cross-interrogatory 6. Were you not the attorney who filed the petition in the chancery court at Wetumpka to relieve the said Lucy B. Micou of the disabilities of nonage? Who employed or retained you to file said petition? Who was the witness, and the only witness examined on the hearing of said petition before the chancery court?

Cross-interrogatory 7th. If you you say B. H. Micou was engaged in spinning thread and weaving cloth during the late war, then
628 state if he was not so engaged as president of the Tallassee manufacturing Company No. 1?

Cross-interrogatory 8. Did not Confederate treasury notes constantly depreciate in value during the late war? Were they not the only currency? If any other, state what other. To what extent did they depreciate? Were not all transactions made with reference to said currency? Did you not appear & represent the defendants or some of them on the examination of witnesses for complain't before Geo. F. Moore as commissioner?

CLOPTON, HERBERT & CHAMBERS,
Sol'ct'rs for Compl't.

Filed the 12th April, 1878.

I. W. DIMMICK, *Clerk.*

Commission to take deposition.

UNITED STATES OF AMERICA:

Circuit court of the United States for the middle district of Alabama.

To Gordon McDonald, esq., of the city of Montgomery:

Know ye, that we, having full faith in your prudence and competency, have appointed you commissioner and by these presents
629 do authorize you at such time and place as you may appoint, to call before you and examine David T. Blakey as witness in behalf of respondents in a case pending in the circuit court of the United States for the middle district of Alabama, at Montgomery, wherein the First National Bank of Montgomery is complainant and B. H. Micou & others are respondents, on oath to be by you administered, upon interrogatories and cross-interrogatories annexed to this commission; to take and certify the deposition of the witness, and return the same to our said circuit court, to be holden on the first Monday in May next, under your hand and seal.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of April, A. D. one thousand eight hundred and seventy-eight.

Issued the 12th day of April, 1878.

[SEAL.]

I. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Ala.

630 *Deposition of D. T. Blakey.*

Deposition of David T. Blakey, a witness sworn and examined under and by virtue of a commission issued out of the circuit court of the United States for the middle district of Alabama, in a certain cause therein pending, wherein The First National Bank of Montgomery is complainant, and Benjamin H. Micou et als. are respondents.

Said witness, DAVID T. BLAKEY, of Montgomery, Alabama, being

duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

1. To the first interrogatory he saith: I know the parties. I am 44 years of age, and by profession a lawyer; I reside and practice law in Montgomery, Alabama.

2. To 2nd int. he saith: I was present at the settlement of the account of Benj. H. Micou as guardian of his daughter, Clara E. Boykin, in the probate court of Tallapoosa County. I acted in said matter as the attorney of Benj. H. Micou.

3. To the 3d int. he saith: Elmore J. Fitzpatrick represented Clara E. Boykin on said settlement. I made out the said account as first filed. I was and am satisfied that no improper or illegal item
631 of debit against the said guardian was inserted in said account or intended to be embraced therein, and that no just or legal item of credit to the said guardian was omitted therefrom or intended to be omitted therefrom. There was never at any time within my knowledge any preconcert or collusion or agreement or understanding with the adverse interest or opposing side as to the manner of making out said account, or as to any of the items to be embraced therein or omitted therefrom, or as to the making of said settlements.

4. To the 4th int. he saith: Micou's account as guardian, as filed by me, was stated on the basis of charging himself with the net proceeds of crops raised on a plantation purchased by him for his wards under order of the probate court of Tallapoosa County, for the years 1859 and subsequent years until the liberation of their slaves, and of crediting himself with the amounts paid out by him in stocking and conducting said plantation, and other sums expended on their account, I being informed by him that there was an order of said probate court
632 authorizing him to keep their property together and carry on said plantation on their account. Elmore J. Fitzpatrick as the attorney representing Clara E. Boykin, on the settlement of said account objected to said account as filed on said basis, and claimed that there was no such order to keep said estate together, and that what I had considered an order to keep said estate together did not amount to such, or furnish authority for so doing, but was simply an order to purchase a plantation for said minors, and, as such attorney, said E. J. Fitzpatrick moved to charge said guardian with the hires of said slaves and the rent of said land, also to charge him with compound interest on the funds in his hands, and also to increase the sum with which he had charged himself for rents of said plantation after the liberation of the slaves belonging to said wards, from 1865 to 1873, inclusive.

5. To the 5th int. he saith: I was never informed how such motions and objections came to be made, but suppose they were made
633 because Mr. Fitzpatrick came to the conclusion after an examination of the papers and orders in the cause that his clients were entitled to elect whether they should charge for profits or for rents and hires, and that it was most to their interest to charge the guardian with rents and hires. I know that he made a long examination of the papers and minute entries before making such motions. There was no suggestion or assistance given him by me or by the party represented by me; said objections and motions, so far as I know or have reason to believe, were made in good faith by the party making them. I resisted said motions by making a speech to the court, in which I used all the arguments I could think of to induce the court to construe the order in question as authorizing the statement of the account as originally made out by me, and refuse to grant the motions. I read several authorities

from Alabama reports in support of my view of the case, and made altogether as good a defense as I was capable of. The said resistance by me was not pretended but was bona fide. This was all before
634 Hon. Allen D. Sturdivant, judge of probate of Tallapoosa County, who was presiding. Mr. Fitzpatrick opened in support of his objections with a speech of some length, citing several Alabama authorities. I replied, as stated above, to which he replied again. No influence, so far as I know, except legitimate argument, was used by either side to induce a decision on the part of the presiding judge. The judge after hearing the argument decided to change the basis of stating the account and charge Micou with rents and hires, and to hear evidence on the value of the same, but he refused to charge Micou with compound interest.

6. To the 6th int. he saith: Mr. Micou, at the request of Mr. Fitzpatrick, made out a list of all the slaves belonging to said minors, getting the names, I think, mostly from the records of the court, and attached the ages to each name. Mr. Fitzpatrick then asked Mr. Micou and myself if we were acquainted with the value of negro hire and land rent in the neighborhood of said wards' plantation during the
635 years in which he was chargeable with hire. Mr. Micou said he was, and I stated that I was well acquainted with the value of both, except for the years 1863, 1864, and 1865; that I had myself hired negroes for all of said years except those last mentioned. Mr. Fitzpatrick then stated to the court that he would introduce us as witnesses to prove the values. And having shown to the court, after our first being sworn by the judge, the qualification and knowledge of the subject possessed by each, he proceeded to examine Mr. Micou as to the qualities and value of the hire of said negroes, taking them one by one from the list, which, I think, Mr. Micou held in his hand during the examination. After he had gone through the list of valuable working hands he took up the children. Some of these were described by Mr. Micou to be what was called water toaters, and were estimated to be worth their board, clothing, taxes, and doctors' bills, and nothing more. Some were suckling babies; they were estimated at nothing and as costing nothing. Other children, too young to work but old enough to eat and wear
636 clothes, were estimated at less than nothing, and according to my best recollection at this time from fifteen to twenty dollars per head was deducted from the sum total of annual hire for each of these. The estimate of the value of hire was given on the basis of the hirer paying taxes and doctors' bill, and furnishing the ordinary amount of clothing, shoes, hats, blankets, &c. Mr. Micou was then further examined as to the value of the rent of the land, and upon his attention being called to the prices at which similar land rented for the years 1866, 1867, &c., was led to state that the actual value of the rent of the plantation in question was greater than he had placed it in his first acc't filed. After Mr. Micou had stated the value of rents and hires for each of the years with which he was charged, Mr. Fitzpatrick called me as a witness; after being sworn, I was examined. Mr. Micou, at the request of Mr. Fitzpatrick, gave a description of each negro, his qualities and capacity, and I testified what the hire of such a negro was worth in the neighborhood of the said plantation (I had owned and worked
637 a plantation in that section, and some 10 or 12 miles from the one in question, and had hired negroes for each of said years, as stated above). I think my estimates were generally above Micou's. I was also examined as to the value of rents. The judge then passed on the amount in each case, and stated what he would charge Micou with, and

ordered the account to be so made out. There was no want of good faith, so far as I know, on the part of the judge in making the decision which he rendered, or on the part of the witnesses examined in fixing the values of rents and hires, or on the part of the attorneys in conducting the proceedings, or on the part of the parties interested in the final result.

7. To the 7th int. he saith: When said settlement was made Clara E. Boykin was over twenty-one years of age, and I think not quite 22. She was a married woman, the wife of Frank Boykin. Lucy B. Micou was over nineteen years of age at that time, and was not 21. I think she was about 20.

8. To the 8th int. he saith: There was no collusion between the
638 attorneys for any purpose in the matter of the final settlement of said Micou as guardian as aforesaid, and I do not believe there was any between the parties. There was no agreement, understanding, or arrangement such as inquired about, or for the purposes inquired about in this interrogatory so far as I know or had any reason to believe, and it would have been difficult for the parties to have had such understanding without my seeing something that would have induced me to suspect it.

9. To the 9th int. he saith: Henry C. Semple was the attorney for said Clara E. Boykin and Lucy B. Micou before and after said settlement. According to my best recollection, after said settlements were made, once or twice, at the request of Maj. Semple, I wrote to the judge of probate to send executions to certain counties, and in answer to these letters the said judge sent a lot of executions to me, and continued to send them to me, although I did not so direct him. When the first
639 of these were sent, as requested by Maj. Semple, I placed them in the hands of the sheriff of Montgomery County, and may have sent some to other sheriffs. Those sent later I paid no attention to, and believe some of them are still in my office. All that I did in the matter of these executions was as agent for H. C. Semple. I attended to this business for him, because he requested me to do so, and at the time he stated some reason why he could not attend to the matter himself. I think that it was that he was just on the eve of leaving here to be absent some time, or some good reason of that sort. I saw no impropriety in attending to the business for him, as my connection with the matter ceased when the decrees were rendered, and I was not retained by Micou to hinder or prevent the parties from using their decrees after they had obtained them.

10. To the 10th int. he saith: I was so examined, as I have before stated, in answer to 6th int.; B. H. Micou was the only other witness examined. The witnesses so examined showed that they were well acquainted with the subjects about which they were examined, and if
640 they did not speak the truth it was for want of something else besides the necessary information on the subject. Their evidence was, so far as I know, given in perfect good faith. I know mine was, and I believe Micou's was, because my estimates were mostly higher than his, and I believe mine to have been fair and about right.

11. To the 11th int. he saith: I have been a farmer; was such from 1855 to 1867, inclusive. During the whole time I had a plantation in Montgomery County, which I cultivated, though part of the time I had another plantation in Pike County, and part of the time one in Macon County, on which I claimed to reside, though a large part of my attention and time, if not the most of it, was always given to the Montgomery County plantation. I knew the said planta-

tion, but not the negroes. I do not know what was the value of the hire of average field hands before the war. It is difficult to state it in one amount. Average women hands, in say 1860, were worth about $125.00; on the usual terms of hiring average men hands were worth about $175.00; on the same terms better hands were worth more.

641 I paid $200.00 that year for first class men hands. Hire was worth more in 1860 than in 1859, and more in 1861 than in 1860. In January, 1862, hands hired for about the same as in 1861, but it was mostly in Confederate money, and that was at some discount as compared with gold, say 40 or 50 per cent. After these years I knew almost nothing about the hiring of hands in Alabama, as I was absent almost all the time with the Confederate army. My present recollection of the statement and list of slaves used on the said examination is that there were something over 30 full working hands on said plantation. If such is the fact, then the hire, in my opinion, was worth $4,500.00 in 1859; $4,750.00 in 1860; $5,000.00 in 1861; same in 1862, with discount, for Confed. money. After these years I do not know enough about the value of hires to testify. As to the rents, said plantation contained about 800 acres of land; about 600 acres good tillable prairie land, worth an average of $3.00 per acre to rent in 1859; $3.25 in 1860; the same or a little more in 1861; the same and $3.50 in 1862, the

642 latter amount to be discounted, say 40 per cent. on acc't of the currency. I know nothing more about the value of rents after that time until 1866, when they were very high; much higher than before the war.

12. To the twelfth int. he saith: Micou was engaged in the manufacture of cotton during the war, at Tallassee. The said plantation was situated sufficiently convenient to his said factory to have assisted in supplying the same with provisions and cotton; and said plantation and negroes could have been so used profitably; but whether they were or not, I do not know.

13. To the 13th int. he saith: Cotton if sheltered will keep without injury for a very long period (many years), and cotton was cultivated in this country and to some extent by Micou during the war. The average price of cotton in 1859 and 1860 was 10 c'ts per pound; cotton was worth in the fall and winter of 1865, after the close of the war, from 40 to 50 cents per pound, and could easily have been sold for that price. Micou had some two thousand bales at the close of the war.

643 14. To the 14th int. he saith: Prudent and far-seeing persons did store away cotton raised during the war to keep until after the war. Micou was one of those who did so.

15. To the 15th int. he saith: Much the larger part of the meat required was raised at home, but the deficiency, which was considerable, was supplied mostly by shipment from the Western States. The principal part of the flour used in this country came from the Western and Middle States. A large part of this supply was cut off after the war commenced, because the principal lines of communication were held by the enemy. The keeping of several large armies in the field created a new and large demand for provisions in this country.

16. To the 16th int. he saith: I have no personal knowledge of the matters inquired about in this interrogatory, and can only answer inferentially that the effect would have been to increase the value of such things (rents and hires) as produced provisions, relatively more than the nominal price of other things was increased by the depreciation of the currency.

644 17. To the 17th int. he saith: I had very little experience with

gold during the war, but my opinion is that the purchasing power of Confederate money was much greater than its relative value in gold according to bankers' tables; gold was not a currency during the war at all; it was a special commodity, in great demand to supply the wants of persons, and even States, who wished to run the blockade or remit to other States or foreign countries, and mon'y to hoard was in scant supply. Most of the banks in the South having suspended specie payment before the war and shipped off their coin to pay outside debts; and for these reasons and the fact that the blockade of the ports prevented gold from adjusting its value by trade with any other country, gold was relatively higher than anything else in the country and took proportionately more Confederate money to buy it.

18. To the 18th int. he saith: I do not know anything personally about the transfer of said stock to Clara Boykin. I know that
645 Micou told me about the said transfer and under what circumstances it was made, and also told me about Frank Boykin's making a fuss about it and refusing to recognize it as a payment, and about his agreement with Boykin and the Barnetts to take the stock back; and after being informed of these things and knowing what little value the said stock had at the time of said transfer, I advised Micou that it would be worse than useless to claim a credit for the amount on his settlement in the probate court; for even if it were allowed in that court (which I did not believe any honest judge of probate would do), that Boykin could go into the chancery court and have it revised and set aside; and from my knowledge of Boykin he would be certain to do it; so that it would only make unnecessary costs and protracted litigation for nothing. So I advised that it be left out of the account. In my opinion the stock at the time of the delivery of the certificate to the said Clara E. was worth absolutely nothing. I know nothing personally of the circumstances under which the transfer was made.

19. To the 19th int'y he saith: I think it might be of benefit to
646 the defendants to explain how the settlement of Lucy B. Micou's account was made. The estate of Clara and Lucy was joint in every particular; the property had never been divided between them, and every item of debit and credit was the same, and the account with Clara could only be ascertained by making out the joint account and taking half of it, or half of each item (I had stated the whole acc't and taken half of it).

After filing the acc't for a settlement with Clara and before settlement a citation was served on B. H. Micou issued by the judge of probate of Tallapoosa County, citing him to a settlement of Lucy B. Micou's estate, and at the time of said filing I was informed that he would be required to give additional bond; in fact, Judge Sturdivant asked me if the bondsmen were not broke. Upon consideration of all these matters, I advised Micou that he had better resign and make a final settlement of his guardianship of Lucy's estate as soon as he could; whereupon he directed me to proceed with that settlement. I then simply refiled the same
647 account for Lucy that had been filed for Clara with a new affidavit and statement that all matters were joint, and the settling one settled practically both. This had all been done before the hearing on the Clara Boykin account which was set for hearing about 14 days before the other. When the objections were made to the Clara Boykin account and sustained, the same rulings were applicable to the Lucy Micou account, for the accounts were the same; so after settling one account, with the consent and advice of the judge of probate and after consulting with him, I withdrew the account as originally filed for Lucy Micou and

restated it to conform to the rulings made by the judge on the other case, which was in fact the same case and refiled it so stated. This was done to save the expense and time and trouble of another trip to Dadeville and another contest over the account, which could only have resulted the same way in the end, and further because I believed it was right and simple justice to the minor. Another thing that may be of benefit to the defendants is, as to the reason why no appeal was taken,
648 which question was asked Mr. Micou, and in answer I am informed he stated that he left the matter entirely with his attorney. I, as his attorney, did not believe there was any reasonable or just grounds for an appeal to stand on. After the close of the discussion between Mr. Fitzpatrick and myself I was convinced in my own mind that he was right and am so still. I was satisfied that an appeal would be useless, and that it would cause useless expense and litigation, the labor of which would fall upon me, and I saw but little chance of getting any pay for it, besides I could not see that it was Micou's duty to his creditors, or to anybody else, and certainly not mine, to delay his wards in reaping the fruits of a just judgment that they had obtaind. Micou could not at that time have, in my opinion, made a valid bond for costs, much less to supersede an execution.

1. X. To the 1st X int. he saith: I first made out said account in April or May, 1873. It was so made out because I was informed by Micou that he had obtained an order of court to carry on
649 a plantation for his wards. There was no item of credit that I have or had any knowledge of to which Micou was legally entitled that was omitted at any time. There was no such conversation.

2. X. To 2nd X int. he saith: The said objections and motions were made orally.

3. X. To the 3d X int. he saith: All the information I had about said transfer came from Micou, though I probably heard Boykin speak of it at the time he was trying to get Micou to take it back, and I think I recollect he asked me to advise Micou to take it back. I have stated in answer to 18th int. upon what information I base all the statements made about said stock. The fact of the transfer of said stock was not brought to the attention of the probate court at all on said settlement. If I had been asked to give a legal opinion, by this I mean an opinion on a business transaction given professionally, as to the value of said stock, I should have declined to do so without considerable investigation into the affairs of the com-
650 pany; and I would have so answered, because I knew that Micou was largely in debt, and much embarrassed for money. I knew that, notwithstanding the large receipts for new stock and the July dividend during the summer, the concern did not have money to purchase cotton for manufacturing purposes, and was borrowing money from the local banks to buy the cotton at heavy rates of interest, say 2 per cent. per month, pledging the cotton as security, and only withdrawing it in small lots of 50 bales (which was 2½ days' supply) as they were able to pay for it. I also knew that one of these banks had in the spring or early summer refused to advance any money to the factory without an exhibit of its condition, and that Micou had refused to make any such exhibit. I knew that during the summer Micou had been buying bacon in very large quantities on a credit of 4 to 6 months, and been selling the same at less per pound, sometimes more than one cent, than it cost him in Louisville and St. Louis, because he sold it for the cash; and when I enquired what this meant, was told that it was cheaper than borrowing money here. I knew that Micou was offering heavy inducements, to be paid out of his own pocket, to any person who would procure subscrip-

tions to the new stock. I knew that many persons were pressing
651 for the payment for cotton bought from them the winter before to be paid in April, and which the factory had used up and got the money for. I knew that cotton bought the winter before at the factory on credit had been shipped to New York to meet bills, and the same cotton had to be replaced in the summer at a heavy expense of freights, hauling, commissions, discounts, &c. I knew that whenever I called on them for the money owing to me I was always put off with the cry of hard times. In fact, from what I saw of the management the rule was to pay nobody that could possibly be put off. Knowing all these things, I should have hesitated to advise any person that the stock was good, and would not have advised that it was worthless without further investigation. By most people the said factory was considered solvent and profitable at the time.

4. X. To the 4th X int. he saith: I was sworn by the judge of probate. The only other witness examined was Micou. No such application was made, because Mr. Fitzpatrick stated that Micou and I were the
652 only witnesses within many miles that knew the value of rents and hires in the neighborhood where this plantation was situated, and that he would be compelled to use us as witnesses.

When he stated this I did not see that Micou could gain anything by delaying the case to get witnesses, for when he was to be the principal witness he could certainly make out a case more favorable to himself than any other witness he could get, and I was confident that I knew the value of rents and hires, and would state them honestly and fairly. I could see no benefit to be derived from the delay, and it would simply entail the double expense of another trip to Dadeville of parties and witnesses, which was a considerable item after the break up of the factory—and my part of which had to be paid out of my own pocket with slight chance of repayment. I have stated fully how the witnesses proceeded to fix the value of rents and hires in answer to 6th direct interrogatory.

5. X. To 5th X int. he saith: I have before stated that I did not
653 know the said negroes personally, and cannot state how many were field-hands, of my own knowledge, or how many were men and how many women, and how many children. My recollection of the list used on the examination is that there were over fifty negroes in 1859, about 35 of whom were field hands, pretty evenly divided between men and women—the other 15 were children, some large enough to earn more than a living—two or three "water toaters," 4 or 5 infants, and 5 or 6 dead-heads that were estimated as an expense. I do not recollect that there was any report of any of them dying for the years I estimated their hire, and they remained about the same each year, except that the children became slightly more valuable; said plantation was situated in Montgomery County 23 to 25 miles from Tallassee by wagon road, 12 or 14 miles further by railroad to go by Shorter's, but not more than two miles would be saved by taking the R. R.

6. X. To the 6th X int. he saith: I was the attorney who filed the said petition. I was employed by B. H. Micou. B. H. Micou was the only witness examined on the hearing of the said petition.

654 7. X. To the 7th X int. he saith: He was so engaged as president of the Tallassee Manufacturing Co. No. 1, or as manager of the firm of Barnett, Micou & Co. I am inclined to think that during the war all the business was done in the name of Barnett, Micou & Co., but it was all the same concern.

8. X. To the 8th X int. he saith: Confederate treasury notes did con-

stantly depreciate in value during the war. They were the only currency after the middle of 1862; up to that time there was more or less of notes of different State banks in circulation. They depreciated until the last quotation made of their value that I have ever seen was $1,200.00 in Confederate money for one of gold. Most transactions were made with reference to said currency, but a good many were not. I did appear and represent the defendants on the examination of Nicholas D. Barnett, and during part of the examination of T. M. Barnett as witnesses before Geo. F. Moore as commissioner. I was present during part of the examination of Micou, but not as an attorney, and took no part
655 in the same.

DAVID T. BLAKEY.

I, the commissioner in said commission named, hereby certify that the evidence of the witness, David T. Blakey, was taken down under oath, and subscribed by him in my presence on the 6th day of May, 1878, in the county of Montgomery, State of Alabama, and that I have personal knowledge of said witness, and that I am not of counsel in the cause, nor of kin to any of the parties interested therein, or in any manner interested in the result thereof.

Witness my hand and seal.

[L. S.] GORDON MACDONALD,
Commissioner.

Filed May 6, 1878.

I. W. DIMMICK, *Clerk.*

Published by order of the court this 30th day of May, A. D. 1878.
I. W. DIMMICK, *Clerk.*

656 *Transcript of inventories offered by complainants in evidence and admitted by respondents.*

Inventory of property received by Benj. H. Micou, guardian for minors, Clara E. Micou, and Lucy B. Micou, from the estate of Thomas M. Barnett, sr., as per receipt given Thomas M. Barnett, adm'r, viz:

Cash rec'd 1st Jan'y, 1858..... $8,055 00

Twenty negroes named & valued as follows, viz:

THE STATE OF ALABAMA,
Tallapoosa County:

Before me, Simeon Goolsby, judge of probate, for said State & county, came Benjamin H. Micou, guardian Lucy B. Micou and Clara E. Micou, minors, who, upon oath, say that the above is all the property and moneys that have come into his hands as yet.

BENJ. H. MICOU,
Guardian.

Sworn to and subscribed before me this 27th day of Jan'y, 1858.
SIMEON GOOLSBY,
Judge, &c.

Examined, approved, and ordered to be filed and recorded, 27th January, 1858.

SIMEON GOOLSBY,
Judge of Probate.

657 Received from estate of Mrs. Lucy A. Micou, on a/c of her minor children, Clara E. Micou and Lucy B. Micou (Benj. H. Micou being both administrator on said estate and guardian for said minors), one half of certain moneys rendered as on hand belonging to said estate, & of certain sums collected since of debts due and crops sold of said estate as follows:

Feb. 1st, 1858.	One-half of 9,000 doll's rendered as on hand 27th Jan'y, 1858, being.....	$4,500 00
May 6, 1858.	One-half of 2,528 33/100 doll's, as being the estates, 1/3 of note due from McClintock and Gilmer for $7,585.00 doll's, one-half of one-third of which am't is.....	1,264 17
Jan'y 1st, 1859.	One-half of balance due from net proceeds of sale of cotton crop for 1858, after deducting 3/4 of the expenses of making said crop, viz:	
	Net proceeds of crop is..... $10,834 25	
	3/4 of exp. of plantation is..... 2,115 78	
	Leaves nett amount from crop. $8,718 47	
	One-half of which amount is.....	4,359 23
		$10,123 40

This receipt being in full for ten thousand one hundred and twenty-three 40/100 dollars, the one-half of total moneys received on a/c said
658 estate at dates, and from sources as explained above.

Tallassee, Ala., Jan'y 1st, 1859.

BENJ. H. MICOU,
Guard'n for minors Clara E. Micou and Lucy B. Micou, jointly.

Sales 53 bales cotton for acc't B. H. Micou, guardian.

a/c 1 c. 52, averaging 500 lbs.....	26,000	
1, " 254	254	
	26,254–10 3/4–2,822 30	
Charges:		
Average charges per bale, 90 c.....		47 70
		$2,774 60

Jan'y 3d, 1859.—The above a/c sales of cotton made up as the price and average charges per bale, from a careful comparison of all our a/c sales of cotton on acc't B. H. Micou, as made by us, and rendered him through the season, all the crop of B. H. Micou in market being sold by us.

JNO. H. MURPHY & CO.
By G. W. PORTER.

Barnett, Micou & Co. to B. H. Micou, guardian.

1858.		
February.	Hire Matthew this month.....	24 00
" "	in March, April, & May.....	78 00
	June.....	26 00

659

July	27 00
August	26 00
September	26 00
October	20 00
November	26 00
December	24 00
	277 00

Above am't p'd.

B. H. MICOU, *Guardian.*
BARNETT, MICOU & CO.
By S. C. GREEN.

TALLASSEE, *Jan'y 3, '59.*

Received, Tallassee, Dec. 8th, 1857, of Thomas M. Barnett, adm'r on the estate of Thomas M. Barnett, senior, as one of the heirs to said estate, the following named property, viz, of negroes: Isaac, Christina, Greenleaf, Louisa, Levi, Ben, Birde, Briny, Daniel, Mathew, Patsey, Elias, Ann, Francis, Arch, Sylvana, Cambis, John, Martha, Willis, twenty negroes valued at $12,400.00 dollars; and the following named mules and horses, viz: Rhody, Susan, Giney, & Fly, valued at 625 dollars, and I hereby receipt to the said Thomas M. Barnett, admi'r for the above negroes, and mules & horses, and accept them in full (in the division of certain negroes & mules, and horses, the whole valued at $39,712.00 doll'rs) as my just and lawful share in that portion of said estate,
660 except that the amount of property hereby receipted for I receive two hundred and eleven $\frac{66}{100}$ dollars less than the full & just proportion due.

BENJ. H. MICOU,
Guard'n for minor children, Lucy and Clara.

Received, Tallassee, June 17th, 1858, of Thomas M. Barnett, admi'r on the estate of Thomas M. Barnett, sr., two hundred and twenty-seven $\frac{62}{100}$ dollars, being one-third of certain moneys collected by him from John H. Murphy & Co., on a/c said estate.

BENJ. H. MICOU,
Guardian for minors, Clara & Lucy Micou.

Received, Tallassee, Ala., March 11th, 1861, of Thomas M. Barnett, admi'r on the estate of Thomas M. Barnett, sr., twelve thousand two hundred and ten dollars, being one third of the gross amount of sale of 333 shares of the capital stock of the Tallassee Man'f'g Co., No. one. Sale made this date for cash.

BENJ. H. MICOU,
Guard'n for minors, Clara E. and Lucy B. Micou.

Received, Montgomery, Ala., March 16, 1861, of Thos. M. Barnett, admi'r on the estate of Thos. M. Barnett, sr., sixteen thou-
661 sand six hundred & forty $\frac{03}{100}$ doll's, being one-third of am't he received of register in chancery this date, as the interest of Thos. M. Barnett, sr., in the copartnership of Barnett, Micou & Co.

BENJ. H. MICOU,
Guard'n for minors, Clara E. & Lucy B. Micou.

Received, Tallassee, Feb'y 26th, 1858, of Thomas M. Barnett, administrator on estate of Thomas M. Barnett, sr., twenty-five hundred and

twenty-eight and $\frac{50}{100}$ dollars, being one-third of am't of principal and interest on note of A. J. Pickett and J. P. Figh, belonging to said estate. This being the portion due the minors, Clara E. and Lucy B. Micou, of said collection as heirs to said estate.

BENJ. H. MICOU,
Guard'n for minors, Lucy B. Micou and Clara E. Micou.

Received, Montgomery, December 31st, 1857, of Thomas M. Barnett, jr., administrator on estate T. M. Barnett, sr., eight thousand and fifty-five $\frac{68}{100}$ dollars, being one-third of a sum of money on hand belonging to said estate, this amount being the proportion of said sum due the minors, Clara E. and Lucy B. Micou, from said estate.

BENJ. H. MICOU,
Guardian.

662 Received, Tallassee, May 17th, 1858, of Thomas M. Barnett, administrator of the estate of Thos. M. Barnett, sr., three hundred & fifteen $\frac{55}{100}$ dollars, on account moneys collected for said estate.

BENJ. H. MICOU,
Guardian for minors, Clara E. and Lucy B. Micou.

Received, Tallassee, Aug. 3d, 1858, of Thomas M. Barnett, administrator on estate of Thos. M. Barnett, sr., the following sums of money, viz: Five hundred and forty-two $\frac{45}{100}$ ($542.45) dollars, being one-third of balance due on Gen. E. Y. Fair note, after paying his a/c from same; also the sum of twenty-eight hundred and eighty-eight $\frac{50}{100}$ ($2,888$\frac{50}{100}$) dollars, being one-third of balance of principal and interest to this date of John Fraser's note and mortgage held by said estate. The above amounts received by me as guardian for minor children, Clara E. Micou and Lucy B. Micou, heirs of estate of Thomas M. Barnett, sr., deceased, these amounts being their one-third portion of said notes as above stated.

BENJ. H. MICOU,
Guardian.

663 CLARA E. BOYKIN AND FRANK S. BOYKIN
vs.
BENJAMIN H. MICOU, NICHOLAS D. BARNETT, Thomas M. Barnett.

Execution issued 16th day of Feb'ry, 1874, and returnable 11th day of May, 1874.

Sheriff's return.

No property found to satisfy this execution.
May, 1874.

J. A. LANCASTER,
Sheriff Elmore Co.

CLARA E. BOYKIN AND FRANK S. BOYKIN
vs.
BENJAMIN H. MICOU, NICHOLAS D. BARNETT, Thomas M. Barnett.

Execution issued the 23d day of September, 1874, and returnable the 24 day of December, 1874.

Sheriff's return.

Returned for alias this 5th day of December, 1874.

E. BARKER, *Sheriff.*

CLARA E. BOYKIN, FRANK S. BOYKIN
vs.
BENJAMIN H. MICOU, NICHOLAS D. BARNETT, Thomas M. Barnett.

Execution issued 14 day December, 1874. Returnable 10th day of May, 1875.

Sheriff's return.

Levied the within execution on the following, as the property of T. M. Barnett, to wit:

That certain tract of land known as T. M. Barnett's old place,

664 near Tallassee, beginning at corner in center of street known as extension of Gilmer st., according as said st. is laid down on a certain map of the town of Tallassee, drawn by Jno. M. Gray, better known as survey of plank road, said corner being 2,322 feet west of corner stone in centre of the street at N. W. corner of lot 31; thence south 30 degrees W. 25 chains; thence north 60″ W. 15 chains; thence N. 30″ E. 20 chains; thence S. 60″ E., along said street or plank road 15 chains, containing, after deducting st., 30 acres; also residence of T. M. Barnett at Tallassee, western part of block No. 5, commencing at S. W. corner of said black, at intersection of King and DuBois st., running thence northerly on DuBois street 315 feet to Phillips street; thence easterly along Phillips street 315 feet to the land of Nicholas D. Barnett; thence southerly parallel with DuBois st. and along N. D. Barnett's land 315 to King st.; thence along King st. 315 ft. to place of beginning, according to Jno. M. Gray plat of the town of Tallassee.

Also fractional sections 32, 28, 29, 31, 20, and 30, all in township 18, range 18, and lying in the fork of the Tallapoosa and Coosa Rivers, containing 987 acres, more or less; also N. W. ¼ of 33, containing

665 160 acres, and part of fractional section 32 adjoining said lands, containing 225 acres, all in T. 18, R. 18, known as river plantation of T. M. Barnett, *of* containing 1,372 acres.

Also the following as the property of N. D. Barnett, to wit: The lot and residence of said N. D. Barnett in town of Tallassee, bounded on the east by Ann st., on the north by Phillips st., south by King st,, and N. W. by T. M. Barnett's lot, being part of block 5, according to John M. Gray's survey. Also the following as the property of Benj. H. Micou, to wit: A certain lot or tract of land enclosed used as a residence by Benj. H. Micou in the town of Tallassee, designated on said John M. Gray's map of said town, made April 18, 1853, as block No. 2. Notice given by advertising in Ala. Constitution in Wetumpka this Dec. 28th, 1874.

E. BARKER,
Sheriff of Elmore County.

JAN. 16, 1875.

I have this day levied upon the following described personal property as belonging to T. M. Barnett, viz, twelve hundred and seventy-two (1,272) shares of stock in the Tallassee Man'g Co. No. 1; also twelve hundred and seventy-two shares of said stock as the property of N. D. Barnett; written notice given sec'ry.

E. BARKER,
Sheriff of Elmore County.

666 Under and by virtue of two executions issued from the probate court of Tallapoosa County, one in favor of Clara E. Boykin and Frank S. Boykin, the other in favor Henry A. Garrett, guardian ad litem for Lucy B. Micou, and both against Benj. H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, I sold on the first Monday in February, 1875, the following property as the property of Benj. H. Micou, to wit:

A certain lot or tract of land enclosed and used as a residence by B. H. Micou in the town of Tallassee, designated on John M. Gray's map of the town of Tallassee, made April 18, 1853, as block No. 2. Henry C. Semple was the highest and best bidder, at the sum of five hundred dollars, for said lot, and the same was knocked off to him, and he became the purchaser of said property at said price of five hundred dollars.

Also the following as the property of Nicholas D. Barnett, to wit: Lot and residence of said N. D. Barnett in the town of Tallassee, bounded on the east by Ann street, on the north by Phillips street, south by King street, and northwest by T. M. Barnett's lot, being part of block 5, according to said John M. Gray's survey of said town of Tallassee.

667 Henry C. Semple was the highest and best bidder for said property, and became the purchaser of the same at five hundred dollars.

Also the following as the property of Thomas M. Barnett, to wit: That certain tract of land known as T. M. Barnett's old place, near Tallassee, beginning at the corner of the centre of street known as extension of Gilmer street, according as said street is laid down on a map of the town of Tallassee, drawn by John M. Gray, better known as survey of plank road, said corner being 2,322 ft. west of corner stone in centre of the street at N. W. corner of lot 31; thence south 30″ W. 20 chains; thence north 60″ west 15 chains; thence north 30″ east 20 chains; thence south 60″ east along said street or plank road 15 chains, containing, after deducting street, 30 acres. Henry C. Semple became the purchaser of said property for the sum of two hundred and fifty dollars, which was the highest and best bid.

Also residence of T. M. Barnett at Tallassee, western part of block No. 5, commencing at southwest corner of said block at intersection o King and DuBois streets, running thence northerly on DuBois street 315 feet to Phillips street; thence easterly along Phillips street 315

668 feet to the land of Nicholas D. Barnett; thence southerly parallel with DuBois street and along N. D. Barnett's land 315 feet to King street; thence along King street 315 feet to place of beginning, to said John M. Gray's plat of the town of Tallassee. Henry C. Semple became the purchaser of said last-mentioned property at the sum of six hundred dollars, which was the highest and best bid for the same.

Also the following as the property of T. M. Barnett: River plantation, fractional sections 32, 28, 29, 31, 20, & 30, all in township 18, range 18, and lying in the fork of the Tallapoosa and Coosa Rivers, containing 937 acres more or less; also N. W. ¼ of sec. 33, containing one hundred and sixty acres and part of fractional sec. 32, adjoining said land, containing two hundred and twenty-five acres, all in T. 18, R. 18, known as River plantation of T. M. Barnett, & containing 1,372 acres. Henry C. Semple became the purchaser of said lands at the sum of six thousand dollars, which was the highest and best bid for the same.

I also sold, by virtue of the said two executions, the following personal property: 1,272 shares in the Tallassee Man'f'g Co., the property
669 of Thomas M. Barnett, of which Henry C. Semple became the purchaser at the sum of one hundred dollars. Also, 1,272 shares in said Tallassee Man'f'g Co., the property of N. D. Barnett, of which the said Henry C. Semple became the purchaser, at the sum of one hundred dollars.

Feb'y 2d, 1875.

E. BARKER,
Sheriff of Elmore County.

The proceeds collected upon the within execution have been disposed of as p'r statement of plaintiff's attorney, H. C. Semple, a copy of which is given below.

FEB'RY 10TH, 1875.

Received of E. Barker four thousand dollars, to be credited on execution from probate court of Tallapoosa County favor of Clara and F. Boykin vs. B. H. Micou, Thos. M. Barnett, and N. D. Barnett, and three thousand nine hundred and eighty-eight $\frac{60}{100}$ dollars to be credited on ex'n from the court of probate of Tallapoosa County in favor of Henry A. Garrett, guardian ad litem, Lucy B. Micou vs. B. H. Micou, Thos. M. Barnett, and Nicholas D. Barnett.

(Signed) HENRY C. SEMPLE.
Plaintiff's Attorney in the above Ex'n.

670 Court cost Tallapoosa County endorsed on the exe'n was. $76 50
On this cost Mr. Terrell receipted to sh'ff of *of* Montgomery
County 16 Dec'r, 1874, for Judge Sturdivant..... 73 10

Leaving a balance of court cost, which Mr. Barker collected.... $3 40

(Signed) H. C. SEMPLE.

CLARA E. BOYKIN, FRANK S. BOYKIN
vs.
BENJ. H. MICOU, NICHOLAS D. BARNETT, Thos. M. Barnett.

Execution issued 16' day December, 1874, and returnable the 16th day of March, 1875.

Sheriff's return.

Received in office Dec'r 28th, 1874, and executed this 28' day Dec'r, 1874, by making levy upon the following described property of Benj. H. Micou, all of section 21, township 17, rang' 21 south of the Tallapoosa River, about 388.80 acres; all section 22, T. 17, R. 21 south of the Talla-

poosa River and west of Callebee Creek, about 126 acres; all of section 3, T. 16, R. 21 north of the road to Tuskegee, about 140 acres; all of sec. 5, T. 16, R. 21 north and east of Cubahatchie Creek, about
671 300 acres; all lying and being in the county of Macon and State of Alabama.

Dec. 28, '74.

C. H. FELTS, *Sheriff.*

The lands described in the within levy were advertised for sale by me in the Tuskegee News for thirty days next proceeding the 1st Monday in February, 1875, and on said 1st Monday in Febr'y, 1875, were sold by me before the court-house door, in the town of Tuskegee, and at said sale B. H. Micou, trustee, became the purchaser thereof at and for the of twelve hundred & fifty dollars, of which 146.25 were applied to the payment of costs and com., and the balance credited on said execution. No other property found on which to levy this fi. fa.

March 9th, 1875.

C. H. FELTS, *Sheriff.*

HENRY A. GARRETT, GUARD'N AD LITEM, &C.,
vs.
BENJAMIN H. MICOU, THOS. M. BARNETT, Nicholas D. Barnett.

Execution issued 2d day of March, 1874, returnable the second Monday in June, 1874.

Sheriff's return.

Returned. No property in my county to satisfy this execution.

June 13th, 1874.

J. H. LANCASTER, *Sheriff.*

672 HENRY A. GARRETT, GUARD'N AD LITEM, &c.,
vs.
BENJ. H. MICOU, THOMAS M. BARNETT, NICHOlas D. Barnett.

Execution issued 24 day of August, A. D. 1874, returnable 14 day of December, 1874.

Sheriff's return.

Returned for alias this 5th day of December, 1874.

E. BARKER,
Sheriff Elmore Co.

HENRY A. GARRETT, GUARDIAN AD LITEM,
vs.
BENJ. H. MICOU, THOS. M. BARNETT, NICHOlas D. Barnett.

Execution issued this 14 day of December, A. D. 1874, and returnable the 10th day of March, 1875.

Sheriff's return.

JAN'Y 16, 1875.

I have this day levied upon the following described personal property as belonging to T. M. Barnett, to wit, twelve hundred and seventy-two shares of stock in the Tallassee Man'f'g Co. No. 1. Also the same number of shares as the property of N. D. Barnett.

Written notice given to sec'y.

E. BARKER,
Sheriff Elmore County.

Levied the within execution on the following as the property of T. M. Barnett, to wit: That certain tract of land known as T. M.
673 Barnett old place, near Tallassee, beginning at corner in centre of street, known as extension of Gilmer street, according as said street is laid down on a certain map of the town of Tallassee, drawn by John M. Gray, better known as survey of plank road, said corner being 2,322 ft. west of corner stone in centre of the street at N. W. corner of lot 31; thence south 30 degrees W. 20 chains; thence north 60″ W. 15 chains; thence N. 30° E. 20 chains; thence S. 60″ E. along said st. or plank road 15 chains, containing, after deducting street, 30 acres.

Also residence of T. M. Barnett at Tallassee, western part of block No. 5, commencing at S. W. corner of said block at intersection of King and DuBois streets, running thence northerly on DuBose street 315 ft. to Phillips street; thence easterly along Phillips st. 315 ft. to the land of Nicholas D. Barnett; thence southerly parallel with DuBois st. and along N. D. Barnett's land 315 ft. to King st.; thence along King st. 315 ft. to place of beginning, according to John M. Gray's plat of the town of Tallassee. Also fractional section 32, 28, 29, 31, 20, and 30, all in township 18, range 18, and lying in the fork of the Tallapoosa and Coosa Rivers, containing 987 acres more or less; N. W. ¼ of sec.
674 33, containing 160 acres, and part of fractional sec. 32, adjoining said land, containing 225 acres; all township 18, range 18, known as the river plantation of Mr. Thos. M. Barnett, containing 1,372 acres.

Also the following as the property of Nicholas D. Barnett, to wit: The lot and residence of said N. D. Barnett, in town of Tallassee, bounded on the east by Ann st., on the north by Phillips st., S. by King st., and N. W. by T. M. Barnett lot, being part of block 5, according to Jno. M. Gray's survey.

Also the following as the property of Benj. H. Micou, to wit: A certain lot or tract of land enclosed and used as a residence by Benj. H. Micou, in the town of Tallassee, designated on said John M. Gray's map of said town, made April 18, 1853, as block No. 2; this 28 Dec., 1874.

E. BARKER,
Sheriff of Elmore County.

Under and by virtue of two executions issued from the probate court of Tallapoosa County, one in favor of Clara E. Boykin and Frank S. Boykin, the other in favor of Henry A. Garrett, guardian ad litem for Lucy B. Micou, and both against Benj. H. Micou, Thomas M. Barnett, and Nicholas D. Barnett, I sold on the first Monday in February,
675 1875, the following property of Benj. H. Micou, to wit: A certain lot or tract of land enclosed and used as a residence by B. H. Micou, in the town of Tallassee, designated on John M. Gray's map of the town of Tallassee, made April, 1853, as block No. 2. Henry C. Semple was the highest and best bidder, at the sum of five hundred dol-

lars, for said lot, and the same was knocked off to him and he became the purchaser of said property at said price of five hundred dollars.

Also the following as the property of Nicholas D. Barnett, to wit: Lot and residence of said N. D. Barnett, in the town of Tallassee, bounded on the east by Ann street, on the north by Phillips street, south by King street, and northwest by T. M. Barnett's lot, being part of block 5, according to said John M. Gray's survey of said town of Tallassee. Henry C. Semple was the highest and best bidder for said property, and became the purchaser of same at five hundred dollars.

Also the following as the property of Thomas M. Barnett, to wit: That certain tract of land known as T. M. Barnett's old place, near
676 Tallassee, beginning at the corner of the centre of street known as extension of Gilmer street, according as said street is laid down on a map of the town Tallassee, drawn by John M. Gray, better known as survey of plank road, said corner being 2,322 feet west of corner stone in centre of the street at NW. corner of lot 31; thence south 30″ west 20 chains; thence north 60″ west 15 chains; thence north 30″ east 20 chains; thence south 60″ east along said street or plank road 15 chains, containing, after deducting street, 30 acres. Henry C. Semple became the purchaser of said property for the sum of two hundred and fifty dollars, which was the highest and best bid.

Also residence of T. M. Barnett, at Tallassee, western part of block No. 5, commencing at southwest corner of said block at intersection of King and DuBois street, running thence northerly on BuBois street 315 feet to Phillips street; thence easterly along Phillips street W. 315 feet to the land of Nicholas D. Barnett; thence southerly paraliel West DuBois street, and along N. D. Barnett's land 315 feet to King street; thence along King street 315 feet to place of beginning to said
677 John M. Gray's plat of the town of Tallassee. Henry C. Semple became the purchaser of said last-mentioned property at the sum of six hundred dollars, which was the highest and best bid for the same.

Also the following as the property T. M. Barnett's river plantation: Fractional sections 32, 28, 29, 31, 20, and 30, all in township 18, range 18, lying in the fork of the Tallapoosa and Coosa Rivers, containing 937 acres, more or less. Also, NW. ¼ of sec. 33, containing one hundred and sixty acres, and part of fractional sec. 32 adjoining said land, containing two hundred and twenty-five acres; all in T. 18, R. 18, known as river plantation of T. M. Barnett, & containing 1,372 acres. Henry C. Semple became the purchaser of said land at the sum six thousand dollars, which was the highest and best bid for the same.

I also sold, by virtue of the said two executions, the following personal property: 1,272 shares in the Tallassee Manufacturing Co., the property of Thomas M. Barnett, of which Henry C. Semple became the purchaser at the sum of one hundred dollars. Also, 1,272 shares in man'f'g co., the property of N. D. Barnett, of which the said Henry C.
678 Semple became the purchaser at the sum of one hundred dollars. Feb'ry 1st, 1875.

E. BARKER,
Sheriff Elmore County.

The proceeds collected upon the within execution have been disposed of as p'r statement of plaintiff's attorney, H. C. Semple, a copy of which is given below.

FEBRUARY 10TH, 1875.

Received of E. Barker four thousand dollars, to be credited on execution from probate court of Tallapoosa County favor Clara E. & F. Boykin vs. B. H. Micou, Tho's M. Barnett and N. D. Barnett, and three thousand nine hundred and eighty-eight $\frac{60}{100}$ dollars, to be credited on execution from probate court of Tallapoosa County in favor of Henry A. Garrett, guard'n ad litem Lucy B. Micou, vs. B. H. Micou, Tho's M. Barnett, and Nicholas D. Barnett.

(Signed) HENRY C. SEMPLE,
Pl'ff's' Attorney in the above Ex'on.

Court cost Tallapoosa County endorsed on the execution was..	$76 50
Of this cost Mr. Terrell receipted to sheriff of Montgomery Co. Dec. 16, 1874, for Judge Sturdivant	73 10
Leaving a balance of court cost of	3 40

Which Mr. Barker collected.

679 (Signed) H. C. SEMPLE.

HENRY A. GARRETT, GUARDIAN AD LITEM, &C.,
vs.
BENJ. H. MICOU, THOMAS M. BARNETT, NICHOLAS D. Barnett.

Execution issued 2d day of March, A. D. 1874, returnable the 8th day of June, 1874.

Sheriff's return.

Levied this execution on the following described lands: N. $\frac{1}{2}$, all south Tallapoosa River, sec. 2, township 17, range 21; SW. $\frac{1}{4}$ part sec. 2, township 17, range 21; all ex. 72 $\frac{23}{100}$ acres b'l'g to Howard and Jordan, sec. 23, township 17, range 21; all sec. 28, township 17, range 21; all, less 15 acres, b'l'g to old Cliett place in SW. corner of NW. $\frac{1}{4}$, near R. R. bridge, sec. 32, township 17, range 21; all E. C. Creek, in sec. 5, township 16, range 21; SW. $\frac{1}{4}$ part sec. 3, township 16, range 21. In SW. corner of sec. 16, township 17, range 21.

March 6, 1874.

J. A. GRIMMET,
Sheriff.

The said lands above described were exposed to sale to the highest bidder, before the court-house door in Tuskegee, on the 4 day of May, 1874, on Monday, and there being no bid made for the same, this execution is returned for want of bidders.

May 5, 1874.

J. A. GRIMMET,
Sheriff Macon Co.

680 H. A. GARRETT, GUARDIAN AD LITEM,
vs.
BENJ. H. MICOU, THOMAS M. BARNETT, NICHolas D. Barnett.

Execution issued the 16th day of December, A. D. 1874, and returnable 16th day of March, 1875.

Sheriff's return.

Rec'd in office Dec. 28, 1874, and executed the same on the day above mentioned by levying the same upon the following described property of Benjamin H. Micou, all of section 21, township 17, range 21, south of the Tallapoosa River, about 388 acres; all of sec. 22, T. 17, R. 21, south of Tallapoosa River and west of Callebee Creek, about 126 acres; all of section 3, T. 16, R. 21 north of the road to Tuskegee, about 140 acres; all of sec. 5, T. 16, R. 21, north & east of Cubahatchie Creek, about 300 acres; all lying and being in Macon County and State of Alabama.
Dec. 28th, 1874.

C. H. FELTS, *Sheriff.*

The lands described in the within levy were advertised for sale by me in the Tuskegee News for thirty days next proceeding the 1st Monday in February, 1875, and on said 1st Monday, 1875, were sold by
681 me before the court-house door in the town of Tuskegee, and at said sale B. H. Micou, trustee, became the purchaser thereof at and for the sum of twelve hundred and fifty dollars, of which forty-six $\frac{25}{100}$ dollars were applied to payment of costs and com., and the balance credit on said execution. No other property found on which to levy this fi. fa.
March 9, 1875.

C. H. FELTS, *Sheriff.*

CLARA E. BOYKIN, FRANK S. BOYKIN,
vs.
BENJAMIN H. MICOU, NICHOLAS D. BARNETT, Thomas M. Barnett.

Execution issued 16 February, 1874, returnable 11 day of May, 1874.

Sheriff's return.

Rec'd in office Feb'ry 28th, 1874, 6 o'clock a. m.

J. A. GRIMMETT, *Sheriff.*

Levied this execution on the following described lands, to wit: N. $\frac{1}{2}$, all south Tallapoosa River, S. 2, T. 17, R. 21, 388; S. W. $\frac{1}{4}$ part S. 2, T. 17, R. 21, 126; all of S. 28, T. 17, R. 21, 636; all except $72\frac{23}{100}$ acres belonging to Howard & Jordan of S. 33, T. 17, R. 21, 578; all except 15 acres belonging to old Cliett place in sec. 32, T. 17, R. 21, 625; all east Calabee Creek in sec. 5, T. 16, R. 21, 150; S. W. $\frac{1}{4}$ part sec. 3, T. 16, R. 21, 140; in S. W. $\frac{1}{4}$ and in the S. W. $\frac{1}{4}$ S. 16, T. 17, R. 21, 42.
682 February 28, 1874.

J. A. GRIMMETT, *Sheriff.*

The said lands levied on which are specially described in the levy

were exposed to sale to the highest bidder before the court-house door in Tuskegee, on Monday, the 4th day of May, 1874, and there being no bid made for the same, this execution is returned for want of bidders.

May 5, 1874.

J. A. GRIMMETT,
Sheriff Macon Co.

Annual settlement.

To the Hon. A. D. Sturdivant, judge of probate in and for the county of Tallapoosa, and State of Alabama:

Your petitioner, Benjamin H. Micou, guardian of Clara E. and Lucy B. Micou, minors, respectfully showeth unto your honor that in pursuance of an order of this honorable court, made on the 20th day of December, 1858, he purchased for the said Clara E. and Lucy B. Micou, his said wards, the following real estate, to wit: The southeast quarter of section twenty-seven, northeast quarter of section thirty-four, west half of the southwest quarter of section thirty-five, the east half
683 of the southeast quarter section thirty-four, and the northwest quarter of section thirty-five, all in the county of Montgomery and State of Alabama, at the price of fourteen thousand four hundred dollars, all of which said purchase-money has been paid as follows, to wit: On the 7th day of December, 1858, the sum of five thousand dollars, and on the 11 day of April, 1859, the sum of nine thousand four hundred dollars. Your petitioner further represents unto your honor that a deed was made and executed to him for said lands by the vendor, and he has now made and herewith presents to the court a deed conveying a fee simple and warrantee title made by himself to the said Clara E. and Lucy B. Micou, his said wards, for said lands.

The premises considered, your petitioner respectfully prays your honor to make order confirming said purchase of said lands by your petitioner, under the order of court aforesaid, for the said Clara E. and Lucy B. Micou, and as in duty bound he will ever pray, &c.

E. G. BECKHAM, *Att'y.*

THE STATE OF ALABAMA,
Tallapoosa County;

Before me, Allen D. Sturdivant, judge of probate in and for
684 said county, personally appeared Benjamin H. Micou, who, being duly sworn, on oath says that facts set forth in the foregoing petition are true to the best of his knowledge, information, and belief.

BENJ. H. MICOU.

Sworn to & subscribed this 23 June, A. D. 1859.

ALLEN D. STURDIVANT,
Judge of Probate.

I, Henry H. Garrett, guardian ad litem for Lucy B. & Clara E. Micou, the minors in the foregoing petition mentioned, hereby deny each and every averment and allegation in the foregoing petition contained.

July 18th, 1859.

HENRY A. GARRETT,
Guardian ad litem for Minors.

In the matter of the estate of Clara E. and Lucy B. Micou, minors.

Probate court, Tallapoosa County, Ala. Special term, July 18, 1859.

This being the day to which the report of Benjamin H. Micou, guardian of Clara E. and Lucy B. Micou, minors, heretofore filed in this court, was ordered to lie over for confirmation, now comes the said Benjamin H. Micou, by his attorney, and moves the court to confirm said re-
685 port; and Henry A. Garrett, who was heretofore appointed guardian ad litem to represent and protect the interest of said minors in this proceeding, who is of no kin to either said guardian or said minors, being present and consenting to act and proceeding to deny the allegations in said report made, and insisting upon the proof thereof, the court proceeds to hear and determine the same. And it appearing to the court by legal and proper proof that the said Benjamin H. Micou, guardian, &c., as aforesaid, has complied strictly with the order of this court, made and entered on the 20th day of December, 1858; and the said guardian having also filed in this court with his said report of said purchase of said lands in said order mentioned, it is therefore ordered that said report of said purchase be and the same is hereby in all things confirmed and allowed, and it is further ordered that said report be filed and recorded.

ALLEN D. STURDIVANT,
Judge of Probate.

686 *Benjamin H. Micou, guardian for minors Clara E. Micou and Lucy B. Micou, in ⅜ current for annual settlement.*

1858.			
Jan'y	5.	Rec'd from Thomas M. Barnett, adm'r of estate Thos. M. Barnett, sr	$8,055 68
		Interest on above to settlement	993 53
Febr'y	26.	Rec'd from Thos. M. Barnett, adm'r of estate Thos. M. Barnett, sr	2,528 50
		Interest on above am't to settlement	282 34
May	17.	Rec'd from Thos. M. Barnett, adm'r of estate Thos. M. Barnett, sr	315 55
May	17.	Interest on above am't to settlement	29 45
June	17.	Rec'd from Thos. M. Barnett, adm'r of estate Thos. M. Barnett, sr	227 62
		Interest on above am't to day of settlement	19 92
Aug	3.	Rec'd from Thos. M. Barnett, adm'r of estate of Thos. M. Barnett, sr	3,430 95
		Interest on above to day of settlement	263 03
Feb'y	1st.	Rec'd of B. H. Micou, adm'r of estate of Mrs. Lucy A. Micou	4,500 00
		Interest on above to day of settlement	528 00
May	6.	Rec'd of B. H. Micou, adm'r of estate of Mrs. Lucy A. Micou	1,264 17
		Interest on above to day of settlement	115 03
1859.			
Jan'y	1st.	Rec'd of B. H. Micou, adm'r of estate of Mrs. Lucy A. Micou	4,359 23
		Interest on above to day of settlement	191 80
687 Jan'y	1.	Proceeds sale of cotton crop on Tallapoosa Co. plantation A	2,774 60

		Interest on above to day of settlement	122 08
		Am't Matthew's wages rec'd as per voucher Letter B	277 00
		Interest on above to day of settlement	12 18
			30,290 46

CONTRA.

1858.			
Febr'y	22.	Am't paid out as pr. voucher No. 1	150 00
		Interest on above to settlement	16 86
Feb'y	24.	Am't pd. out as per voucher No. 2	180 00
		Interest on above to day settlement	20 20
May	7.	Am't paid out as pr. voucher No. 3	7 35
		Interest on above to day of settlement	65
Dec.	1.	Am't paid out as per voucher No. 4	17 75
		Interest on above to day of settlement	78
Dec.	7.	Am't paid out as per voucher No. 5	1,340 02
		Interest on above to day settlement	65 51
"	13.	Am't paid out as per voucher No. 6	200 00
		Interest on above to day settlement	9 35
"	20.	Am't paid out as per voucher No. 7	340 00
		Interest on above to day of settlement	15 86
1859.			
Jan'y	1st.	Am't paid out as per voucher No. 8	284 69
		Interest on above to day of settlement	12 52
"	"	Am't paid out as per voucher No. 9	56 72
		Interest on above to day of settlement	2 49
"	"	Am't paid out as per voucher No. 10	50 44
		Interest on above to day of settlement	2 21
"	"	Am't paid out as per voucher No. 11	17 50
688		Interest on above to day of settlement	76
1859.			
Jan'y	1.	Am't paid out as per voucher No. 12	29 77
		Interest on above to day of settlement	1 30
Jan'y	1.	Am't paid out as per voucher No. 13	749 13
		Interest on above to day of settlement	32 95
"	"	Am't paid out as per voucher No. 14	533 40
		Interest on above to day of settlement	23 46
"	3.	Am't paid as per voucher No. 15	80 00
		Interest on above to day of settlement	3 46
"	14.	Am't paid out as per voucher No. 16	12 00
		Interest on above to day of settlement	52
Feb'ry	1.	Am't paid out as p'r voucher No. 17	40 00
		Int. on above to day of settlement	1 48
"	21.	Am't paid out as p'r voucher No. 18	13 00
		Int. on above to day of settlement	43
	25.	Am't paid out as per voucher No. 19	47 00
		Int. on above to day of settlement	1 47
Jan'y	1.	Am't paid out as per voucher No. 20	460 00
		Int. on above to day of settlement	60 72
1858.			
Dec.	7.	Am't paid out on a/c of plantation as p'r deed enclosed as voucher No. 21	5,000 00
		Int. on above to day of settlement	653 32
1859.			

Apr.	11. Am't paid balance on a/c of purchase of plantation as p'r deed enclosed as voucher No. 21	9,400	00
	Int. on above to day of settlement	202	60
	As p'r voucher No. 22	250	66
	Int. on that am't up to settlement	5	40
		20,393	71
	Balance in hands of guardian	9,896	75
		30,290	46

680 THE STATE OF ALABAMA,
Tallapoosa County:

Before me, Allen D. Sturdivant, judge of probate in and for said county and State, personally came said Benjamin H. Micou, guardian of Clara E. Micou and Lucy B. Micou, and after being duly sworn deposeth and saith the above report filed for annual settlement is correct as it stands stated.

BENJ. H. MICOU.

Sworn to and subscribed before me the 23d day of June, 1859.
ALLEN D. STURDIVANT,
Judge of Probate.

Decree on annual settlement.

Clara & Lucy B. Micou, minors, estate of. Annual settlement. Probate court.

JULY 13TH, 1859.

This being the day set to hear and pass upon the account of Benjamin H. Micou, guardian of the estate of Clara Micou and Lucy B. Micou, for an annual settlement of said estates, now comes the said Benjamin H. Micou and moves the court to proceed with such settlement and that said account be passed and allowed. And it appearing to the court from proper evidence that due notice of the time and nature of such settlement has been given by publication for three successive weeks
690 in the Tallapoosa Times, a newspaper published in this county; and Henry A. Garrett, who was heretofore appointed guardian ad litem to protect the interests of said minors, appearing in court, consenting to act and contesting said settlement, the court proceeds to examine said accounts and to hear proof in relation thereto; whereupon it is found that the said Benjamin H. Micou, guardian as aforesaid, has received of the estates of Clara Micou and Lucy B. Micou, minors, in cash, the sum of thirty thousand two hundred and ninety $\frac{46}{100}$ dollars, and has expended in paying the just debts of said minors and the costs and charges attendant upon said guardianship, the sum of twenty thousand three hundred and ninety-three $\frac{71}{100}$ dollars, leaving a balance in favor of said minors and against said guardian of nine thousand eight hundred and ninety-six $\frac{75}{100}$ dollars. It is therefore ordered, adjudged, and decreed by the court that said account be, and the same is hereby, in all things passed and allowed as above stated; it is further ordered that said accounts, vouchers, evidences, and statements, together with all other papers on file pertaining to this settlement and proceedings, be recorded.

691 It is further ordered that said Henry A. Garrett recover of the

said guardian two $\frac{50}{100}$ dollars for services rendered said minors in protecting their interests in this settlement.

It is further ordered that said guardian pay all the costs and charges of this settlement, to be allowed him against said estate, for which let execution issue.

ALLEN D. STURDIVANT,
Judge of Probate.

THE STATE OF ALABAMA,
Tallapoosa County:

I, Allen D. Sturdivant, judge of the probate court in and for said county, hereby certify that the foregoing is a true transcript of annual account and decree thereon filed by Benjamin H. Micou, as guardian of Clara E. and Lucy B. Micou *Micou*, minors, as appears from the records on file in my office.

In testimony whereof I have hereto set my hand and official signature at office the 22d day of October, 1877.

ALLEN D. STURDIVANT,
Judge of Probate.

692 *Final decree and order of sale.*

In the circuit court of the United States, middle district of Alabama.
In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU ET ALS. } No. 20.

This cause is submitted for final decree on pleadings and evidence, and upon consideration, after argument by counsel, it is ordered, adjudged, and decreed that the complainant is entitled to the relief prayed for.

It is further ordered, adjudged, and decreed that the decree rendered by the probate court of Tallapoosa County, State of Alabama, on the 10th day of February, A. D. 1874, in favor of Clara E. Boykin and her husband, Frank S. Boykin, for the sum of eighty-eight thousand and three hundred dollars against Benjamin H. Micou, as guardian, and the sureties on his guardian's bond; and the decree rendered by said probate court on the 24th day of February, A. D. 1874, in favor of Henry A. Garrett, as guardian ad litem of Lucy B. Micou, for the sum
693 of eighty-eight thousand and thirty-one $\frac{77}{100}$ dollars against the said Benjamin H. Micou, as guardian, and the sureties on his, guardian's, bond, copies of which decrees are annexed to the bill of complaint as Exhibits A and B, and all proceedings, executions on said decrees, and sales of the property in the bill described as the property of said Benjamin H. Micou, under and by executions issued on said decrees, are all and each fraudulent and void as against the complainant.

It is further ordered, adjudged and decreed that the said decrees and the sales of the property of Benjamin H. Micou in the bill described, had under and by executions issued on said decrees, or either of them, and the deed of Paul Strobach, as sheriff of the county of Montgomery, State of Alabama, dated the 10th day of August, A. D. 1874, to Henry C. Semple, and the deeds of J. A. Grimmett, as sheriff of Macon County, State of Alabama, and of C. H. Felts, as sheriff of said county of Macon, and the deed of J. A. Lancaster, as sheriff of Elmore County, State of

Alabama, all to the said Henry C. Semple, so far as said deeds, or any of them, convey property of the said Benjamin H. Micou
694 sold by said sheriffs respectively under executions issued upon both or either of said decrees of said probate court, be, and the same are, each and all, set aside and held for naught, and that the said property of the said Benjamin H. Micou in the bill described is subject to the debt of the complainant.

It is further ordered, adjudged, and decreed that there is due to the complainant on its judgment in the bill mentioned at the date of this decree, of principal, interest, and costs, the sum of seventeen thousand six hundred and forty-six and $\frac{42}{100}$ dollars, for the payment of which sum, with interest thereon from the date of this decree, it is further ordered, adjudged, and decreed that J. W. Dimmick, as master, and who is appointed master for that purpose, proceed to sell the following real estate mentioned in the bill as the property of the said Benjamin H. Micou, which was sold under executions issued on said decrees of said probate court, namely: The northeast quarter, the east half of the northwest quarter of section eight (8); all of section seventeen
695 (17); the southeast quarter and the east half of the northwest quarter of section five (5); the west half of the northwest quarter and the west half of the southwest quarter of section sixteen (16); all in township fifteen (15), of range twenty (20). Also lots one (1) and two (2), in square nine (9), in Haurick's plat, in the city of Montgomery; also a part of lot number ten (10), in square number fourteen (14), being twenty-six and one-half feet (26½) by one hundred and twenty (120) feet, in the southeast corner of Bibb and Commerce streets, in the city of Montgomery, Alabama; also lot number eleven (11), on the south side of Market street, and lot number eleven (11), on the north side of Washington street, in said city of Montgomery; all the above real estate situated in said Montgomery County. Also all of section twenty-one (21) lying south of the Tallapoosa River; all of section twenty-two (22) lying south of the Tallapoosa River and west of Caleebee Creek, all in township seventeen (17), of range twenty-one (21); also all of section three (3), in township sixteen (16), of range twenty-one (21), north of
696 the road to Tuskegee; all of section five (5), township sixteen (16), range twenty-one (21), north and east of Cubahatchie Creek; all the last above-mentioned real estate situate in said county of Macon. Also the house and lot in the town of Tallassee, in said county of Elmore, known as the residence of said Benjamin H. Micou, and designated in Gray's map of said town as block number two (2). The master will give thirty days' notice of said sale by advertisement in the Montgomery Advertiser, a newspaper published in said city of Montgomery, and will sell said property at public auction for cash, at the Artesian Basin, in said city of Montgomery. Any of the parties to this suit may purchase at said sale. The master will sell only a sufficiency of said property to pay complainant the amount of its said debt as ascertained by this decree and the costs of this suit, and the whole of said property, if necessary for that purpose.

He will execute titles to the purchaser or purchasers, which, upon the confirmation of said sale by this court, shall vest in such pur-
697 chaser or purchasers all the title, either in law or equity, of all the parties to this suit to said property.

Out of the proceeds of sale the master will pay the costs of this suit, the expenses of said sale, and his commissions for selling, and then to complainant or its solicitors the said sum of seventeen thousand six hundred and forty-six $\frac{42}{100}$ dollars, with interest thereon from the date of this

decree, and the sarplus, if any, will report to this court. It is further ordered, adjudged, and decreed that the defendants pay the costs of this suit, to be taxed by the clerk of this court, for which execution may issue. If said property sells for enough to pay said costs, the expenses of said sale, and the commissions of the master, and the amount due complainant, then there will be no further collection of said costs; but if said property does not sell for enough to pay said costs, the expenses of said sale, and the commissions of the master, and the amount due complainant, then said costs will be collected by execution as here-
698 in provided, and the amount thereof paid to complainant until the debt of complainant is fully satisfied.

The master will report his proceedings under this decree to the next term of this court.

July 30th, 1878.

JOHN BRUCE, *Judge.*

Filed July 31, 1878.

J. W. DIMMICK, *Clerk.*

Order allowing appeal and fixing bond.

THURSDAY, *August* 1*st*, 1878.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU, HENRY C. SEMPLE, Frank S. Boykin, Clara E. Boykin and Lucy B. Micou. } #20.

In equity.

In this cause the respondents in open court this day prayed an appeal to the Supreme Court of the United States, to reverse the decree rendered therein on the 30th of July, 1878, and that said appeal operate as a supercedeas of said decree, and it is ordered that said appeal be and the same is hereby allowed, and that same operate as a supercedeas of said decree upon defendants giving bond as required by law, in the sum of seven thousand dollars.

699 *Supersedeas bond.*

Circuit court of the United States for the fifth circuit of the United States and middle district of Alabama. In equity.

THE FIRST NATIONAL BANK OF MONTGOMERY
vs.
BENJAMIN H. MICOU, HENRY C. SEMPLE, Frank S. Boykin, Clara E. Boykin and Lucy B. Micou.

Know all men by these presents, that we, Henry C. Semple, Daniel S. Troy & William A. Gunter, are held and firmly bound unto the First National Bank of Montgomery in the sum of seven thousand dollars to be paid to the said the First National Bank of Montgomery, its successors or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each

of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 1st day of August, 1878.

Whereas the above named Benjamin H. Micou, Henry C. Semple, Frank S. Boykin, Clara E. Boykin, Lucy B. Micou have prosecuted an appeal to the Supreme Court of the United States to reverse
700 the decree rendered in the above-entitled action by the circuit court of the United States for the 5th circuit and middle district of Alabama:

Now, therefore, the condition of this obligation is such, that if the above-named Benjamin H. Micou, Henry C. Semple, Frank S. Boykin, Clara E. Boykin, and Lucy B. Micou shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HENRY C. SEMPLE. [L. S.]
D. S. TROY. [L. S.]
W. A. GUNTER. [L. S.]

The above and foregoing bond is hereby approved.
Aug. 1st, 1878.

JOHN BRUCE, *Judge.*

Filed Aug. 1, 1878.

J. W. DIMMICK, *Clerk.*

701 UNITED STATES OF AMERICA,
Middle District of Alabama, ss:

I, J. W. Dimmick, clerk of the circuit court of the United States for the fifth judicial circuit and middle district of Alabama, hereby certify that the foregoing pages, numbered from 1 to 700 inclusive, contain a full, true, and complete transcript of the record and proceedings in a cause lately pending in said court, wherein The First National Bank of Montgomery was the complainant and Benjamin H. Micou, Henry C. Semple, Frank S. Boykin, Clara E. Boykin, and Lucy B. Micou were respondents, as the same remains on file and of record in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this 21st day of September, A. D. 1878.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. District of Alabama.

(Indorsement on cover:) No. 310. Benjamin H. Micou, Henry C. Semple, Frank S. Boykin, Clara E. Boykin, & Lucy B. Micou, appellants, vs. The First National Bank of Montgomery. M. Alabama C. C. U. S. Filed 22d October, 1878.

SUPREME COURT U.S.
FILED
MAY 24 1881
JAMES H. MCKENNEY, CLERK

Supreme Court of the United States.

[No. 310.]

BENJAMIN H. MICOU AND OTHERS, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

Appeal from the Circuit Court of the U. States for the Middle District of Alabama.

ARGUMENT FOR APPELLANTS BY W. A. GUNTER.

Supreme Court of the United States.

[No. 310.]

BENJAMIN H. MICOU AND OTHERS, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

Appeal from the Circuit Court of the U. States for the Middle District of Alabama.

ARGUMENT FOR APPELLANTS BY W. A. GUNTER.

STATEMENT OF THE CASE.

The appellee, being a judgment creditor of the firm of Barnett, Micou & Co., with a return of *nulla bona* by the sheriff, filed its original bill in equity, in aid of its judgment, to subject certain real property to the payment of its debt, alleging that it belonged to Benjamin H. Micou, one of the members of said firm of Barnett, Micou & Company, but had been fraudulently conveyed from him in the manner following, that is to say: That said Benjamin, with his two brothers-in-law, Thomas M. Barnett and Nicholas D. Barnett, who composed said firm of Barnett, Micou & Co., were largely insolvent in the fall and winter of 1873, by reason of heavy endorsements and liabilities assumed by said firm for accommodation of the Tallassee Manufacturing Company No. 1, which had then failed:

That at that time, and for many years previously, the said Benjamin had been guardian, under the laws of Alabama, of the estates of his two daughters, Lucy B. Micou (then an infant) and Clara E. Boykin (then a married woman, the

wife of Frank S. Boykin), with the said Thomas M. Barnett and Nicholas D. Barnett, the uncles of said wards, as his sureties on his guardian's bond:

That, knowing said insolvency and the impending ruin of the members of said firm of Barnett, Micou & Co., the said Micou conspired with his said daughters and Frank S. Boykin, the husband of one of them, to have fraudulent decrees rendered against him in the Probate Court of Tallapoosa county, upon the settlement of his accounts as guardian, and to have all of his property protected thereby from other creditors and conveyed away from him to the use and benefit of his said daughters; and that this conspiracy had been carried out by the rendition of final decrees in said Probate Court, in favor of each of said wards, for sums largely in excess of the real amounts due, and the sale of all the property of said Micou as well as that of the said Barnetts, and the purchase of the same by one Henry C. Semple in trust for said daughters.

The bill is filed against Benjamin H. Micou and his daughters, Clara E. Boykin and Lucy B. Micou, and his son-in-law Frank S. Boykin, and Henry C. Semple, and prays that the said decrees in the Probate Court of Tallapoosa county, on the settlement of the accounts of said Micou as guardian as aforesaid, and all sales and proceedings thereunder be vacated as fraudulent and void, and that certain specific property be sold as the property of B. H. Micou for the payment of the judgment of appellee.

Under the requirement of the bill, the answers of the several defendants were put in under oath, denying all the allegations of fraud. The case was submitted upon the pleadings and evidence, and the decree of the court was in accordance with the prayer of the bill.

ASSIGNMENT OF ERRORS.

1. That the decree in the Probate Court of Tallapoosa county, rendered on the 10th February, A. D. 1874, in favor of Clara E. Boykin and her husband, Frank S. Boykin, for the sum of $88,300 against Benjamin H. Micou, as guardian,

and the sureties on his guardian's bond, and all proceedings, executions on said decree, and sales of the property in the bill described as the property of said Benjamin H. Micou, under and by executions issued on said decree, were held to be fraudulent and void as against complainant.

2. That the decree, in the same court against the same parties, rendered on the 24th of February, A. D. 1874, in favor of Henry A. Garrett, as guardian *ad litem* of Lucy B. Micou, for the sum of $88,031.77, and all proceedings, executions on said decree, and sales of property in the bill described as the property of B. H. Micou, under executions issued on said decree, were held to be fraudulent and void as against complainant.

3. That the said decrees in the Probate Court of Tallapoosa county, mentioned in assignment one and two, and the sales of property of B. H. Micou in the bill described, had under executions on said decrees, or either of them, and the deed of Paul Strobach as sheriff of Montgomery county, and the deed of J. A. Grimmett as sheriff of Macon county, and of C. H. Felts as sheriff of Macon county, and J. A. Lancaster as sheriff of Elmore county, to the said Henry C. Semple, so far as said deeds convey property of B. H. Micou, sold by said sheriffs respectively under executions upon both or either of said decrees, were set aside and held for naught, and that the property of B. H. Micou in the bill mentioned is subjected to the payment of complainant's debt.

4. That certain property, in the bill mentioned, belonging to Lucy B. Micou and Clara E. Boykin, as heirs at law of their deceased mother, and not the life interest of B. H. Micou therein, is ordered to be sold for the payment of complainant's debt.

5. That the decree in the cause deprives Lucy B. Micou, an infant, of her estate in the hands of her guardian, by taking from her the fruits of her said decree, on the allegation of a fraudulent conspiracy by her to obtain the decree.

6. That the decree deprives Clara E. Boykin, a *feme covert*, of her separate statutory estate, upon the allegation of a

conspiracy with her husband and others to perpetrate a fraud.

7. That complainant's bill was not dismissed.

8. That relief was granted to complainant.

9. That said decree makes no provision for the protection of Henry C. Semple, the trustee, in so far as he has *bona fide* acted under the deed of trust to him.

And, by leave of the court, the several appellants sever in the assignment of errors, and each one severally assigns each of the foregoing.

ARGUMENT.

I. There are, practically, but two leading questions involved in this case. The one, of law, whether an infant and a *feme covert* can, in legal contemplation, enter into a fraudulent conspiracy as charged in the bill, and, under the penalties in such cases against persons *sui juris*, forfeit their estates? The other, of fact, whether the fraud, if possible, was established by legal and sufficient evidence?

We will argue them in the order named.

The bill, as well as the evidence, shows that at the date of the rendition of the decree in the Probate Court of Tallapoosa county in favor of Clara E. Boykin, on the 10th February, 1874, and in favor of Lucy B. Micou, on the 24th February, 1874, on the final settlement of the accounts of B. H. Micou as guardian, the one was a married woman, the wife of Frank S. Boykin, and the other a minor.

The decree of the Probate Court, in the one case, recites the coverture, and is rendered in favor of the *feme* and her husband; and in the other, it recites the non-age, and is rendered in favor of the guardian *ad litem*.

Record, pp. 24, 29; § 2 of bill, R. p. 2; § 7 of bill, R. p. 4; § 5 of bill, R. p. 3; Exhibit C. to bill, R. p. 32.

It is true the bill alleges, in paragraph 5, R. p. 3, that "At the time of the settlement with Lucy B. she was a minor

over the age of nineteen years, but said B. H. Micou had caused her disabilities of non-age to be removed by decree of the Chancery Court of Elmore county." But this averment of the removal of the disabilities of non-age, before the 24th day of February, 1874, is contradicted by the transcript of the proceedings for the removal of disabilities, attached as exhibit C. to the bill, which shows that the decree was rendered on the 1st June, 1874.—R. p. 32.

The bill charges, that this *feme covert* and this minor confederated and colluded with their father and guardian, B. H. Micou, and with Frank S. Boykin, the husband of Clara E., to procure said decrees on the settlement of the accounts of said B. H. Micou as guardian, and to have the property of said B. H. Micou sold thereunder to the said Clara E. and Lucy B., with the *intent* to hinder, delay or defraud the creditors of B. H. Micou.—§ 2 of bill, R. p. 2.

And that the same parties *conspired* together to cause said decrees to be made, and that by *collusion* they were made for sums largely in excess of the real amounts due.—§§ 5 and 6, R. pp. 3, 4.

In the 17th paragraph of the bill (R. p. 9,) the same charges are in substance repeated, only that in the latter instance the two Barnetts are joined as co-conspirators. The allegation of fraud in the last named section is:

"That, in fact and in truth, there is and has been since to-wit: January 1st, 1874, an agreement and understanding by and between the said Clara E. Boykin, Frank S. Boykin, Lucy B. Micou, B. H. Micou, Thomas M. Barnett and Nicholas D. Barnett, that the decrees should be had and made as set forth in this bill; that none of the parties to said agreement, understanding, or arrangement, should offer any thing more than pretended opposition to the rendition of said decrees, and that each and every act, and thing done and performed, or suffered to be done or performed, as set forth in this bill, should be so done and performed in and to the pecuniary interest and profit of each and all of the said parties to said decrees, both plaintiffs and defendants, and to the prejudice, hindrance and delay of other creditors of said Barnetts & Micou."

"And orator further charges, that since the rendition of said decrees there has been a complete understanding and

agreement between the parties to said executions, that the plaintiffs therein should so use said decrees and process to be issued thereunder as to enable the defendants therein to hinder, defraud and delay their several creditors, *in that they were to be permitted and aided in converting property to their own use, as shown herein.*"—R. p. 9.

In paragraph numbered 21 of the bill, (R. p. 9,) there is an averment that since the sales of real estate under the decree Micou and the two Barnetts had each of them been suffered to remain in possession and control of every parcel of their real estate, and to enjoy the use, profits and benefits thereof; and if they have made agreements to pay any thing for the use thereof, yet they have so made them, with the intent that Micou and the Barnetts "should be allowed to profit pecuniarily, by virtue of and in accordance with some prearranged plan, agreement or understanding by and between them and the said Lucy B. and Clara E. and her husband previously had and entered into, the terms of which are unknown to orator, but by which a secret use and benefit was reserved to the defendants in said executions, or some of them. And orator avers that the effect of this agreement or secret understanding, was that the said decrees were rendered each for a larger amount than was due, and that the process issued thereunder was so used by the said plaintiffs in execution as to benefit the said B. H. Micou and Barnetts, all of which was in furtherance of said secret understanding and agreement, and of an *intent* to hinder, delay or defraud the creditors of said B. H. Micou, Thomas M. Barnett and Nicholas D. Barnett."—R. p. 9.

These are the fundamental allegations of the bill on which alone the relief prayed and granted can be founded.

The question is, can a married woman, and an infant, be guilty of that fraudulent and *quasi* criminal intent and agency necessary to make a judgment in their favor, on the settlement of the accounts of their guardian, void, as having been intended to hinder and delay other creditors?

No case affirming the proposition can be found in the books. And it would seem that the reason of their absence, until the occurrence of this case, is, that it has always been

considered law that conduct could never be visited with punishment when there was no free agency to act.

It is plain that a decree, taking from a married woman, and from a minor, the fruits of judgments in their favor and devoting the property to the payment of other creditors, because of the alleged *intent* of the *feme covert* and minor, is highly punitive, since the result may be to deprive them of their estates.

We insist, that neither a married woman nor an infant can be guilty of the charge.

The authorities all maintain that the legal existence of a married woman is merged in that of her husband, or that she is always *sub potestate viri*, and incapable of acting for herself.

Story's Eq. Ju., § 243, § 1367.

1 Bishop on Law of Married Women, §§ 35, 39.

Phipps v. Sedgwick, 95 U. S. Rep. 3.

O'Connor v. Chamberlain, 59 Ala. 437.

Married women have two kinds of estates in Alabama. The one, the equitable estate known to the common law, in which the property is given to her by deed or will in such manner as to exclude the marital rights.

Pickens v. Oliver, 29 Ala. 528.

Lippincott v. Mitchell, 4 Otto, 765.

The other, the statutory separate estate, embracing property held in any other manner and by any other title.

ib.; Code of Ala. § 2705.

With reference to the former, the rules of the common law prevail as to their power over it; but it is unnecessary to discuss them, as the estate of Clara E. Boykin, the *feme covert*, in this instance is wholly statutory, being derived as an heir and distributee of her mother, Lucy A. Micou, and of her grandfather, Thomas Barnett, Sr., and grandmother, Margaret Barnett. The estate would be presumed to be statutory, as being the most usual as well as most to the

interest of the *feme covert*, and against the pleader attacking it without specifically stating its nature.

Winter v. Quarles, 43 Ala. 692.

But the bill itself, and other parts of the record, show that the estate consisted of property derived as *heir* and *distributee*, and of *accumulations therefrom*, or purchases therewith made by her guardian.

See Exhibit A. to bill, R. p. 16, *et seq.*.
Exhibit D. to bill, R. p. 33, *et seq.*
Transcript of inventories, R. p. 220.
Deposition of Micou, R. p. 183, ans. to int. 4.

It is well understood that married women, in Alabama, labor under all the disabilities of the common law, except in so far as statutes have expressly removed them; and that the statutes relating to their estates are enabling, and qualify them to do only the specific things enumerated.

Garrett v. Lehman, Durr & Co., 61 Ala. 394.
O'Connor v. Chamberlain, 59 Ala. 431.
Mitchell v. Dillard & Jones, 57 Ala. 317.
Jones v. Wilson, *ib.* 122.

It results, as a consequence, unless some law is shown removing the common law disabilities of married women, that Clara E. Boykin could no more conspire with her husband and father for the rendition of the decree on the final settlement of the guardianship of her estate, so as to impute *mala fides* to her, than if she had then been dead.

The same may be said of the infant Lucy B. Micou. She was then about nineteen, but she had no more legal capacity to do any act to the prejudice of her estate than if she had been only three years of age. "In contemplation of law, an infant three years of age is not inferior to one of twenty."

Wilt v. Welsh, 6 Watts, 9.

The law, because of the incapacity of infants to take care of themselves and their estates, places them in a condition of servitude, as it were, to their father, and their estates in the keeping of their guardians, until they arrive at years of

maturity. Judge Story well says, "*Infans non multum a furioso distat.*"

1 Story's Eq. J., § 242.

The same author says that accountability can not exist, except where there is free agency.—*ib.* and § 239.

Though the disability of an infant is not as absolute as that of a *feme covert*, it seems to be well settled that he can do no act to his prejudice, which is not a pure tort.

Tyler on Infancy, 42–3, 48.

Oliver v. Houdlet, 13 Mass. 237.

Easley v. Dye, 14 Ala. p. 168.

Tucker v. Moreland, 10 Pet. 70.

Notes to same case, 1 Am. L. Cases.

Ewell's Leading Cases, 206.

2 Kent Com. Lec. 31.

Perry on Trusts, §§ 52–3, 603.

In Gilson v. Spear, 38 Ver. 311, it is said, "In Johnson v. Pie, 1 Lev. 169, decided in 1664, judgment was arrested on the ground that, 'although infants may be bound by actual torts, as trespass, &c., which are *vi et armis et contra pacem*, they will not be bound by those which sound *in deceit*.'"

Ewell's Lead. Cases, 201.

An action on the case against an infant "for injuries done negligently or wrongfully to goods entrusted to him under any kind of bailment, (Vasse v. Smith, 6 Cranch, 226; Schenks v. Strong, 1 Southard, 87; Campbell v. Stokes, 2 Wend. 138,) or for *fraud* or *fraudulent warranty* on a sale (Brown v. Dunham, 1 Root, 272; West v. Moore, 14 Vermont, 447,) will not lie."

1 Am. Lead. Cases, *supra*.

Nor can an infant be made a bankrupt.

O'Brien v. Currie, 14 Eng. C. L. R. 569.

Britton v. Hodges, 23 *ib.* 509.

Tyler on Inf. 38; 6 Ves. 440.

1 Ves. & B. 494; 2 M. & Scott, 496.

The fraudulent act to charge an infant, says Chancellor Kent, must be wholly *tortious*.

2 Kent. Com. Lec. 31.

And, "it is the duty of the court to protect the interest of minors."—9 Peters R. p. 97.

A little consideration, independent of direct authority, would seem to be sufficient to show the absurdity of basing the hope of impeaching a judgment in favor of an infant on the allegation of a conspiracy by the *infant* with the guardian for its rendition.

The infant has in fact nothing to do with the litigation concerning his estate; he stands *in vinculis*, as it were, and can not appoint an attorney, nor appear in the case, or do any act whatever in the direction or control of the litigation. The court appoints a guardian *ad litem*, who, under its control and direction, conducts the suit in behalf of the infant.

The guardian *ad litem*, in this instance, was Henry A. Garrett, in whose favor the decree in behalf of Lucy B. Micou was rendered. And he is the person who managed the litigation for her, and upon whom the legal and moral responsibility for its good conduct rested. Yet, strange to say, there is not an averment in the bill against the *bona fides* of his *intents* or *acts*, nor is he even made a party defendant.

The alleged conspiracy between the infant and the guardian, then, could not impeach or affect the decree procured by the guardian *ad litem*.

II. But, even if the conspiracy had been made out against Frank S. Boykin, the husband and trustee of Clara E. Boykin, and E. J. Fitzpatrick, her attorney, and if it had been alleged and made out against Henry A. Garrett, the guardian *ad litem* of Lucy B. Micou, the relief prayed in complainant's bill could not have been granted, and the bill should have been dismissed.

It is evident that great injustice to persons not *sui juris* would be done if any misconduct of their trustees *could forfeit their estates*. If a guardian, suing for a ward, by collusion with the debtor should take a judgment for a sum greater

than that due, it would be contrary to equity to say that the ward should have no benefit of the judgment, and should forfeit the actual sum due and collected to other creditors of the debtor.

This rule is well enough when applied to persons *sui juris*, and who, therefore, in such cases wilfully endeavor to perpetrate a wrong; but no ethical principle can make its application just when *infants*, idiots, lunatics, or *married women* are concerned. And accordingly no case, prior to this, has ever occurred, so far as we are aware, in which such a forfeiture was enforced against persons of that character.

If the common law did not discover to us the equity of such a case, the jurisprudence of other countries would furnish sufficient light. The identical case seems to be provided for in 1 Domat's Civil Law, by Strahan, § 1649, where it is said:

"If a tutor or guardian becomes partaker in any fraud which a debtor commits against his creditors, by favoring in that quality the unfair dealing of the said debtor, by any act which relates to the person whom the said tutor or guardian has under his charge, he shall be bound personally for the loss which his fraud may have caused. And the minor, whose estate the tutor or guardian had the administration of, shall likewise be bound to repair the fraud, although he knew nothing of it, *but he will be liable only for so much as he shall have profited thereby.*"

It is manifest that this authority points us to the only equity against the ward, or person under disability in such a case. There should be no forfeiture by the *cestui que trust*, because there is no *criminality*. But in so far as he is the recipient of the benefits of the fraud beyond his debt, he is in law and morals an innocent receiver of the goods of the debtor, and liable to account to that extent to his creditors.

13 Pet. p. 107.

Lord Eldon, in Huguenin v. Beasely, 14 Ves. 288, says, "I should regret, that any doubt could be entertained, whether it is not competent to a court of equity to take away from *third* persons, the *benefits* which they have derived from the *fraud*, imposition, or undue influence of others."

When these third persons are innocent, they may claim what is justly due them through a fraudulent deed.

Marberry v. Brooks, 11 Wheat. 78

Anderson v. Hooks, 9 Ala. 704.

The case of Tatum v. Hunter, 14 Ala. 557, does not militate against, but rather supports the positions assumed. The equity of the infant in that case is not passed upon.

The theory of the bill in this case is not to recover from the ward and *feme covert* what they have profited by the alleged fraud; but it is founded upon the idea that they are responsible as persons *sui juris*, and seeks to make them surrender the fruits of their decrees; in other words, to enforce a forfeiture of their estates.

There is no allegation in the bill that Clara E. Boykin and Lucy B. Micou have *received* any thing upon their said decrees in excess of the real sums due them by their guardian B. H. Micou, upon a just and proper accounting. And, as the law is well settled that "Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff, so that the same may be put in issue by the answer, and established by the proofs," (9 Peters, 503,) it is plain that the complainant's bill should have been dismissed, though the *probata* had shown that the wards of Micou had been largely overpaid.

The view the civil law takes of fraudulent conveyances to persons not *sui juris*, is fully sustained by this court in the cases of Phipps v. Sedgwick, 95 U. S. Rep. 3, and Trust Co. v. Sedgwick, 97, *ib.* 308, wherein it is decided that a *feme covert* can never be made personally liable in the matter of a fraudulent conveyance to her, and that her estate can not be made liable beyond the benefit derived from it.

The absurdity of imputing a *criminal intent* in such matters to persons who in law are supposed to have no will of their own, or to have no control in the management of their affairs, is sufficiently reprobated in those cases.

Liverpool, etc., Loan Association v. Fairhurst, 9 Exch. 422. Wait's Actions and Defenses, vol. 6, p. 610.

It seems, then, that if the decrees in favor of the wards were really rendered for too much, by the fraudulent connivance of the guardian with the husband of the *feme covert*, and with her lawyer, and with the guardian *ad litem* of the infant, the complainant should at least have alleged and proved the fraud of the lawyer of the *feme covert*, and of the guardian *ad litem*, and have alleged and proved the extent to which the beneficiaries of the decrees had realized thereon, beyond the actual amounts due to them, and should have sought to recover from them this surplus, but leaving to them what a court of equity would have decreed to them upon a proper accounting.

Not having done this, and it being impossible for the court, under the law, to adopt the complainant's theory of its rights, and to enforce the forfeiture sought for its benefit, the only alternative for the court was to have dismissed the bill.

III. But if we are wrong in all that we have said, still the complainant was not entitled to relief, because the alleged fraud was not substantiated by the evidence.

The oath to the answers not being waived, the respondents were each required to file full and responsive answers *under oath*. This was done, and each of them was also examined as a witness in the cause upon all matters in issue. Their answers, as well as their depositions, flatly deny every allegation of fraud ; and they are corroborated by other and disinterested witnesses upon almost every point. It is clearly shown that Clara E. Boykin, the *feme covert*, and Lucy B. Micou, the infant, were each entirely ignorant of the condition of their affairs, and of what could be done and of what was done for their protection. They employed an old ac-

quaintance and friend, Henry C. Semple, as their lawyer, and requested him to take such steps as he deemed proper, and left the matter entirely with him. So far from conspiring fraudulently with their father, B. H. Micou, and their uncles, the Barnetts, they never had any communication, directly or indirectly, with any of them upon the subject.

And the only communication held by Henry C. Semple with the guardian or the sureties, was to learn from the attorney of Micou of the steps that were then in progress by him for a final settlement. He then, being suddenly called away, employed a total stranger to the wards, Mr. E. J. Fitzpatrick, to represent them on the settlement, and this lawyer, who had no communication whatever with any of the parties, not even with his clients, except indirectly through Semple at the time of the employment, conducted the settlement resulting in the decrees now impeached by the complainant. This attorney, of his own motion and without suggestion from any source, made the point to the court that the guardian had never been authorized to keep the estates of the wards together, and to conduct farming operations on their account, and that, consequently, the wards were entitled to elect between the profits and rents and hires, and, upon this, based his motion to surcharge and falsify the account of the guardian, as shown on pages 20, 21, 22, 23, of the record.

The result of this was, that the court increased the joint balance of the account of the guardian, for the wards, from $107,430.52, as shown by his account as originally filed (see record, p. 18) to $185,967.60, (see record p. 23). The items of this *increase* are the only ones alleged by the complainant to be incorrect in said decrees.—R. p. 4. They are alleged to have been fraudulently and collusively made and allowed, "for that the said Micou was, by orders of said probate court, made, as shown by the full and true copies thereof hereto attached and marked Exhibit D, and prayed to be taken as part of this bill of complaint, authorized to keep his said daughters' property together, and he was only liable to account for the profits arising from the same, which were small."—R. p. 4, § 6, of bill.

This Exhibit D. is found at p. 33 of the record, and, like

Exhibit E., flatly contradicts the allegation of the bill relating thereto. Exhibit D. does not even purport to be an order to keep the estates of the minors together, but is a decree entering up *nunc pro tunc* an order for the purchase of certain lands for said minors. Nor is there in the whole record any thing showing, or tending to show, that there ever was any such order made. The alleged *scienter*, then, on the part of Micou and his daughters, that the former was authorized to keep the estates together, is shown to be false. The judge of probate, who is the keeper of the records, declares that there is no such record, and that "He decided that there was no authority for Micou to keep the estates together and run the farm."—See answer to 2d cross int., R. p. 96.

Fitzpatrick states, in his deposition, record p. 204, in answer to 4th interrogatory:

"I, as attorney for Clara E. Boykin, did make objections to the account of the guardian as filed. Such objections were made without any preconcert or collusion with said guardian or his attorney, or any one for them. I remember distinctly moving to charge said guardian with hire of slaves and rents of land in lieu of the crops, and to disallow his credits for expenses of making said crops and carrying on said plantation. * * * All motions and objections made by me, were made by me of my own accord, without suggestions, understanding, or agreement, or collusion with any one—the guardian, his attorney, or any one else, in his or their interest. Such motions and objections as were made by me, were made in good faith and in the usual way, and disposed of in the usual way."

See, also, his answer to the 7th interrogatory, (R. p. 206,) wherein he gives a general history of his connection with the rendition of the decree.

This evidence of Fitzpatrick is not only not contradicted, but is corroborated by every defendant and witness who could speak in relation thereto. See the deposition of D. T. Blakey, the attorney for Micou, record, p. 213; deposition of Micou, record, p. 183; deposition of H. C. Semple, record, pp. 146 and 152–3.

It must be taken, then, as true that the objectionable items were *bona fide*, so far as the claim to them by the attorney

for the wards is concerned. And the law is well settled that the court correctly decided, on the facts before it, that the wards were entitled to make the election between the rents and hires, on the one part, and the profits, on the other.

And it cannot be pretended, even if the beneficiaries laboring under disabilities be regarded as persons *sui juris*, that there was any guilty or fraudulent intent or knowledge on the part of Clara E. Boykin or her husband, or of Lucy B. Micou, since every allegation of that kind is flatly denied, and proved, without contradiction, to be untrue.

Then, the decrees would not be impeachable for fraud, or be liable to be decreased at the instance of another creditor of Micou, though it were shown that the court committed an error in deciding that Micou was chargeable with rents and hires, instead of with profits, and though it were shown that Micou did not make a *bona fide* defense, unless notice of his fraud and participation therein by the beneficiaries of the decrees was shown.

When there is an unadjusted debt due, and a *bona fide* contestation by *the claimant* in a judicial proceeding, the amount of the judgment must necessarily fix the amount of the debt as to all the world.

It is true that the *bona fides* of any proceeding between debtor and creditor may be impeached by any existing creditor. And upon such challenge it is admitted that the burden is on the defendant, claiming under any conveyance or judgment, to show that the transaction is based upon a valuable consideration, because this is affirmative matter within his knowledge.

Stephen on Plead. 84.

Hubbard v. Allen, 59 Ala. 283.

Carroll v. Malone, 28 Ala. 521.

But this being shown, the burden is then on the complainant to establish the fraud, which must be averred with certainty and proved as alleged.

63 Ala. p. 567.

In this case, the bill charges that Micou was the guardian of the estates of the wards and shows his bond in the sum

of $250,000, (R. 35,) and the inventories of receipts (R. pp. 220–1–2,) as well as the depositions of B. H. Micou and T. M. Barnett (R. pp. 105–6 and 183–4,) show large estates in his hands to be accounted for, and the account filed by Micou for final settlement, no item of which is alleged to have been wrong, showed a balance against him of $107,430.52, (R. p. 18).

Here, then, was a large and unadjusted balance due by Micou to his wards. This is the consideration for the contest resulting in the judgment. If the wards, by *bona fide* contest on their part, obtain the judgment of the court for a larger sum than the balance admitted by the debtor, it is manifest that there is an end of the matter.

Successive creditors can not require the judgment creditor to itemize the verdict of the jury or decree of the court, and to show that no item could, upon another and different trial, be for a less sum. Yet this was, in effect, gravely argued below, and is, in effect, solemnly decided by the court, since its judgment can not stand upon any other theory. Fraud, in fact, on the part of the wards and children of Micou, is as clearly, as positively and as rationally shown not to have existed, even if its legal possibility be conceded, as any negative can be established by uncontradicted human testimony.

The origin of the objectionable items of the account, is likewise shown to be above suspicion as to good faith, and it is plain law that the election claimed was with the wards.

The only ground, then, on which the decrees can be held to be fraudulent and void, in their rendition, is the one above referred to, that a judgment attacked for fraud is *presumed to be fraudulent*, until the judgment creditor can show, to the satisfaction of every successive judge and jury, that the first triers of the questions between him and the common debtor were men of such moderation and sagacity that they arrived at the very truth, and that no other judge or jury could, on a different contest as to the same matter, give less damages.

The absurdity of this position is too gross to bear argument with an intelligent mind and we will, therefore, dismiss

it, with the great mass of evidence in the case concerning the value of hires and rents, as having nothing to do with the questions for argument.

Unless it can be shown that the contest for the allowance of those items was not *bona fide* on the part of the wards before the probate court of Tallapoosa county, the judgment of that court necessarily fixed the *quantum* of that debt as to all the creditors of Micou.

Bump. on Fraudulent Conveyances, 2d ed. 558.

The general charge of fraud and conspiracy on the part of Lucy B. Micou, being fully met and denied by the answers, and not even attempted to be proved, and there being, as we have stated, not even an allegation of fraud or conspiracy on the part of Henry A. Garrett, her guardian *ad litem*, who obtained the decree for her, and the same charges against Clara E. Boykin and her husband Frank S. Boykin, being likewise, with one immaterial exception to be presently noted, fully met and refuted by the answers and in no manner proved by the complainant, there is nothing to impeach the *bona fides* of the proceedings in the probate court up to and including the rendition of the decrees.

When a complainant, having the option to waive the oath of a defendant to his answer, deliberately puts him upon his conscience to discover the whole truth, the weight of the answer as evidence is not lightly esteemed. It is conclnsive, unless it is met by the direct evidence of two witnesses, or of one witness with corroborating circumstances.

Parker v. Phetteplace, 1 Wall. 684.

Tobey v. Leonards, 2 *ib.* 430.

The only circumstance, anterior to the rendition of the decrees, which can be relied on as tending in any manner to show fraud on the part of either of the wards, is alleged in the 7th paragraph of the bill, (R. p. 4,) wherein it is stated that *after* the marriage of Clara E. Micou with Frank S. Boykin, B. H. Micou paid to Clara $30,000 in stock of the said

Tallassee Company on his debt to her, besides other property, and that said $30,000, and other advancements and payments, were "collusively and fraudulently omitted from said settlement by the parties thereto."

There is no evidence that Micou ever made any payment whatever to either of his daughters, except the said $30,000 of stock to Clara E., and all other payments and advancements than that are expressly denied by all of the respondents.

It is conceded that Micou did deliver to his said daughter $30,000 of stock of said Tallassee Company, and that he intended it as a part payment of his debt, but it is denied that it was in fact a payment, and that it was collusively or fraudulently omitted from the said settlement.

The account given of this transaction by Clara E. Boykin and her husband Frank S. Boykin, and by B. H. Micou, can be seen in their respective answers, at pages 46 and 75 of the record, and is substantially this:

In July, 1873, B. H. Micou, of his own accord and without the privity of his said daughter, had $30,000 of said stock transferred to her name on the books of the company. On the 22d of October, 1873, about 12 o'clock, and a few hours before her marriage that evening, he delivered to her an evelope covering the certificate of stock, a letter (a copy of which is Exhibit A., R. p. 81,) and a receipt for $30,000, and requested her to take it to her room and to read the letter and return him the receipt signed, which she did in a few moments, without hesitation. The daughter was then living with him, had had no settlement of the guardianship, and knew nothing of the state of her accounts or of the value of the stock, which was in fact worthless. About a week after the marriage she called her husband's attention to the transaction and he then told her that the stock was worthless. The daughter never did speak to her father about the matter, but a few weeks afterwards, the factory having in the meantime failed, Frank S. Boykin advised with Semple about the transaction, and he told him that he was not bound by it,

that it was a fraud and did not amount to any thing. Micou, at his request, thereupon agreed to regard the transaction as cancelled, and he omitted the matter from his accounts on the advice of his lawyer. D. T. Blakey, that it could not be maintained as a payment.

See deposition of Micou, answer to 14th interrogatory, R. p. 184.

Deposition of Blakey, answer to 18th interrogatory, R. p. 217.

Deposition of Semple, answer to 5th interrogatory, R. pp. 145–6.

Answer of Micou to interrogatory 8, R. p. 52.

No lawyer can contend that the yielding of Clara E. Boykin to the request of her father and guardian, and her acceptance of the certificate of stock under the circumstances of that interesting occasion, amounted to a payment or created any estoppel to the full assertion of her rights. The confidence of nature is not thus to be betrayed. Though the ward was of age, and the parental authority then legally at an end, there had been no settlement of accounts and she still lived under the roof of her father, and it is plain that her love and dependence and his authority knew no change. It is clear that she did not "*trade*" with her father and guardian.

Bigelow on Fraud, 250.

Maitland v. Backhouse, 16 Sim. 58.

Micou, therefore, did right to cancel the transaction when so requested, and to omit it from his accounts, and there can be no presumption of bad faith from his doing voluntarily what any court of equity would have required him to do.

Wilson v. Sheppard, 28 Ala. 623.

Zouch v. Parsons, 3 Burr. 1794.

Ewell's Leading Cases, 3.

Elliott v. Horn, 10 Ala. 348.

It is but just to the counsel representing the case of the complainant in the lower court, to say, that in the presence of the court they abandoned the claim to impeach the decrees on account of the stock transaction. But there being

no notice of that in the record, the point could not be omitted in the argument on appeal.

There being nothing to establish fraud against the beneficiaries of the decrees in the probate court, at or prior to the rendition of the decrees, the latter would be good though it were shown that B. H. Micou himself acted in bad faith.

Marshall v. Croom, 52 Ala. 555.

Tompkins v. Nichols, 53 *ib.* 200.

Marberry v. Brooks, 7 Wheat. 577, 11 *ib.* 78.

But there is no evidence that B. H. Micou was guilty of any fraud. It is shown in the answer and deposition of Micou, and in the deposition of Blakey, (R. pp. 45, 46, 183, 4, 5, 6, 213–15,) that Micou, a year before his failure, and while he thought himself a rich man, contemplated making a final settlement of his guardianship accounts directly upon the older child, Clara E., becoming of age. That he delivered all of his papers and accounts to his lawyer, D. T. Blakey, for that purpose, with instructions to make out his account, and at the same time to take steps to have the disabilities of the younger one, Lucy B., removed, so that, since their estates were joint in every particular, one settlement might serve for both. That, upon his failure, he gave no new instructions whatever to his attorney, and that he and his attorney, both, believed that the account as filed for the final settlement was full, fair and honest. Indeed, as we have seen, there is not an allegation, or item of evidence against this original account.

We have likewise seen that the idea of increasing the balance of that account, by giving the wards rents and hires instead of profits, originated entirely with Fitzpatrick, the attorney for the wards. Micou confesses that he thought he had the right to farm on account of his wards, and instructed his attorney to make out his account on that basis. And it is plain that the motion to charge him with hires and rents was unexpected and a surprise. Although collusion between him and the wards is averred in the bill, it is expressly denied in the answers and is proved, also, in the depositions of the respondents to be untrue *in toto*. No collusion be-

tween him and Fitzpatrick, who made the motions, is averred in the bill, and is, besides, shown not to have existed.

The defense to the motions of Fitzpatrick was a legal matter, which Micou properly left to his attorney. It could only be tried by an examination of the records. If the order for keeping the estates together existed, it was matter of record, and would defeat the motions. If it did not exist, the wards had the right to elect. There is no averment in the bill of collusion between the wards and the attorney of Micou, nor between Fitzpatrick, the attorney of the wards, and Blakey, the attorney of Micou.

And notwithstanding the judge of probate, who was examined as a witness by the complainant, is made to say in his deposition something which may savor of weakness or want of good faith on the part of Micou's attorney in "yielding" points after discussion, it is manifest that the defense made by Mr. Blakey was not only *bona fide*, but was as good as could be made.

The judge had no doubt, or at least expressed none, when his decision was made, or when he was examined as a witness, about his decision being correct. And it is quite likely that he has confounded some expression of Blakey's after the trial with what occurred during the trial, or that the commissioner has made some mistake in taking his evidence. For, it would be the height of folly for a lawyer of sense, desiring to practice a fraud, to render it palpable by resisting points only to yield them. And, besides, Mr. Blakey himself says, in his deposition:

"I was never informed how such motions and objections came to be made, but suppose they were made because Mr. Fitzpatrick came to the conclusion, after an examination of the papers and orders in the cause, that his clients were entitled to elect whether they should charge for profits or for rents and hires, and that it was most to their interest to charge the guardian with rents and hires. I know that he made a long examination of the papers and minute entries before making such motions. There was no suggestion or assistance given him by me or the party represented by me; said objections and motions, so far as I know or have reason to believe, were made in good faith by the party making

them. I resisted said motions by making a speech to the court, in which I used all the arguments I could think of to induce the court to construe the order in question as authorizing the statement of the account as originally made out by me, and refuse to grant the motions. *I read several authorities from Alabama Reports in support of my view of the case, and made altogether as good a defense as I was capable of. The said resistance by me was not pretended, but was bona fide.* *** No influence, so far as I know, except legitimate argument, was used by either side to induce a decision on the part of the presiding judge."

R. p. 213–4, answer to interrogatory 5.

And further, that "There was no want of good faith, so far as I know, on the part of the judge in making the decision which he rendered, or on the part of the witnesses examined in fixing the values of rents and hires, or on the part of the attorneys in conducting the proceedings, or on the part of parties interested in the final result."

Record, page 215, answer to interrogatory 6.

See, also, R. p. 215, answer to interrogatory 8.

And Mr. Fitzpatrick, in his deposition, in answer to the question, if there was "any agreement, understanding, or collusion whatever, whereby the decrees upon the settlement of the accounts of the said Micou, were to be, or were increased by any improper or illegal item, or otherwise made larger against the said Micou than was just, legal, and proper?" says, "There was no agreement, no understanding, no collusion, of the character inquired about. I, as attorney for Clara E. Boykin, did make objections to the account of the guardian as filed. Such objections were made without any preconcert or collusion with said guardian, or his attorney, or any one for them. *** Both the motions mentioned above were argued by me and *counsel for the guardian in good faith, so far as I know or believed.* *** Such motions and objections as were made by me were *made in good faith* and in the usual way, and disposed of in the usual way."

R. p. 204, answer to interrogatory 4.

And further says, "There was no understanding, agreement, preconcert or collusion by which any item of charge was increased, nor any credit decreased or disallowed."

ib., answer to interrogatory 5.

And further says, "After satisfying myself that, on the record and facts disclosed by it, my clients ** had a right to elect to ask for hires and rents, I made a motion to do so

and made an argument and read several authorities in support of the motion. *Col. Blakey replied to my argument as fully, I thought, as any one could, on his side, and with every appearance of good faith and earnestness*; so much so that my recollection is that I rejoined, and felt by no means certain the court would rule for me, but *the court* did so rule.

"I made the other motion mentioned, and I think it was argued by both Blakey and myself, and *the court overruled it.*"

R. p. 205, answer to interrogatory 7.

And Benjamin H. Micou, in his answer, and in response to the 8th interrogatory propounded by complainant, calling for a full and specific discovery of the conduct of the trial before the probate court, and particularly as to whether the questions raised were settled by concurrence of parties, or counsel, or really left to the court to decide, and were decided by the court, and "whether Micou made or instructed his counsel to make any such real contestation, as it appears of record upon the exhibit to this bill was made, of the question of his liability to account for rents of land and hire of negroes," says:

"It was left to the court, after argument by counsel on both sides, to pass upon the effect of the same," (*i. e.* the order purporting to relate to keeping the estates together). ***"The question of such increased liability was really presented to the court for consideration and decision; and said court, after hearing argument and authorities on both sides of said question, passed on the same, *it was not settled by concurrence of counsel.* *** Respondent instructed his counsel not to allow any charge to be passed against him that was not legal and right, and would not bear the most rigid scrutiny; and respondent believes that the efforts of his counsel were honestly and fairly directed towards carrying out those instructions, and that the contestation was really made, as shown on the record, that the court might fairly pass on the questions at issue, and, as proof of the *bona fides* of the contestation, respondent states that his counsel succeeded in convincing the court that some of the claims made by Mr. Fitzpatrick should not be allowed."

R. p. 52–3, answer to interrogatory 8.

After what these witnesses say, it would be unjust to impugn the good faith and honesty of Mr. Blakey, the attorney of Micou, in the fair conduct of the trial, upon the loose expressions of the deposition of the judge of probate, who, besides showing a bad recollection of the trial, does not seem

to clearly understand the force of the language used by him. He did not remember that any witness besides Micou was examined, or that the construction of any order relating to said estates was required of him during the trial, when he himself says that he decided that Micou had no authority to run the farms, which involved an examination and construction of all orders relating to the estate, and when three other persons, to-wit: Micou, Fitzpatrick and Blakey, swear that Blakey was examined as a witness, and that the order which complainant calls an order for keeping the estate together was called to the attention of the court and construed by it.

Record, pp. 46, 52, 213–14, 204–207.

The same witness says that *he decided* the questions raised, and yet by saying *incidentally*, that Blakey "yielded the point," would seem to mean that the point was settled by concurrence of counsel. When questioned directly in these words, "On hearing the argument as to the construction of said order, did you not, as presiding judge, decide that the said order did not authorize said Micou to keep the estate together, and that he was liable for the rents of the lands and hires of the negroes for said years, and was not this the cause and these the facts and circumstances which show *how it was that Micou was charged with said hires and rents?* *** If you say that any admissions were expressed by Micou or his attorney in reference to the construction of said order, by which one of them was it made, and was it not after you, as judge, decided on its construction?" he answers:

"He decided that there was no authority for Micou to keep the estates together and run the farm, and, according to his recollection, no order in regard to keeping the estate together was produced, and that no order is on record which purports to authorize the keeping together of said estate, ** that he has no knowledge or recollection of any *admissions* having been made by any one as to the construction of any such order. ***

R. p. 96, answer to cross interrogatory 2.

The only question which could be before the court on the point as to whether the wards had a right to elect, was whether by any order there was authority in the guardian to farm for his children, and if there was no admission on

the construction of any previous order, it is plain that Mr. Blakey did not "*yield the point*," which he and Micou and Fitzpatrick swear he honestly contested, and which the court claims to have decided honestly for itself.

There is no evidence that Micou and Blakey, the witnesses examined before the probate court as to the value of the rents and hires, did not honestly render their evidence, indeed, there is no allegation in the bill to that effect, and it is shown that their estimates are not higher or materially different from those of witnesses examined by the complainant on this trial.

As to the omission to insert the amount of the commissions he was entitled to in his account, the action of the judge, of including the amount *himself*, shows that the allowance of commissions, as provided by law, of $2\frac{1}{2}$ *per cent.* on disbursements and receipts, was a matter of course and properly to be inserted in closing the account, or that the judge was guilty of a most unbecoming act in including them in the account himself.

The commissions could not be inserted until the other items of the account were allowed by the court, and the uniform practice is to allow $2\frac{1}{2}$ *per cent.* on each side of the account, unless cause is shown against the propriety of so doing.

Upon the whole, then, there is nothing to overturn the presumption of fair dealing and honesty of Micou, in the matter of said settlement, supported, as it is, by his own direct response in his answer and deposition to the charges of fraud, and corroborated, as it is, by the collateral aid of the answers of the other respondents, as well as by the evidence of Fitzpatrick and Blakey.

The decrees, then, with or without fraud on the part of B. H. Micou, stood upon their rendition as good and valid debts in favor of the wards, the conspiracy for their rendi-

tion being both impossible, in point of law, and untrue as matter of fact.

IV. It only remains to examine the matters charged in the bill as having occurred after the rendition of the decrees, and claimed by the complainant as being either fraudulent in themselves and a substantial ground of relief, or as being evidence of an original fraudulent conspiracy for the rendition of the decrees.

Soon after the decrees were made Henry C. Semple, who was the attorney of the wards and an old friend of the family, and a kinsman of Boykin, who had recently married Clara E., induced Frank S. Boykin, Clara E. Boykin and Lucy B. Micou to make to him the assignment of the decrees, shown as Exhibit A. to Semple's answer, R. p. 73. A full account of how that assignment came to be executed, is shown in the answer of Semple, R. p. 68, and more fully in his deposition at p. 147. Semple's account of this matter is confirmed by F. S. Boykin in his deposition, R. p. 194, answer to inter. 5; by Clara E. Boykin, at p. 196, and by Lucy B. Micou, at p. 198; and there is nothing in the record contradicting or conflicting with this account. A short statement of the matter is, that Semple, after the rendition of the decrees, of his own accord and without suggestion from any one, told Boykin and the wards that they ought to provide, out of their abundance, for the families of B. H. Micou and the two Barnetts. The arguments he used may be seen by referring to the record. He advised them that they had a right to make the provision, and under his advice the assignment was made.

The assignment transfers the decrees to H. C. Semple—but in trust—

1st. So to proceed as to secure certain named property of B. H. Micou, *clear of all expense*, for the assignors.

2d. To purchase as much of the property of the other defendants as could be sold under the decrees, and to settle

that owned by Micou "on the wife and children of the said Micou, by his present wife," and that of T. M. Barnett "on the wife and children of the said Thomas M." and that of N. D. Barnett "on the wife and children of said N. D. Barnett." But the property settled on the family of T. M. Barnett is to be charged with the sum of $8,500 to be paid to Clara E., and the like sum on the property settled upon the family of N. D. Barnett to be paid to Lucy B. Micou, with interest to be paid annually, which property and sums to said Clara E. and Lucy B. are to be clear of all expenses and costs whatever. The date of the assignment is the 4th April, 1874, and the parties to it are Clara E. Boykin, F. S. Boykin, Lucy B. Micou and Henry C. Semple.

This instrument does not, by any reflex light, show that there was an original conspiracy or fraudulent dealing for the rendition of decrees for improper amounts. It is not shown to have been the price of the decrees. No connection between it and the rendition of the decrees is traced; on the contrary, they are distinctly shown to have been wholly independent of each other.

Two questions then arise—is there anything illegal in said assignment, and is the complainant's bill or claim to relief grounded thereon?

The first question resolves itself into this: does the relation of debtor and creditor destroy the latter's right and dominion of property, or deny to him the consolation of benevolence?

To say that the execution of the assignment mentioned, under the circumstances under which it is shown to have been made and for the purposes therein declared, is *per se* illegal, is to answer both clauses of the interrogatory last suggested, in the affirmative. For in what other light does the transaction show itself than that of the owner of property directing an appropriation to the necessities of helpless women and children?

The law, no less than humanity, recognizes these classes of persons as proper objects of bounty, and, certainly, a kinsman should have no less right to give than a stranger.

The decrees belonged to the daughters of Micou—they had the undoubted right to have them paid out of the property of the defendants—their right is as undoubted to direct the application of the collections for the benefit of the families of their father and uncles, as it would have been to have retained every thing themselves. The recipients of their bounty hold the title of the donors, and to deny their right of enjoyment is to deny the right of the donors themselves.

There is nothing in the body of the transfer to Semple which is even open to criticism. The purpose of a judgment is to sell the property of the debtor, if payment is not presently made. And the provision in the deed, that the decree should be used to purchase as much of the debtors' property as possible, and that the property when purchased should (subject to certain heavy charges) be settled to the use of third persons, is unobjectionable in any aspect.

As an independent transaction, the assignment to Semple is, therefore, harmless and not to be questioned.

Bump. on Fraud. Con. 191.

We cite the case of Young v. Dumas, 39 Ala. 60, to show that there is nothing in law against a father's buying the property of an insolvent son-in-law and instantly giving it to his daughter. And the case of Anderson v. Brooks, 11 Ala. 953, to show that strangers may buy and settle the property of a debtor on his wife and children. Surely daughters and nieces are not to be denied the right to make such provisions out of their own means.

But this transfer to Semple is not impeached in the bill or sought to be set aside, otherwise than as its fall is an incident to the destruction of the decrees, on which of course it is based.

Its nature and character, and contents, were fully set out in the answers and depositions in the case. Yet there was no amendment of the bill directing any allegations against its legality, nor were the persons shown by the instrument itself to be primarily interested therein, to-wit: the wife of B. H. Micou and his children by her, made parties. And it

will be observed that they are indispensible parties, since Semple is the agent of the grantors, and not the trustee of the wife and children of Micou, and authorized to act for and to bind them.

Marberry v. Brooks, 11 Wheat. p. 87.

It is not pretended that such a deed by persons *sui juris*, following the rendition of the decrees, might not well be considered as a circumstance to stimulate the scrutiny of the transaction, but when its origin and the motive for it are so clearly shown to have been innocent, and when the decrees are shown to have been upon proper considerations and free from fraud on the part of the wards, the assignment is not to be relied on to establish fraud in the decrees, when it itself comports with honesty.

Young v. Dumas, 39 Ala. 60.

Tompkins v. Nichols, 53 Ala. 200.

But the assignment of the decrees to Semple, was itself only a formal act on the part of Clara E. Boykin, for she was then a *feme covert* without any power or capacity to divest herself of her separate statutory estate, except by a *sale* or by will.

61 Ala. 394; 59 *ib.* 431; 57 *ib.* 317; *ib.* 122.

And at the time of its execution Lucy B. Micou was herself an infant.

The assignment never was the *act and deed* of Clara E. Boykin, and could, therefore, never be evidence against her. It could now be set aside by her children as not binding her.

We come now to the other allegations in the bill, of misconduct after the rendition of the decrees, as *indicia* of fraud in the decrees themselves These allegations consist entirely of averments concerning the management of the matter of the collection of the decrees, the general averment being in the paragraph of the bill numbered 17, at page 9 of the record, in these words:

"And orator further charges that, since the rendition of

said decrees, there has been a complete understanding and agreement between the parties to said executions, that the plaintiffs therein should so use said decrees and process to be issued thereunder as to enable the defendants therein to hinder, defraud and delay their several creditors, *in that they were to be permitted and aided in converting property to their own use, as shown herein.*"

This general charge, and the specific details following in the bill, are in all material respects met and denied by the answers, which are responsive to the searching interrogatories of the bill. Independent of this, there is not the slightest evidence to connect either of the beneficiaries of the decrees with any understanding or agreement for any improper use of the decrees or the process thereon, nor is there any evidence in the case to show that there had been any improper use of the decrees or the process thereon. And, independent of this, after the assignment of the decrees to Semple in April, 1874, just after their rendition, the management of the process on the decrees has been entirely under the control of Henry C. Semple, the trustee.

His instructions are in writing, being embodied in the deed transferring the decrees to him, and they certainly do not evince any fraudulent purpose on the part of the grantors to prevent the property of the defendants from being applied to the payment of their debts. On the contrary, the very purpose expressed in the deed is to exhaust the decrees by a sale of their property.

If after the assignment Semple did any thing wrong, it would be his own act, and would neither vitiate the decrees nor defeat the trusts declared in the deed, and especially those in favor of persons not *sui juris*, but would only work his own displacement as trustee, and, in the event of his act being injurious to other persons, might make him personally responsible.

But his conduct since the assignment is shown to have been unexceptionable in every particular. It is deemed unnecesary to enter into the details of his actings and doings under the decrees, as there is no evidence to support the allegations of the bill of misconduct, and Mr. Semple in his

answer and deposition clearly shows that his only purpose has been faithfully to execute the trusts of the asignment to him.

No improper instructions whatever have been shown to have been given to any sheriff holding an execution, nor is there any allegation, and much less any evidence, that the property has been sold and bought at prices less than its value.

The intent which the law condemns as fraudulent, is not the purpose to obtain a priority, for the right of a debtor at common law to *give* a priority is admitted, (Marberry v. Brooks 11 Wheat. 79,) and the right of a creditor, in due course of law, or by any lawful diligence, to obtain a prior lien, has never been condemned even by the policy of a bankrupt law, but the intent which is denounced by the law is a purpose to prevent the debtor's property from being applied to his debts in due course of law.

Alabama Life Ins. Co. v. Petway, 24 Ala. 566.

The necessary consequence of every appropriation of the property of a debtor to the payment of *a debt*, is to prevent its application to any other debt; but this is lawful, for it must accompany every effort at obtaining payment of a just demand.

It is only when the creditor has a purpose beyond this, and when he seeks, in addition to the satisfaction of his own demand, to aid the debtor in keeping property from other creditors, that his act becomes fraudulent.

If the persons accused of this desire to cheat and swindle the complainant in this case, were persons capable in law of acting for themselves, and thus liable to forfeit their fortunes by aiding a fraudulent debtor, the case is not sustained in any aspect by the evidence. The weight of the answers alone, without the corroborating evidence of the depositions of other witnesses, would involve the dismissal of the bill.

Parker v. Phetteplace, 1 Wall. 684.

Tobey v. Leonards, 2 Wall. 430.

McMicken's Ex'rs v. Perin, 22 How. 284–5.

Marshall v. Croom, 52 Ala. 55.

Tompkins v. Nichols, 53 *ib.* 200.

And when to the force of these unrefuted denials of the answers, is added the corroborating evidence of disinterested persons, who, though not defendants, were principal actors in the transactions charged to be fraudulent, and the further consideration of the disabilities of the *feme covert* and female infant, who are charged and sought to be *punished* as the prime conspirators, it is the more manifest that the complainant was not entitled to relief.

Parker v. Phetteplace, 1 Wall. 685.

Nor can it be held that any expectations which B. H. Micou or his sureties, the Barnetts, may have had that the daughters of Micou would make some provision for their families, in the event they succeeded in collecting their debts, could affect the right of the daughters to their decrees and to collect the same, unless it is shown that the proceedings to obtain the decrees were to be influenced by the hopes of such settlement. The innocence of the wards of Micou is not to be "annulled by any hope which might have lurked in the bosoms" of the guardian and the sureties, that the children of Micou might not prove themselves unnatural daughters.

Marberry v. Brooks, 11 Wheat. 84–5.

Nor is it to the shame of these ladies that they yielded to the eloquence of Mr. Semple and made haste to relieve the necessities of their unfortunate relatives.

Bump. on Fraudulent Conveyances, 191.

Their bounty was not exercised at the expense of other creditors.

It is plain, then, that the plaintiffs in these decrees have a legal priority, and that the complainant has no equity to deprive them of it and thus to forfeit their estates for its benefit.

Bump. on Fraud. Con. 187.

We have shown that the complainant, if the decrees at-

tacked were really, by the fraudulent concurrence of Micou and the guardian *ad litem* of the minor, and the attorney of the *feme covert*, rendered for too much, might have had relief against this *feme covert* and minor to the extent that they unwittingly had profited by the fraud.

But in such case the frame of the bill would have been essentially different from the present one, and the relief sought and afforded would not have violated the principles of natural justice.

V. It is only deemed necessary, in the matter of the 4th assignment of error, to cite the pages of the record showing its truth.

The land mentioned in the bill (R. pp. 9, 10,) as being in township 15, range 20, and as having been bid off at $7,000, constitute the farm in Montgomery county inherited by Clara E. Boykin and Lucy B. Micou from their mother, Lucy A. Micou, and was held by Benjamin H. Micou only for life.—R. p. 61–2, § 10; 64, § 21; 158, ans. to cross-int. 15; 159, ans. to cross-int. 18. The decree of the court (R. p. 237,) directs *this property*, and not the life interest of Micou therein to be sold

VI. The 5th, 6th, 7th and 8th assignments are covered by what has already been said. It only remains to notice briefly the 9th, which is that the decree of the court makes no provision for the protection of Henry C. Semple, in so far as he has acted under the trust to him *bona fide*.

There is no allegation of fraud, or notice of fraud, on the part of Semple, nor any evidence thereof, and he is shown to be a trustee under the deed of assignment to him, found at page 73 of the record as Exhibit A., and to have proceeded at great length in the execution of the trust, and to have assumed large personal liabilities and to have incurred great

expense. To this extent it is evident that he stands as a *bona fide* purchaser without notice would have stood, and it seems that, assuming the case as made out against the other defendants, Semple is entitled to be protected in so far as he has proceeded *bona fide* under the deed of trust. And the court should have directed a reference for that purpose.—See the remarks of the court in Cummings & Cooper v. McCullough, 5 Ala. 337–8. The creditor's right dates from his bill, which was the exercise of his election to avoid the decrees.

See opinion of Mr. Justice Field, *In re* Estes, 12 C. Law Journal, 135.

But we rely with confidence upon the points in bar of any relief to the complainant in this case, and by no means confess their weakness in noticing minor matters, which, if allowed, would not avert the ruin of the respondents.

Walker
Wallace Phillips
for appellants

Supreme Court of the United States.

[No. 310.]

BENJAMIN H. MICOU AND OTHERS, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

W Wallett Phillips

Reply in behalf of Appellants, by W. A. GUNTER, *to the argument of* DAVID CLOPTON, SAML. F. RICE AND H. A. HERBERT, *for the Appellee.*

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Reply in behalf of Appellants, by W. A. GUNTER, *to the argument of* DAVID CLOPTON, SAML. F. RICE AND H. A. HERBERT, *for the Appellee.*

1. In the argument filed in the first instance in behalf of the Appellants, one position taken was that, because infants were, in contemplation of law, persons without capacity to manage their affairs, and could make no binding agreement to the prejudice of their estates, except for necessaries, and because they could not appear in a cause, nor appoint an attorney, nor do any act to control, manage or shape litigation for, or against them, there could not be a conspiracy between an infant and a guardian for the rendition of a decree, on the settlement of the guardianship, which would make the decree void, as being *intended by the infant* to defraud the creditors of the guardian, and by preventing the collection of the decree, give such creditors the right to deprive the infant of his or her entire estate.

And, because married women are supposed either to have

no legal existence, or to be *sub potestate viri*, it was asserted that a *feme covert* could not conspire with her husband and her guardian for the rendition of a like decree, which would be void *in toto* as to creditors of the guardian because *intended by her* as a fraud on them, with the right in such creditors to deprive her of her estate, by preventing the collection of the real debt, or by taking from her the fruits of the entire judgment.

We fortified this position as well as we could by reasoning and authority, and asserted that no well considered case could be found in the books, in which such results and forfeitures had been approved and enforced, anterior to this one. It was expected that if the reasoning of counsel was faulty it would be exposed, and if there were any adverse authorities to be produced the diligence of counsel would discover them. For, it seems that if there is now, in the 19th century, no precedent in English or American law for such a claim it ought justly to be regarded as unwarranted.

The reply of counsel to this position, found on page 36 of their argument, is that it is a new doctrine to them, and that they have not heretofore learned that such was the law.

And to the challenge for authorities they make a quotation from Phipps v. Sedgwick, 5 Otto. p. 9. This quotation is only of parts of two sentences. And it will be seen that the doctrine of that case, and, indeed, of the whole of either of the sentences quoted from, sustains our contention. The material portion of the sentence omitted in the first quotation is this: "We are not aware of any well considered case of high authority where the pursuit of the property," [meaning property fraudulently conveyed by husband to wife,] "has been abandoned, and a judgment *in personam* for its value taken against the wife." The whole of the other sentence is, "Equity has been ready where such property remains in her hands, to restore it to its proper use, *but not to hold her separate estate liable for what she has received, and probably spent at his* [the husband's] *dictation*."

Why this immunity of the wife and of her estate from responsibility for *proceeds* of property fraudulently conveyed to her by the husband? Persons *sui juris* are liable in such cases.

Backhouse v. Jett, 1 Brock, 500.

The wife's exemption manifestly rests, as the case from which the quotations are made plainly shows, on the fact that the intent of a fraudulent conveyance cannot be imputed to her.

Counsel next refer to the case of Humes v. Scruggs, 4 Otto, 22; but this case is one in which the property of the husband was merely pursued into the hands of the wife and taken from her, because she showed no consideration for her deed.

We do not contend that a *feme covert*, or an infant can hold the property of a debtor by deed, or judgment, without an adequate consideration. Our position is that a *criminal intent* on the part of a married woman, or an infant in receiving a deed, or taking a decree on the settlement of a guardianship is no more to be imputed to them than to a lunatic. These classes of persons are alike regarded as not being free agents, capable of voluntary intelligent action, and, therefore, cannot entertain the guilty and criminal intent involved in a conspiracy to defraud as charged in this case.

A lunatic, like an infant, is liable *civiliter* for his torts.

Krom v. Schoonmaker, Ewell's Leading cases, 638 and notes.

But, how would it sound for a lawyer to bring a case against a lunatic to deprive him of his estate on the charge that he conspired with his guardian or committee, on the settlement of the trust, to take a decree for sums in excess of the real amount due, with the *intent* to defraud the creditors of such guardian or committee?

Would the case be better if it was against an infant three weeks old, or one nineteen years old? Does the law make any distinction in the protection afforded infants which is founded upon their age? (3 DeG. M. and G., p. 9.) Does an

infant nineteen years of age, in fact, have any thing more to do with the conduct of litigation in his behalf than one three weeks old? If an infant cannot contract fraudulently so far as to become a bankrupt, how can the *fraudulent intent* of a grantor dealing with him be imputed to him? Can it be said that a fraudulent contract is necessarily to his interest and shall bind him? Would not the law give him the same option given in other agreements to repudiate it on arriving at his majority? How then can a creditor found a right upon the efficacy of a fraudulent agreement entered into during minority?

And when the dealing between the supposed fraudulent grantor and the infant is a matter obliged to be transacted, as the settlement of a guardianship, and the result is objectionable or impeachable only because of the supposed intent or *mala mens* of the infant, the law ought to reject the idea of its entertainment by him.

If the learned counsel, who profess such profound ignorance of the doctrine, will consult the authorities anew they will have cause to change their opinion. Though new to them it has no claim to novelty.

In the case of Blanton v. Taylor, Gilmer (Va.), 209, it is said:

"The court is of opinion, upon the testimony, that the deed of March, 1803, * * is fraudulent and void, so far as it respects the creditors of the said Langhorne, but as the dower interest of Mrs. Langhorne in the tract of land conveyed to Thomas Hobson, by the deed also among the proceedings, is admitted to have been relinquished by her in consideration of the provision made for her and her children by the deed first mentioned, and, as the fraud of her husband in relation to the said deed, *if she participated in it, should not be imputed to her by reason of her coverture*, the court is further of the opinion, upon the principles settled in Quarles v. Lacy (4 Mun. 251), that the provision made by the said deed should not be disturbed, so far as it does not exceed the value of the dower interest for which it was substituted."

In the case of William and Mary College v. Powell, 12 Grattan, 372, Lee, J., says:

"That a post nuptial settlement in favor of a wife, made in pursuance of a fair contract for valuable consideration will be held good is a doctrine supported by abundant authority. And although it may have been made under such circumstances that it must be pronounced fraudulent and void, as to the creditors of the husband, yet if the wife have relinquished her interest in property on faith of such settlement, it will be held good to the extent of a just compensation for the interest which she may have parted with."

And in Taylor v. Moore, 2 Rand. 363, Judge Green says:

"It is admitted that the deed was fraudulent in conveying, under pretence of making to Mrs. Moore a just equivalent for her dower, property to three or four times the value of her dower interest. If she had been a person *sui juris*, and privy to this, it would have avoided it *in toto; but, being a married woman, this fraud is not to be imputed to her*, nor to her children, who are probably infants * *."

Lee v. Bank, 13 Pet. 107.
Phipps v. Sedgwick, 95 U. S. 3.
Trust Co. v. Sedgwick, 97 U. S. 308.

It seems, therefore, almost too plain fo[illegible] that the *intent to defraud other creditors* cannot be imp[illegible] *infants*, idiots, lunatics, or *married women*, though entertained by the person dealing with them, and that in such cases, if liable at all, it is only as innocent recipients of the property fraudulently conveyed to them, and only to the extent of the benefit received by them from the fraud.

1 Domat's Civil Law, § 1649.

But the learned counsel say, that if a creditor takes a judgment *knowingly* for more than is due, or accepts such judgment after it is taken, the fraud corrupts the entire judgment.

This, clearly, is the rule applicable only to persons *sui juris*, and rests upon the presumed agreement to assist the debtor to cheat his creditors. In this case it is to be noted that the estates of the wards consisted, beyond the real estate owned by them, in a chose in action against their guardian, that this claim was merged into a judgment without

infant nineteen years of age, in fact, have any thing more to do with the conduct of litigation in his behalf than one three weeks old? If an infant cannot contract fraudulently so far as to become a bankrupt, how can the *fraudulent intent* of a grantor dealing with him be imputed to him? Can it be said that a fraudulent contract is necessarily to his interest and shall bind him? Would not the law give him the same option given in other agreements to repudiate it on arriving at his majority? How then can a creditor found a right upon the efficacy of a fraudulent agreement entered into during minority?

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Trust Co. v. Sedgwick, 97 U. S. 308.

Sims v Eastland in note

It seems, therefore, almost too plain for further argument, that the *intent to defraud other creditors* cannot be imputed to *infants*, idiots, lunatics, or *married women*, though entertained by the person dealing with them, and that in such cases, if liable at all, it is only as innocent recipients of the property fraudulently conveyed to them, and only to the extent of the benefit received by them from the fraud.

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But the learned counsel say, that if a creditor takes a judgment *knowingly* for more than is due, or accepts such judgment after it is taken, the fraud corrupts the entire judgment.

This, clearly, is the rule applicable only to persons *sui juris*, and rests upon the presumed agreement to assist the debtor to cheat his creditors. In this case it is to be noted that the estates of the wards consisted, beyond the real estate owned by them, in a chose in action against their guardian, that this claim was merged into a judgment without

(on our assumption) capacity on their part to *knowingly* conspire or agree for the rendition of a fraudulent decree. The consideration given by these wards for this decree is the whole of their just demands against their guardian. The decree being rendered, and, thus, the consideration for it paid, or passing during the innocence of the wards, no court of intelligence or equity could require them to renounce the benefits of the decree; for to do this would force them to renounce their whole estates. The most that can be required of them in such a case, *i. e.* of the rendition of a decree for too much by the fraud of the guardian, is to allow creditors of the guardian to hold them to account for all benefits received from the decree beyond the actual amount due upon a proper statement of the accounts.

Accordingly, the rule laid down by the learned counsel for the appellee that fraud vitiates a transaction *in toto*, has this exception; when an innocent party has paid a valuable consideration the fraud cannot vitiate his title. Even an innocent party, if a mere volunteer, cannot claim through a fraud; but if he has parted with a valuable consideration, he is always protected.

Topham v. The Duke of Portland, 1 DeG. J. & S. 517.
Scholefield v. Templer, 4 DeG. & J. 429.

The legal surrender, or merging of the unadjusted claim of the wards, against their guardian and his sureties, into the decrees was a mutual estoppel between the parties and the destruction of the claim as it stood, by its merger into the higher security, and is, therefore, a valuable consideration.

If the beneficiaries of the decrees, therefore, are innocent, either as a consequence of their *status*, or as matter of fact, the decrees are certainly good to the extent of the *bona fide* debts of the wards.

In such a case the decrees being supported by a valuable consideration, with *bona fides* or innocence on the part of the wards, they would at law be taken as good for their whole amount; but, in equity, they might stand good only for the

actual debt of the guardian, if it is shown that, by his fraud, the decrees were for too much.

Wright and Cooke v. Stanard, 2 Brock. 311.

1 Domat's Civil Law, § 1649.

Our position, in the first place, is that, no fraud being charged in the bill against the attorney of the *feme covert* and the guardian *ad litem* of the infant, their good faith being even expressly conceded by counsel in their printed argument, the legal *status* of the *feme covert* and of the infant, would effectually shield them from responsibility for any apparent participation in the fraud of the guardian, which might be shown.

And, with all deference for the wisdom of the opposing counsel, it seems to us as a plain consequence, from the legal non-entity of the wife, or the legal duress under which she lives, and from the legal incapacity of an infant, that neither of them can be held to responsibility, as persons *sui juris*, for agreeing and contracting with their guardian to become a trustee for him, and to hide his property under their enlarged claims. If such responsibility was exacted the imbecility of infants and the duress of married women, rendering them incapable of proper discrimination and of resisting the seductive influences of persons in authority over them, would be the very cause of their destruction. Such acts and contracts by married women and infants are not *pure torts*, nor *vi et armis et contra pacem*, and infants and married women are clearly as much entitled to immunity from forfeitures arising therefrom as idiots and lunatics.

But the counsel for the appellee say that they do not seek any judgment *in personam* against this infant and *feme covert*, but only to have their decrees and sales thereunder declared fraudulent, and the property sold for the payment of appellee's debt! To take from them the *fruits* of their fraud, which is not the excess above their debt, but *the whole property!* This is, indeed, a concession to the immunity of infants and married women? Imprisonment for debt is no

longer tolerated, and a judgment *in personam* would only give the right to sell the property of the defendant. What distinction of value is there, then, between condemning the estate of a person by specific proceedings, instead of under a general execution. It is not the manner of the condemnation we are contending about, but the question of guilt or innocence, which is at the bottom of any condemnation.

The estates of these wards of Micou became merged, from an unadjusted chose in action, in the decrees rendered against their guardian and his sureties, and, by sales under them, now exist in the specific property sought to be condemned.

The wards thus stand as purchasers for value, and it is plain that if the property can be taken from them, judgments *in personam* could be rendered against them for the proceeds if they had sold it; and that if their *status* would make them innocent holders of the proceeds and protect them *in personam*, it will protect them in the possession of the property. Their immunity, in either case, results from paying value for the property and from not participating in the supposed unlawful purpose of the guardian.

In so far as they may not have paid value for the property their innocence would probably not protect them, and they would stand as mere volunteers, liable to account, *on proper proceedings*, to creditors. This would only be for the *benefit* to their estates resulting from the fraud, and it is that only which equity could, under any circumstance, deprive them of.

But it would be a strange sort of equity which would compel them to concede the fraud of the guardian and the errors of the probate court, upon *the information* of a creditor of the guardian contained in the allegations of a bill in equity; to abandon their title and resort to a cross-bill for protection, as is suggested by the learned counsel, on page 38 of their argument. The fact of their having received any excess beyond their debt, and the fact of the fraud of the guardian are matters they have a right to have adjudicated, and their adjudication against them would not any more than

their denial of the facts impute *mala fides* to them, or deprive them of what in equity they were entitled to, but would only give the court the right to comdemn in their hands, or to hold them to account for the excess, or benefit derived innocently from the fraud.

II. But we have enlarged sufficiently upon this branch of the case, and now proceed to consider the other matters in the argument of the appellee, involving the question of fraud on the part of the appellants regarding them as persons *sui juris.*

The first question is one in reference to the burden of proof. In the discussion of legal questions, legal principles should constantly be kept in view, and judgments should be controlled by them rather than by loose or unguarded expressions of judges in precedents.

Now, we readily admit that it is incumbent upon a defendant, holding by any conveyance from a debtor, which is attacked by an antecedent creditor, to show that he has given a valuable and *adequate* consideration. The reason of this is plain. It is affirmative matter which the holder of the conveyance must set up, or negative matter *to be alleged*, but not proved, by the complainant.

But a valuable consideration, adequate in law, being shown by the admissions of the complainant, or by evidence in the cause, the burden is then on the complainant to show that the purpose and intent of the act was fraudulent; and, in such case, "the proof must be clear and convincing that such was the purpose and intent of the act."

Terrell v. Green, 11 Ala. 214.

This for two reasons; first, it is affirmative matter alleged and, of course, to be proved by the complainant; second, because being criminal and not according to the natural order of things, it is not to be aided by unwarranted presumptions. If provable facts were presumed, the plaintiff would

always have an invincible case, and the defendant an uncontrovertible defense.

Now, in this case, the bill expressly charges that Micou was the guardian of the estates of his daughters—Clara E. Boykin and Lucy B. Micou—and shows that his accounts were unadjusted, and avers that the decrees on his settlement were fraudulent, because he conspired with his daughters to have the decrees rendered for more than was due, and then specifies that certain *items*, with which the account had been surcharged on the settlement, were not legally due from him, as was well known to all the parties; and that certain of these items for land rent and negro hire were not chargeable because, as the parties well knew, Micou was authorized by orders of the probate court, "shown by the full and true copies thereof hereto attached and marked exhibit D," to keep the estates together, and was liable only to account for profits, which were small.—R. p. 4.

The bill itself then, independent of the evidence, discloses a valuable and *adequate* consideration for the decrees, by showing unadjusted demands against the guardian and their ascertainment by judicial proceedings, and attempts to avoid the effect of the judgments by averring fraudulent collusion between the guardian and the wards.

The counsel for appellee, playing upon the word "adequate," used in some of the cases, seem to think that it is incumbent upon the defendant, in a case of this kind, to go over the account of the guardian and to prove anew every item, in order to make the consideration "equal" to the decree.

Suppose the decree attacked was a judgment in an action for slander. Collusion for a judgment in such a case would render it as nugatory as in any other. Upon the slander, and an action therefor, and a judgment being shown by the creditor's bill, and an averment of collusion, would the defamed man have to try his case over, and bring the Chancellor to the same estimation of his character as that shown by the jury? Clearly not; for this would probably result in as

many different estimates of character as there happened to be impeaching creditors. The enquiry in such a case would only relate to the *bona fides* of the contest. And a creditor of the slanderer would have no right to complain of any error not traceable to fraudulent collusion by the plaintiff.—When the consideration, in cases even of mere bargain and sale, is not so insignificant, when compared to the property conveyed, as to satisfy the conscience that the conveyance must have been intended to cover the property from the just claims of creditors, the law takes no notice of the discrepancy.

Wright v. Stanard, 2 Brock. 315.

The law does not make contracts for parties, and when the consideration is not nominal in legal estimation, its amount as compared to the property conveyed is a subject of enquiry only as throwing light upon the *bona fides* of the transaction.

Bump. on F. Conv. 189.

When a demand or claim is admitted to exist and is shown to have been unadjusted, and to have been determined by judicial proceedings, the sole question is one of *bona fides* on the part of the plaintiff.

And the *mala fides* of the transaction being the fraud, and its existence an affirmative allegation by the plaintiff, and a valuable and adequate consideration being thus shown and admitted to exist in the unadjusted claim, the burden is on the attacking creditor to show by "clear and convincing proof" that the purpose of the judgment creditor was fraudulent and unlawful.

Terrell v. Green, 11 Ala. 213-14.

Thames v. Rembert, 63 Ala. 567.

Bump on F. Conv. 2d Ed. 192.

Starting out with this object, the complainant avails itself of the privilege the law gives of making the defendants answer, under oath, every allegation and interrogatory propounded in the bill. The effect of this requirement is, that the compainant makes the defendants its witnesses, and en-

dorses their credibility so far that it is not allowed to impeach their character for truth and veracity.

1 Daniel's Chan. Prac. 4 Am. Ed. 844 and note.

Vandegrift v. Herbert, 36, E. Green. (N. J.) 469.

The effect of an answer fairly responsive to the bill and denying the facts charged becomes itself a heavy burden for the complainant to carry.

In this case it is not denied that the answers were full and frank; there were no exceptions to them. And it is admitted that the denials are absolute and unqualified.

We must admit, as is stated in the case cited by appellee (9 Cranch 160), the possibility of overcoming the denials of an answer by circumstances alone, but these circumstances or admitted facts must have the same weight as the direct testimony of two credible witnesses or of one with corroborating circumstances. The effect of an answer too, like the deposition of a witness, depends upon the opportunity of the party to know the matters testified to—matters of information or inference, as in the case in Cranch, *supra*, do not carry conviction to the mind as where, as in this case, the responses relate to matters particularly within the knowledge of the witnesses.

The counsel for appellee, however, say that there is such a "*concurrence of probable circumstances*" in this case, showing a conspiracy between Micou and his daughters for the rendition of the decrees for excessive amounts, that the court ought, notwithstanding every thing to the contrary, to find for the appellee.

In starting out upon the investigation of these circumstances it should be borne in mind constantly that the only items, making up the decree, objected to are those with which the account of the guardian was surcharged on the final settlement, and that, of these, the negro hire and land rent were particularly wrong because of Micou's alleged known authority to keep the estates together. R., p. 4.

No fraud as to the items of the balance of the account is

intimated in the *bill*, or shown in the evidence or the argument.

Now, as to these items of increase of the guardian's account, besides the denials of the answers, there is the testimony of disinterested witnesses. Mr. E. J. Fitzpatrick states explicitly that *he* as the attorney of Clara E. Boykin, after an examination of the records of the court, of his own accord, and *bona fide*, and because he thought his client entitled to do so and without suggestion, understanding or collusion, instituted and carried through the proceedings resulting in this surcharge of the account *by the court*. See his deposition, R. pp. 204–5–6.

His account is corroborated *in toto* by the deposition of D. T. Blakey, who was the attorney of Micou. See his deposition, R. pp. 213–4–5.

They are both corroborated by Micou in his answer and deposition. R. pp. 183–4–5–6–7–8. R. p. 52.

And the probate judge states that he, on Fitzpatrick's motion, decided to charge Micou with these items. R. p. 96, ans. to Cross. int. 2. The origin of these items objected to is thus clearly shown. The *bona fides* of Mr. Fitzpatrick is not only not questioned in the bill or evidence, but is conceded in the argument of counsel. See printed argument, p. 34.

But relying on "the concurrence of probable circumstances," counsel, in effect insist that all this concurrent testimony is *deliberately false*. We will notice some of their concurrent circumstances.

The first matter called to the attention of the court is the relationship of the parties. In a bargain and sale the parties come together, or treat of their own accord, and, as it is most natural that a secret trust and confidence should find its *nidus* in the bosom of relationship, the courts justly hold that it is a circumstance to sharpen scrutiny. But here the relation of guardian and ward had existed for more than fifteen years, and this relation *necessitated* a settlement, between the wards, on the one part, and the father and uncle on the other. There was no new coming together or asso-

ciation of the parties, the refore, on the press of an insolvency. And though we have no objection to the sharpest scrutiny, still this transaction wears a different aspect from those having cotemporaneously their conception and birth.

The next circumstance is the threatened insolvency of the guardian and his sureties, and the subsequent sale of property to a large amount under the decrees, which say counsel, "are circumstances which should cause the transactions to be looked on with suspicion, and in connection with other circumstances, making their fairness questionable, are sufficient to declare them fraudulent." p. 11.

It appears to us that as the daughters of Micou did not get up the relation of guardian and ward on the occasion of the insolvency, the occurrence of the latter during that relationship is a matter rather naturally to stimulate their desire and efforts for a settlement, and, thus, to lead to the decrees, and should not be a ground of suspicion against them, as, certainly, a sale of property for their satisfaction is not.

Counsel devote page 10 of their argument to show a "glaring conflict" between the answer and deposition of Micou, but the result seems to be a *lucus a non lucendo*. We think that a disinterested grammarian and critic can reconcile the statements quoted from the answer and deposition as being in "glaring conflict;" besides, it is in reference to a collateral and almost immaterial matter. But, if it were otherwise, is it a matter proper to urge against the other defendants? If every allegation of the bill was confessed by a decree *pro confesso* against Micou, it would not add strength to the case against the wards.

Thamas v. Rembert, 63 Ala. 567.

On pages 11 and 12 counsel argue that Micou well knew in the spring of 1873 that his insolvency and that of the Tallassee factory were imminent, and that that fact induced him to prepare as early as the spring of that year for making a settlement as guardian, and that, consequently, he deliberately lied when he states that he then believed himself a rich man. And yet, on the next page, in which they refer

to the letter of Micou to his daughter Clara, enclosing a payment of $30,000 in the stock of this Company in October 1873, and stating that he supposed that he owed her about $35,000, they say, "It is not to be presumed that he was intentionally misleading his daughter," and, on this presumption, ask this court to *suspect* "that there were some disbursements or payments, or credits of some kind to which he was entitled, and which do not appear in his account as filed in court," and which, we add, he and his daughter expressly swear, in their answers in response to the bill, and in their depositions, did not exist, and to contradict which there is not an iota of evidence.

This is a fair specimen of the reasoning of counsel on the "probable concurrence of circumstances."

They ask the court to believe that, knowing himself and the factory ruined, he commenced to prepare for a fraudulent settlement in the spring of 1873, but making out the account, however, at that time, as afterwards filed and not now objected to by complainant; that afterwards in October, on the marriage of his daughter he gave her in payment (carrying out, we suppose, the same fraudulent scheme on his creditors hatched in the spring) $30,000 of worthless stock. That he is to be presumed too honest to misstate, in a rough estimate in a letter, the amount of an indebtedness extending and increasing and unbalanced for more than fifteen years, when the data to make a proximate estimate were in the hands of Mr. Blakey, and when the estimate in the letter was only incidental and had no pretension to accuracy; but, nevertheless, is on presumption to be regarded as so base as not to be believed as to matters under the solemn sanction of an oath, though corroborated in the most direct and positive manner by the oath of his deceased daughter, Clara E. Boykin.

We argue the very reverse of the learned counsel, and say, that, the delivery of this stock to his daughter in October 1873, is a conclusive circumstance to show that he then regarded it as "good and valuable property" (R. p. 46), and,

therefore, that he did not foresee in the spring of 1873 his ruin and that of the factory, when he commenced proceedings to have a settlement made. That nothing was more natural than for him to underestimate his indebtedness in the letter to his daughter (R. p. 81), and that he and *his daughter* are not, as counsel suggest, to be suspected, for the discrepancy between the account and the letter, of having deliberately perjured themselves by suppressing payments by Micou on the indebtedness. And especially where there could hardly have been any occasion for any prior advancement. Micou was a man of large wealth and able to support and educate his daughter, who was single, with no separate establishment and no use for money beyond what it was his duty to furnish her out of his own means.

We, therefore, conclude that the circumstance of this letter adds to the presumed verity of the answers, instead of detracting from them as the counsel contend.

At the bottom of page 13 of their argument the counsel have fallen into grave mistakes, and consequently into misstatements of the facts. They complain of a surcharge of $13,484.40, including interest of over 100 per cent. in the matter of mules, corn, fodder, pork and cattle, and contend that these were things purchased by Micou and that he should not have been charged therewith. They say that the wards had no plantation previous to Micou's purchase for them, and no means of growing corn or raising pork, and that Micou does not return in his inventory any mules, stock of any kind, corn or fodder.

The evidence shows that the wards inherited the Micou place mentioned in the bill, pp. 9–10, as in township 15, range 20, and as bid off at $7,000, from their mother, Lucy A. Micou. R. p. 61--2, § 10; 64, § 21; 158, ans. to cross. int. 15; 159, ans. to cross. int. 18; and they were entitled by law to one-half of all her personal property including mules, corn, cattle, cotton, &c. It appears (R. p. 221), that they

received cotton from that estate before the purchase in December, 1858, by Micou of land for them. They had the same means of growing or inheriting corn, meat and cattle and mules and hogs, as cotton. And it ought to be known judicially that such articles were, in those days, concomitants of cotton raising. Micou, it is true, does not return any of these things inherited from that estate in his inventory, but the reason doubtless was that he held them for use on the plantation which he purchased in the winter of 1858 for his daughters.

Fitzpatrick in his deposition states that Micou was charged for such articles of corn, mules, &c., with which he had not charged himself in his account, and that the court decided the matter on evidence before it. R. p. 207, ans. to cross. int. 4.

And Micou in his deposition shows that the wards were inheritors of three estates (R. 183, ans. to int. 4), and that they inherited mules, 7 or 8 of which he had on the place purchased by him for them, (R. p. 187, ans. to cross. int. 10), and it appears that he did return to the court an inventory or receipt for four mules from one estate in December, 1857, valued at $625. R. p. 222.

And independent of this there is evidence which the counsel have referred to in their argument, and presumed to use against the appellants and which we may, therefore, use against them, which shows the origin of the mule account to a cent. We refer to Micou's final account attached, as exhibit A, to the bill, (R. p. 16,) in which he states that mules to the value of $450 had been received from the estate of Thos. M. Barnett, Sr., and to the value of $1,630, from the estate of Lucy A. Micou; these sums added make the sum of $2,080.00 charged to him, (R. p. 21,) for mules, on which is charged $2,246.00 interest. The opposing counsel have referred, on page 22 of their argument, to this very statement, preceding the account of Micou, as being evidence against the appellants. As they thus use it as evidence we may do the same. As to the use we make of it, it might moreover be regarded as an

admission by Micou against interest *ante litem motam*, but as to the extract the appellee proposes to use, it is evidently mere matter of pleading, the suggestion of counsel, not evidence against even the *actor*, when offered in another proceeding, and besides, is not evidence against other persons, nor is it even as against Micou, liable to the criticism of the opposing counsel. The fact of the statement in the address of the guardian to the Probate Court that the ward "*now demands* a settlement, &c.," instead of showing collusion and understanding for the rendition of a fraudulent account, tends rather, we think, to show hostile feelings. It is evident that the ward did demand a settlement through H. C. Semple, who undertook to have it made, and who required it in his interview with Micou's attorney, Blakey. R. p. 145, ans. to int. 4.

Where is the inconsistency of this fact, with the innocence of the wards of Micou of a conspiracy with him for a fraudulent settlement?

But returning to the item we were discussing relative to the charge for mules, corn, &c., there are two reasons why the appellants did not bring any special evidence as to those items. First, because the items are not alleged in the bill to be wrong; and, second, because it is never incumbent upon a judgment creditor to go further than to show the assertion of a *bona fide* claim before the court and the adjudication thereon. The existence of a large unadjusted claim is shown by the bill, as well as the evidence; this being a conceded fact of the case, the respondents directed their attention to the defense of the only assailable point, which was the *bona fides* of its assertion. That their defense is perfect in that direction, we think there is no room to doubt. Micou's good faith is shown in the fact that he filed his account in a form not even now objected to by the appellee, there being no allegation of the bill of error, intentional or otherwise, in it. The good faith of the wards is shown in the fact that they were not present and knew nothing of the proceedings, and from the incontrovertible fact that every disputed item of the

account had its origin in the motions of Fitzpatrick on the trial, made *bona fide* and of his own accord in the discharge of his duty as an attorney.

If these facts are sustained, it is idle to say that it was incumbent on the appellants to go into the particular items of the account at all.

The learned counsel have cited several cases in the Alabama Reports as supporting their position, but they do not sustain them, unless expressions of the opinions are warped into a meaning beyond their plain import. These cases are—first, Hubbard v. Allen, 59 Ala. 283; and, the others, Harrell v. Mitchell, 61 Ala. 270, and Hamilton v. Blackwell, 60 Ala. 545. They simply decide the elementary rule, that when a conveyance is attacked for fraud by an antecedent creditor, a valuable and adequate consideration must be shown by the grantee. Which is a matter we admit, and insist that it is fully done in this case. The bill itself shows a *bona fide* claim for a large sum, and the evidence shows that it was pushed to judgment by proceedings shown to have been conducted in good faith, beyond all doubt, on the part of the wards and the persons representing them.

Does any authority hold that they must try their case over again every time a creditor brings an action? Not at all. It is incumbent to show, of course, that there was occasion for the contest, and the *bona fides* of the contest must be maintained against all assaults. Here we think it is preposterous to say, in the face of the evidence, that Micou made out his accounts and filed them in an unobjectionable form, with any view or expectation that the balance against him would be increased by surcharges, as was done. Or, to say that the wards conspired for a thing shown to have been the result of Fitzpatrick's examination of the records on the day of trial in their absence, and to have been fairly and regularly raised and disposed of by the court.

But the counsel urge objections against this judgment in their argument. They say that, although Fitzpatrick acted in good faith, his misfortune was that he used Micou, who

was an *interested party*, as a witness.—See their argument, p. 34. The answer to this is, that there is nothing in the law condemning the use of an interested witness. Besides, Micou being the defendant, was not interested in the sense meant by the counsel, except for some fraudulent purpose not shown, or charged to have been known to Fitzpatrick.

The bill, moreover, does not aver that the decree was obtained by means of false swearing on the part of Micou, but the distinct ground of objection in the bill is that Micou, being authorized to keep the estates together, was not chargeable with rents and hires, but with the profits; and that the parties conspired together for the rendition of the fraudulent decree. "Nothing is more settled than the doctrine that when you charge fraud you must state the facts upon which you allege fraud, and prove them distinctly."

1 Daniel Chan. Prac. 4 Amer. Ed. 324, and notes.
McLane v. Manning, 1 Wins. (N. C.) No. 2 (Eq.), 60.
Flewellen v. Crane, 58 Ala. 627.

The opposing counsel, while conceding Fitzpatrick's good faith in prosecution, and Blakey's earnestness in defense (see argument, pp. 14-5), say that the weight of the decision of the judge of probate is destroyed, because, when his deposition was taken some years afterwards, he seemed to labor under the hallucination that the matter was settled by concurrence of counsel.

On this point, of course, the weight of the evidence ought to govern. Mr. Fitzpatrick and Mr. Blakey, both disinterested witnesses, distinctly and positively swear that there was, in fact, no collusion; that the proceedings were regular, and the contest real and *bona fide*, and determined by the court.—R. pp. 213-4-5, 204-5. They are supported in this by Micou, who was present at the trial. And it will be seen that the Judge of Probate (Sturdevant) as distinctly swears that he, as judge, *decided* the matters brought before him, and that "the only things or facts tending to show that said Micou was willing that large decrees might be rendered

against him, or did not in good faith wish to prevent the rendition of large decrees against him, was the liberality of his estimates of the value of the rent of lands, the hire of slaves, and the value of mules, &c., and the fact that in the account as filed by him originally, and also as filed after a restatement, he charged no commissions."—R. pp. 95-6.

The last named witness, as mentioned in our original argument, betrays a bad recollection of the events, and the commissioner does not pretend to give the witness' language; he seems to have no conception of the *oratio recta;* but, withal, the whole tenor of the deposition is to the effect, as the other three witnesses testify directly, that the contest was *bona fide*, and that the judicial mind passed upon the questions. As to Micou's liberality in the estimates of rents and hires, there is no *charge* that he swore falsely, or that the other side put him up, knowing or believing that he would not truly render his evidence, nor if the charges had been made is there any evidence of these facts, but abundant to the contrary. As to not inserting the commissions in the account, it is a well known practice to insert and allow them, as was done in *this* case, as a matter of course, unless objected to, and in the blank draft of the decree which was prepared for the judge to sign, as stated in his deposition, (R. p. 95,) a clause for the allowance and deduction of court costs and commissions was incorporated.—R. p. 25.

In reference to the hire of negroes, the counsel have fallen into another grave error. The fact they state is literally true, viz: that Micou returned only *twenty* slaves in his inventory, filed January 27, 1858.—See their argument, p. 16. But the inference they would have the court to draw from this statement, that there were but twenty slaves belonging to the wards, is altogether unwarranted by the evidence. It will be seen that the inventory they mention refers to property received from one estate only, to-wit: Thomas M. Barnett's, and it will be seen that the wards received negroes from three estates, and that they got 33 from the estate of their mother, Lucy A. Micou, 20 from Thos. M. Barnett, and 3 from Margaret Barnett.

Deposition of Micou, R. p. 183, ans. to int. 4.
Inventory, R. p. 220.
Receipt, R. p. 222.
T. M. Barnett's deposition, R. p. 109.
N. D. Barnett's deposition, R. p. 117.
Statement to Micou's final account, R. p. 16; referred to by counsel for appellee as evidence in this case.

The question of how many negroes the wards had is not raised by the bill, and for that reason the appellants did not go into it.

If the bill had charged that the wards received and were allowed hire for negroes when they had none, or for more than they had, which would impute fraud to them, they would have had to meet any evidence on that head. But when the bill says, you were not entitled to land rent and negro hire, because the estates were authorized to be kept together, and you, knowing the fact, conspired with Micou for the rendition of the decrees, very different questions are raised.

So, too, if the values of the rents and hires were determined by the Probate Court on competent and legal evidence and the wards acted in good faith, this court would have no right to vacate or review the judgment of the Probate Court, because it might believe that the values were higher than should have been allowed.

We do not deny that in a case of bargain and sale, where agreement is the basis of the contract, a great disproportion between the consideration and the thing conveyed tends to show a fraud and secret agreement. But when the value of a claim is fixed by a court, the amount allowed, not being matter of agreement, stands upon a different footing.

The decree is, of course, liable to impeachment for fraud, but, as stated *supra*, the facts showing the fraud must be stated (Flewllen v. Crane, 58 Ala. 627,) and no others are in issue.—Candee v. Lord, 2 Comstock, 276--7.

In the last mentioned case it is clearly shown that the *bona fide* contestation of a claim before a court concludes the

debtor and all of his creditors, "To establish, first, the relation of debtor and creditor, and, second, the amount of the indebtedness." The reasoning upon which the conclusion is reached is unanswerable, and meets the approval of Mr. Bigelow in his Treatise on Estoppel.—Big. on Estoppel, p. 81.

In this case there is no charge that the Probate Court did not act honestly in fixing the values from the evidence, nor is there any charge that the wards used any evidence which they knew was false, or which was in fact false.

The only question, then, raised by the allegations of the bill, as to the effect of the decrees, is as to the *bona fides* of the wards in their contestation. Did they have an unadjusted debt or claim for litigation before the court, and did they, knowing that Micou was authorized to keep the estates together, fraudulently conspire with him for the rendition of these decrees for hires and rents, instead of for profits?

Candee v. Lord, 2 Comstock, *supra.*
Big. on Estoppel, 81.

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The fact that the complainant alleges that the hires and rents were fixed too high, amounts to nothing. It is an immaterial and unnecessary allegation, unless it had coupled with it a statement, substantiated by the evidence, that the estimates acted on by the court were false and known to be false by the party obtaining the decrees. Immaterial matters are disregarded in equity, though in formal issue between the parties.

Story's Eq. Plead. § 883.
2 Comstock, 277.

The issue was, whether the decrees were bad because of the conspiracy to take them for rents and hires instead of for profits, and to use them to the hindrance and delay of other creditors. These are the alleged facts showing the fraud, if any, allowing the vacation of the decrees, and to these the respondents properly confined their evidence.

But, really, there is no discrepancy as to amounts, which, even in case of a bargain and sale, where agreement measures

the consideration, ought to meet with adverse criticism. It should be noticed that, naturally, if there had been a conspiracy to defraud, Micou would have put improper items in his account in the first instance—which was not done in this case—and, if there had been a conspiracy for fraudulent charges about rents and hires, the fraud would not have been confined to hires alone, but would have extended to rents. It will be seen, however, that the appellee does not even insist that the rents charged are greater than the values fixed by its own witnesses in this case. And as to the hires of slaves the appellee's witness, the Judge of Probate, states that the "witness, B. H. Micou, as he was interrogated, gave the ages of the different negroes, and stated the value of the annual hire * * * * stated it from what he said negroes were being hired for during those years; said witness fixed the value of the hire of full field hands at $180 *per annum* for the years 1859-60-61," and took off one-third for 1862, took off one-half for 1863, and took off two-thirds for 1864, and for 1865 put whole hire at $454.—R. p. 94.

The witness Blakey, in his deposition, (R. p. 214--15--16,) shows that the different negroes were taken up one by one and the value of the hire fixed by both the witnesses—that his estimate was generally higher than that of Micou, and that he was well acquainted with the value of the hire of negroes in that neighborhood, and that in the year 1860 he had paid $200 for first class field hands.

And the witnesses for the appellee say, that the value of hires during the war diminished about 25 *per cent. per annum*, (R. p. 129, ans. to cross. int. 2,) while by Micou's estimate it was diminished 33 *per cent. per annum*. And it will be seen by the inventory or receipt, put in evidence by the appellee, and shown at bottom of p. 221 of the record, that one of the slaves belonging to the wards hired for $24 *per* month during the year 1858. Witnesses, examined by the appellee, show that a number one slave was worth about $1,600 or $1,700, and that the interest on money was twelve to eighteen

per cent. per annum.—R. pp. 134--6--7, ans. to 5th cross. The hire of personal or perishable property, the capital of which must soon be lost to the owner, by a natural law exceeds the interest of money or rent of land, which are in perpetuity. But putting the hire of hands as only equal to the interest of the money invested in the purchase, and the interest at the lowest rate fixed by the witnesses, and we have the hire of a full hand, worth $1,700 at 12 *per cent.* interest, equal to $204, which is more than the rate fixed by the witnesses Micou and Blakey on the trial before the Probate Court.

It is thus seen that there is nothing in the amount fixed by the Probate Court to shock the conscience, and to be reasonably accounted for only on the supposition that there was a conspiracy for the use of Micou as a witness and for his perjury, and for Blakey's and Fitzpatrick's co-operation therein, all of which matters, besides being in the very highest degree improbable, are shown to be absolutely false.

The two facts upon which complainant below founds its charge of fraud in the decrees, we are willing to meet, but a party cannot " by stuffiing his pleading or his argument with irrelevant matter," get up an immaterial issue in chancery.

Candee v. Lord, 2 Comstock, 277.

Story's Eq. Plead. § 883.

We, therefore, do not discuss, at all, the question as to whether the Probate Court erred in ruling that there was no authority for Micou to keep the estate together. And for the like reason we do not further discuss the question as to whether the *hires* were estimated at too high a rate. The good faith of litigants does not in any manner depend on the astuteness of the judge, and it is the want of good faith alone, which affords any ground for impeaching a judgment between debtor and creditor.

The real questions recur again and again, did the wards

and Micou know that the latter was only chargeable with profits, and not hires and rents? Did they know that there was an order authorizing the estates to be kept together? Is exhibit "D" to the bill such an order? Did they conspire, nevertheless, to have hires and rents, and suggest to Mr. Fitzpatrick to make the motion and to Mr. Blakey to cooperate in the scheme? And have they since the decrees used them to deprive the crditors of Micou of any right?

And we ask, shall the affirmative of all these questions, the burden of establishing which, with clear and convincing proof, rests upon the complainant below, be *presumed*, contrary to the direct testimony of disinterested witnesses and the responses of the defendants to the charges of the bill, when every circumstance of the case is consistent with the innocence of the defendants?

On page 18, of their argument, the counsel for appellee say that there is no evidence that two items, one for $4,512.48, and the other for $3,190, were correct charges. The plain reason is that the bill raises no question as to them, beyond the *bona fides* of the wards in the proceedings for the decrees. They are in the account of Micou, as originally filed, and are not alleged to be false or fictitious.

Our knowledge of the law is not such as is imputed to us on the same page of their argument. We think that a creditor of Mr. Pickwick, impeaching the judgment in favor of Mrs. Bardell by bill, and showing therein "the relation of the parties," the action and the judgment (as in this case), would have no right to insist that Serjeant Buzfuz should be forced to leave his accustomed field of labor, and come into chancery to show that the jury did not rate the damages of his client at too high a figure. On the contrary, we say, that, in such a case, the sole question would be, collusion or no collusion between the illustrious parties, and that the burden would, from the start, be on the complainant to show that Mrs. Bardell either knew, or was advised by Messrs. Dod-

son & Fogg, that she had no real claim, that there was a secret trust for the benefit of Mr. Pickwick, and that his imprisonment was all a sham.

We have already noticed the position assumed for the second time on page 20 of the argument of counsel, that Micou knew that he and the factory were broke in the spring of 1873, and we cite again as conclusive about the matter, that he attempted in October of that year to hide his property from his creditors by paying his daughter off in stock which he knew (on the supposition of counsel,) in the spring of 1873 to be worthless.

As to the position of counsel that "an election can be made for an infant only by the Chancery Court" (argument, p. 23), there are two answers. First, there is no attack in the bill on that ground. If there was want of jurisdiction the decree would be void, and the sales and proceedings thereunder would be no impediment to the complainant's rights. If it was mere error, this court could not reverse it for the infant at the instance of an adversary party. In the next place the learned counsel do not state the law correctly. It is not held in Alabama that an election for an infant between rents and hires on the one hand, and profits on the other, can not be made in the Probate Court. On the contrary, it is constantly done, and in the late case of Hatchett, Adm'r, &c., v. Billingslea, in MSS., (will likely be in 64 Ala.) the direct question was, whether or not an administrator *de bonis non* could, in a settlement with the administrator in chief, elect between profits and hires, and rents, so as to bind the infants interested? And the court said that it could be done, and refused permission to go into chancery on *that pretense.*

McCreeliss v. Hinkle, 17 Ala. 460.

Hopper v. Steele, 18 Ala. 832.

Billingslea v. Glenn, 45 Ala. 540.

Glenn v. Glenn, 41 Ala. 571.

The case of Bush v. Cunningham, 37 Ala. 68, cited by counsel, presents a very different question.

We do not think that it is *manifest* that the idea of making an election between the profits and hires, and rents, was suggested to Mr. Fitzpatrick by *some one*, as counsel insist on page 22 of their argument. Mr. Fitzpatrick says, that Semple, in giving him an account of the case, either suggested to him the idea of examining the records with a view to such election, "*or it occurred to me* from the facts stated that I should examine into the guardian's authority for carrying on the plantation with a view to making an election." A court cannot presume that an attorney has not capacity to understand his business without suggestion, nor will it presume, when he gives his evidence in a cause as a disinterested party, and when he is corroborated, and not discredited or contradicted even by the concurrence of a single probable circumstance, that his evidence is not true.

The account this witness gives is that, "after satisfying myself that, on the record and facts disclosed by it, my clients, Mrs. Boykin and her husband, had a right to elect to ask for hires and rents I made a motion to do so * *. R. p. 205.

"No suggestion from him (Blakey) nor his client (Micou), nor any one else was made to me as to how the balance could be increased. I insisted on all that I thought my clients were entitled to, and would not have taken more if I could have got it." * * "There was no collusion, concert, preconcert agreement, nor understanding by which the balance against Micou was illegally or unfairly increased."—R. p. 206. "All motions and objections made by me were made of my own accord, without suggestion, understanding, or agreement or collusion with any one—the guardian, his attorney, or any one else, in his or their interest."—R. p. 204.

All this is corroborated as far as it could be by Blakey, by Micou, by Semple, by Clara E. Boykin, Lucy B. Micou, and by Frank S. Boykin. Of course the corroboration of some of them is only negative by showing that the alleged conspiracy set up by the complainant below had no existence, and that the account was passed and decree rendered without any knwoledge of the proceedings on their part.

In reference to the conduct of parties after the rendition of the decrees, we must yield our assent to the position that the use made of an instrument is ordinarily a circumstance indicative of the purpose of such instrument. And we do not deny that the declaration of a trust by the plaintiffs in large judgments for the benefit of the families of the defendants soon after the rendition of the judgments is a circumstance on its face against the appellants, which tends to show combination and fraud, and requires explanation from them.

But we insist that we have given this explanation in the fullest manner. We have shown that the decrees were, in fact, rendered without fraud or collusion, both by denials and by tracing to their origin and fountain head the only items objected to by the complainant and by showing their good faith beyond question. And this has been followed up by showing when, how and by whom, and upon what consideration *the trust*, calculated by itself to cast a reflex-light of suspicion upon the decrees, arose. Clara E. Boykin, Lucy B. Micou, Frank S. Boykin and Henry C. Semple, all agree in saying that after the rendition of the decrees, Semple induced the execution of the deed of trust as a gratuity to the families of the unfortunate debtors.—R. pp. 68, 147, 194, 196, 198.

It is very questionable, indeed, if the beneficiaries under the deed of trust to Semple, would not stand as *bona fide* purchasers for value, for the deed provides for the payment by the grantees of large debts to other persons as well as large sums to the grantors, and there is no averment that the value of the property exceeds such payments.

But, however that may be, if the true account of the origin of the deed of trust has been given, no one can, it seems to us, question its legality or insist that it is indicative of combination and fraud for the rendition of the decrees for unjust demands.

And that the account given is true, there is no room to doubt, no witness, nor any circumstance of weight even to contradict.

But the counsel undertake to show that the deed of trust is bad in itself, as amounting to a transfer by the debtors, of property with a reservation of a *secret use* for their own benefit.—Argument, pp. 25--6--7.

And they liken the declaration of trust to Semple, by the beneficiaries in the decrees after their rendition, to the case of a mortgage by the debtors securing the debt and stipulating that on a sale certain property should be settled on their families, and ask with a triumphant air, "would any court hesitate to pronounce such a mortgage fraudulent?" We say no. But we think it does not require a brilliant understanding to see that their illustration is only suitable to the capacity of a jury.

Suppose, however, a *bona fide* mortgagee, after the creation of the mortgage debt and its maturity should make a will, or a deed of trust and provide, as in this instance was done with reference to decrees on which executions were in the hands of the sheriff, that certain property of the debtor be sold and bought and *then* to be settled to the use of the debtor's family, would any juror even, much less a court, hold that such proceedings would be invalid in law, as a transfer of property by *a debtor to the use of his family?*

The distinction the counsel undertake to draw between the declaration of trust in this case and that in Young v. Dumas, 59 Ala. 60, is not to be tolerated in a court of equity, which never sticks in the bark.

The declaration in the deed of trust that the trustee should exhaust the decrees by selling property *which should then be settled*, is as harmless and as easily comprehended as the disposition by Mr. Horn, in Young v. Dumas, of the property, *after it was acquired.* And the debtor, plainly, has as little to do with the transfer in the one case as the other.

There is nothing in any authority cited by counsel, on pages 28 and 9 of their argument, indicating that if the decrees were good the deed of trust to Semple would not be good, and it is so clear that it would be valid, that we do not pursue the discussion further.

On page 29 of their argument counsel say, "This retention of possession by B. H. Micou is *prima facie* evidence of fraud, and, without explanation, authorizes a judgment of condemnation."

It is matter of surprise that counsel should so mistake the law.

The contrary of what they assert, has been the settled law of Alabama, perhaps, ever since it was a State.

The retention of possession after a judicial sale either of real or personal property is not even a badge of fraud.

Simerson v. Branch Bank, 12 Ala. 205.
Creagh v. Savage, 14 *ib.*, 454.
Cawthorne v. McCraw, 9 *ib.*, 519.
Wyatt v. Stewart, 34 *ib.*, 716.
Montgomery v. Kirksey, 26 *ib.*, 172.

Nor is the retention of possession a badge of fraud in case of private sales if the conveyance is duly recorded. The record is notice, and therefore the possession is not calculated to mislead any one.

Tompkins v. Nichols, 53 Ala. 200.

Moreover, what little retention of possession there has been by Micou, after the judicial sales, is fully explained.—See Semple's ans. R. pp. 71--2. Ans. of Lucy B. Micou, R. pp. 84 and 86. Ans. of B. H. Micou, R. pp. 50 and 54--5. The residence of Micou in the city was mortgaged to Mrs. Ring for more than its value, and *she* allowed Micou to retain possession.—R. p. 50. His daughters had possession of all his other property except the residence in Tallassee, for which Semple charged no rent. The daughters resided with their father, whose family occupied the residences.—R. pp. 197--199.

The learned counsel say, on p. 29 of their argument, that no satisfactory explanation is given why Micou should have conducted farming operations for his daughter. We do not know what would be satisfactory in the opinion of the counsel, but it seems to us that the explanation is quite sufficient

when we consider that Micou had nothing of his own, but was a man of experience in farming, and that his daughter, Lucy B. Micou, had the means, with no other person to see after her affairs. It was quite natural that both of them should look to the combined use of his skill with her capital, as the only means of support.

The daughter had the right thus to employ her father, and it was natural that she should prefer him to all other men.

It is not shown that any improper use whatever was made of the executions issued upon the decrees. Mere delay to execute the writs, when no command is given restraining the sheriff, would not even postpone elder to junior executions coming to the hands of the sheriff. "There must be an active interference on the part of the plaintiff, or some person authorized to represent him."

Leach v. Williams, 8 Ala. p. 766.

Wood v. Gary, 5 Ala. 43, 55.

It is difficult for us to understand how the omission of the sheriffs to sell out the property as soon as they might have done, hindered, delayed or defrauded the appellee or any other creditor, nor do we understand why such omission, if shown, should so be laid to the charge of appellants as to make their *decrees fraudulent.*

The counsel for appellee, on p. 30, of their argument, insist that if Micou had a fraudulent purpose, his daughters could not be innocent, and ask the court to assume that the daughters had information of the intentions of Micou "from their mother or some other source."

We think that if it *is assumed* that Micou, contrary to his denial, was actuated with a purpose condemned by law, we should also assume that he would naturally not reveal himself to his family.

It is, however, improbable that Micou had any other desire than that his daughters might have decrees for what was justly due them. It is certain that he did nothing in-

dicating any purpose beyond this anterior to the day of the settlement in the probate court. His accounts as filed, and as he expected them to pass have not been assailed, as improper in form or amount, by the complainant below.

And if we look to what occurred on the trial, and give any credence to the evidence of the actors, we cannot fail to believe that the idea of being charged for hires and rents never entered Micou's mind prior to the motions made on the trial by Fitzpatrick. He, therefore, had no opportunity to conspire with his daughters about *that matter*, which adds strength to their *denials*. And *that matter* is the only thing objected to in the account, and the ground of objection to it is shown by the record (Exhibit D. to the bill) to be untrue.

It is a pure *assumption*, then, even as to Micou, to say that he acted fraudulently in the matter of the settlement of his guardianship, and it is a double assumption, a possibility upon a possibility, to *presume* his daughters guilty.

We understand the rule of equity to be that a provable fact is never *assumed*, that a party is never presumed more guilty than the evidence shows him to be, nor a complainant to have a better equity than his pleadings claim, and the evidence sustains.

The wards of Micou have obtained a legal priority. In the absence of a bankrupt law priorities cannot be avoided. It is, moreover, the right of a debtor to give preferences.

And the simple question in all this case is, have these two persons done anything which warrants justice in depriving them of their priority and thus stripping them of their fortunes, for the benefit of other creditors of Micou?

We have already stated that the attorney of the *feme covert* and the guardian *ad litem* of the infant are not even charged with complicity in any wrong, that they are expressly acquitted in the argument of counsel.

The wrong, if any, done to the complainant was done by the *feme covert* and her sister, the infant.

The counsel rely upon the "concurrence of probable circumstances" to make out their case. We have reviewed

what they have said, and with allowances for mistakes of fact, errors of law and illogical deductions throughout their argument, we have found nothing inconsistent with the honor of the defendants or the honesty of the witnesses, who have testified to their innocence.

We still maintain with confidence, the positions taken in the outset, that the charge against the infant and *feme covert*, is unfounded in fact, and impossible in law.

W. A. GUNTER, W.H. Phiel

Of Counsel for Appellants.

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IN SUPREME COURT OF THE UNITED STATES.

BENJAMIN MICOU *et al.*

vs.

FIRST NATIONAL BANK, MONTGOMERY.

Brief of P. PHILLIPS for Appellants.

June 9th, 1881.

R. O. POLKINHORN, PRINTER.

In Supreme Court of the United States.

Benjamin Micou *et al.*

vs.

First National Bank, Montgomery.

Brief of P. PHILLIPS for Appellants.

The controversy in this case may be thus briefly stated:

Clara E. Micou (now Clara E. Boykin) and Lucy B. Micou inherited from several ancestors a large real and personal estate.

Benjamin Micou, their father, became their guardian.

In February, 1874, the guardian appeared before the judge of probate for Tallapoosa County to render his account.

On the 10th of that month, two decrees were rendered against the guardian, one in favor of Henry A. Garrett, guardian *ad litem* of Lucy B. Micou, the other in favor of Boykin and wife.

Executions issued, and the property of the guardian was sold thereunder and purchased in by Henry C. Semple, the counsel and connection of the wards, for their benefit.

The First National Bank of Montgomery, holder of bills of exchange executed by Benjamin Micou *et al.* in 1873, recovered a judgment thereon 1st June, 1877, and not being able to obtain satisfaction by execution, filed its bill in

the Circuit Court for the Middle District of Alabama, praying that the decrees of the Probate Court be declared null and void, together with the executions and sales made under them; and that the lands sold thereby be subjected to the complainants' judgment.

The decree, now the subject of appeal, was rendered by John Bruce, Judge, on 31st July, 1878, in accordance with the prayer of the bill.

The defendants in the bill are Benjamin H. Micou, Frank S. Boykin, and Clara, his wife; Lucy B. Micou, and Henry C. Semple.

The bill, in its 2d paragraph, makes a general charge that Micou "confederated with his daughters and Frank Boykin" to procure the decrees so as to aid him in defrauding his creditors, and that they have carried out and consummated their fraud.

In the 6th paragraph the fraud is particularized by the averment that the $90,000, admitted to be due by Micon in his settlement, was not legally due; and that this was known to Micou and his wards; that each item of negro hire was charged at too high a rate; that the sum allowed was too much by $50,000, and this could have been shown if said Benjamin had desired to make a fair settlement. p. 4.

The defendants are required to answer *under oath*. They have so answered; denying in the most ample manner all charges of fraud and collusion, general and special.

Attention is called to the fact that neither in the evidence nor even in the brief, filed in this court by the appellee, is there any attempt, even by implication directly,

to impeach the veracity of either of the defendants charged with collusion and fraud. Their solemn denial made in their answers, and repeated in their depositions, is sought to be overborne by inferences deduced from circumstantial evidence.

The inquiry is, therefore, whether from the undisputed circumstances surrounding the transaction before the Probate Judge, this court will be forced to the conclusion that the parties to it have committed perjury.

The allegation is specific that the two wards corruptly colluded with their guardian in procuring decrees for a larger amount than was justly due. The denial is, in all respects, as specific as the charge.

The scene of this transaction is laid in Tallapoosa County, Alabama.

The dramatis personæ present, and participating, are the Judge of Probate, Benjamin Micou and his attorney, D. T. Blakey, and E. I. Fitzpatrick, the attorney for the wards.

Neither of the wards were present. One of them resides in Macon County, and the other in Montgomery County.

Henry C. Semple was the legal adviser and counsellor of the wards, but being compelled to be in Washington at the Busteed investigation, he employed Fitzpatrick to attend to the settlement.

Mr. Fitzpatrick testified that Semple instructed him to examine the guardian's authority for carrying on the plantation with a view to elect "between the profits, and the hires, and rents." That he was anxious to get as large a decree as the law would allow, but was equally anxious not to commit any errors in making charges, or in disallowing credits which could be grounds for attacking the decree.

There was a race between creditors, and the prime object was to get a first lien. p. 205.

The witness further testifies that he did not know either of the wards, and had no communication with them; and that the objections made by him to the guardian's account were his own suggestions and without preconcert or collusion with said guardian, or his attorney, or any one for them.

His objections, he says, were replied to in argument by Col. Blakey as fully as the case warranted, and with every appearance of good faith and earnestness; so much so that he rejoined, and felt uncertain whether the court would sustain him.

He contended for all that he believed his clients were entitled to, and would not have taken any more if he could have got it. He was anxious to get a lien, and wanted a decree—a decree that would stand—as he thought the securities to the guardian's bond would attack it. 206.

Blakey testifies that there was no collusion between the attorneys or parties whereby improper credits or items of debit should be omitted or insisted on, or whereby the decision of the court, upon any item, should be made against the interest of either party to the settlement, or in any manner to effect a fraud upon any person or creditor. It would have been difficult for parties to have had such understanding " without his seeing something to have induced him to suspect it." p. 215.

He says he took no appeal from the decree, because he believed that there was no just ground to stand upon.

The only other actor in this alleged conspiracy, present at the settlement, is Benjamin H. Micou.

He is asked whether he ever had any conversation or agreement with either of his wards or with any person representing them prior to the settlement in relation thereto.

Whether there was any agreement or understanding with any person that his account should be so stated as to show an amount greater than his real indebtedness.

Whether he had such design himself; and if so, whether he ever communicated the same to his wards, or to any person representing them.

All these interrogatories are fully answered in the negative. p. 183.

But the case does not rest here. To supplement and complete the evidence on the charge of conspiracy—we have the depositions of—

1, F. S Boykin,
2, Clara, his wife, and,
3, Lucy B. Micou.

The first testifies that he never had any conversation with Micou before the decrees in reference to his settlement. Micou never said anything to him about said accounts. He never made any exhibit or gave him any information in reference thereto. He was wholly ignorant of the status of the account. p. 195.

Clara answers, she had no conversations with her father prior to the decrees in reference to the settlement; and that he never gave her any account or information of his liability, except in his letter mentioned in answer to direct interrogatories. p. 197.

Lucy testifies she had no conversations with her father before the decrees in reference to his accounts as guardian,

and never received any information from him in reference thereto. p. 198.

Micou deposes that he never had any agreement or consultation with either of the wards, or any person representing them, as to the conduct and arrangement of the settlement; and that there was no understanding with any person that his accounts were to be made out so as to show a larger amount against him than was really due; and that he had no such design himself. p. 183.

As already stated, it is not pretended that the conspiracy charged is sustained by any direct evidence, but it is rested solely upon inferences derivable from the circumstances of the case.

The circumstances mainly relied on are "the relationship of the parties, pecuniary embarrassment of Micou, and the sale of so large an amount of property, added to which is the provision made for the benefit of the families of Micou and his sureties soon after the rendition of the decrees.

The attention of the court is particularly invited to the deposition of Mr. Semple, who fully explains the character of this arrangement. He testifies that the proposition was suggested by him and carried into execution without the knowledge of the beneficiaries. Rec., p. 147; Appellants' opening brief, p. 27.

"This (says the appellee), when considered with the foregoing circumstances, casts *suspicion* upon the decrees themselves which can only be removed by clear evidence of good faith and adequate consideration." p. 25.

It is admitted, that Courts of Equity will grant relief, on the ground of fraud, established by presumptive evidence, which evidence, courts of law would not always deem sufficient proof to justify a verdict.

But circumstances of *mere suspicion*, leading to no certain results, will not be deemed a sufficient ground to establish fraud.

It is equally a rule in Courts of Equity and Courts of Law, that fraud is not to be presumed; but it must be established by proofs."

1 Story, Eq. Jur., S. 190.

Nor need we deny that the circumstances narrated, standing alone, justify a suspicion that there had been collusion. The question is, can this suspicion override the sworn answers directly responsive to the discovery sought by the complainant.

These answers, we submit, are "clear evidence of good faith and adequate consideration," in absence of sufficient evidence to the contrary, and fully comply with the requirements of the appellees' proposition.

The case is to be considered in a two-fold aspect.

First. As to the guilt of both parties, in obtaining the fraudulent decrees.

Second. As to the guilt of Micou, alone.

That a fraudulent judgment may be collaterally attacked by third persons, and that the fruits of such judgment cannot be retained by a *particeps criminis*, though there be really something due to him by his co-conspirator, are propositions readily admitted.

What we assert is, that the inferences and suspicions arising from the circumstances of the case, do not rise to such dignity of proof of fraud, *on the part of the wards*, as to justify a forfeiture of their rights.

We assert this with the utmost confidence, and on this maintain that the decree must be reversed, although it may appear that Micou fraudulently consented to a larger judgment than he was justly subject to.

This doctrine is thus stated in *Gregg* vs. *Jayne*, 8 Pet. 253: "where an act does not necessarily import fraud, where it has been more likely done through a good than a bad motive, fraud should never be presumed. But it is not necessary to decide whether the conveyances were fraudulently made by Ormsby or not. The important point is to know whether Gregg and wife had any knowledge of the fraud, if committed, or participated in it. This knowledge the court charged was immaterial, as the fraud of Ormsby rendered the deeds void. *This is clearly erroneous.*"

Peck vs. *Carmichael*, 9 Yerger, 329;
Brown vs. *Smith*, 7 B. Mon., 361;
Violett vs. *Violett*, 2 Dana, 324;
Partelo vs. *Harriss*, 26 Ct., 480.

This is the common law rule, and the Statutes 13 and 27, Elizabeth, are but an exposition of it, and were intended to avoid deeds contrived and devised fraudulently for the delay and hindrance of creditors, in *cases only where both parties participated in the fraud.* The grantor may intend fraud, but if the grantee is an innocent purchaser, his title is not to be affected by the fraud of his grantor.

Sands vs. *Hildreth*, 14 Johns, 497.

There is, however, no sufficient evidence to justify the conclusion that Micou was guilty of fraud in the proceedings before the Probate Court.

The charges made against him are that he permitted himself to be debited with rents and hire of slaves, while he should have accounted only for the profits in managing the estate; and that the rents and profits testified to by him were exaggerated largely beyond their true value.

The first charge involves a *question of law* merely, and

was decided by the court on fair argument. How and by whom it was raised and argued, is fully and satisfactorily explained in the depositions of the attorneys of both parties—Messrs. Fitzpatrick and Blakey.

The rents and hires were allowed by the judge on the the evidence of Blakey and Micou.

The charge of fraud on this point stands merely on such diversity of opinion as is to be found in the depositions of the several witnesses examined by the complainant. This is surely insufficient.

The only fact of any importance bearing on the charge, is the statement made by Micou in a letter to his daughter dated October, 1873. "I estimate the amount due you from these estates amount to about the sum of $35,000."

The account, as he presented it to the court, showed a debit balance of about $50,000.

This is the solitary fact in the case, all else is mere suspicion and surmise.

Micou deposes as to this, that it "was a simple estimate without having any figures."

We submit that if even the rights of the wards were dependent on the *bona fides* of Micou, there is no such evidence as to warrant the decree that the probate settlement is void for fraud.

Courts have made a distinction where the case shows *actual fraud*, and where the fraud is merely rested upon *inferences from circumstances.*

In the case of *Holmes* vs. *Spann*, the bill was filed to set aside a judgment Holmes had recovered against Spann, on the ground of fraud.

The chancellor decreed that the transaction was intended as a mere cover for Spann's property; but in set-

ting aside the same, allowed Holmes a credit for the sum really due him.

On appeal, to the Supreme Court, it was held that "where actual fraud, *dolus animus*, is clearly proved, the judgment is wholly void, and will not be permitted to stand as security for what is actually due. But where equity *infers fraud from the circumstances, and relation, and character of the parties*, it is in the discretion of the court to allow the security to stand for what is actually due.

2 Hill's Ch., 95;

Herme vs. *Meres*, 1 Vernon, " 465.

And so it is said in *Boyd* vs. *Dunlap*, "where it is doubtful whether the conveyance was founded in actual fraud to defeat creditors, a court of equity will take a middle course and will allow a deed to stand for money really due, and give the creditors the surplus."

1 John Ch., 478.

In the syllabus it is thus stated—

"Where a deed is sought to be set aside as voluntary and fraudulent, as against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but *suspicious circumstances* as to the adequacy of the consideration and fairness of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as security for the sum actually due."

The counsel for appellee conclude their brief with the following propositions:

1. The decree merely deprives the daughters of Micou of the fruits of *their fraud*, for the fruits of an *actual fraud* are not merely the *excess* of the property after paying what is actually due.

2. If they are not innocent, either because of actual participation or by accepting its benefits under circumstances calculated *to excite suspicion of its existence*, they can claim nothing for what may be due to them.

3. Even if innocent of the fraud, they are not entitled to what may be really due to them, as they have filed no cross bill, and have, by no appropriate proceeding, claimed the amount really due. Nor have they by their answers disclosed and claimed the amount really due, repudiating the fraud.

While the *first* proposition defeats the rights of the wards, upon the ground of their *actual fraud*, the *second* enlarges the claim, and defeats them if they accepted the probate decrees under circumstances calculated to excite *their suspicion of fraud.*

We may admit the first proposition, as a general rule, to be well founded. As to the second proposition, we say, if the wards did not collude with the guardian in reference to his settlement, there are no circumstances developed of such suspicious character as obligated them in good faith to reject its benefits; and even if there were such circumstances, the law of the proposition, as we have shown, is not as contended for by appellee.

The third proposition, that the wards' rights have been forfeited by want of *proper pleading*, has, we submit, no reasonable basis.

The bill rests solely upon the charge of a conspiracy between the guardian and wards by which a fraudulent judgment was obtained. The answers denied this, and the issue to be tried by the chancellor was thus fairly and fully presented.

If the evidence justified the charge of the claimant, it was wholly immaterial what was the real amount due.

If there was no fraud in obtaining the judgment, then the whole amount, as stated therein, was justly due.

It is not seen by what process of reasoning the appellee insists that the wards should, by cross bill or otherwise,

have filed a claim for any other sum than that allowed by the judgment, thus admitting its unfairness, which was the precise issue to be determined by the court on the charge and denial.

The appellee falls into a similar error in reference to the *burthen of proof*.

The position assumed being that "the complainant having proven that its debt was contracted before the rendition of the decrees, it was incumbent on *those claiming under them*, to prove an adequate consideration for them, and also the existence of the debts for which they were entered." p. 18.

Now an answer where relief is sought consists of two parts, and performs a double office. It consists, first, of the defence to the case made by the bill; and, secondly, to the examination of the defendant on oath, as to the facts charged in the bill, of which discovery is sought and to which interrogatories are addressed.

Story, Eq. Pl., § 850.

The replication constitutes the *litis contestatio*, but the answers, on oath, to the examination as to the facts charged are evidence for the defendant, which must be overcome by the complainant. The replication *does not shift the burthen of proof*.

This stands upon the reason that when a complainant calls upon a respondent to answer allegations, he admits the answer to be evidence; and if it is testimony in the case, it is equal to the testimony of any other witness, and the complainant cannot prevail if the balance of proof is not in his favor; he must have circumstances in addition to his single witness to turn the balance."

Tobey vs. *Leonards*, 2 Wall., 430;
Amendment to 41st Rule, Eq.

If, then, the answers of the defendant have not been disproved by the complainant, it was not incumbent on them to make further proof as to the validity of the decrees.

We have discussed this case as though all the parties charged with the fraud were *sui juris*.

The bill, while admitting a large amount due to the wards, claims the entire forfeiture of all the rights derived from the decrees.

One of these wards is a minor, the other a *feme covert*.

Whether persons occupying such status are answerable for such fraud as is chargeable in this case, is fully and ably discussed in the opening and reply briefs of Messrs. GUNTER and W. HALLETT PHILLIPS.

On these considerations we submit, the decree appealed from should be reversed.

P. PHILLIPS,
of Counsel for Appellants.

OFFICE SUPREME COURT U.S.
FILED
MAR 25 1881
JAMES R. McKENNEY, CLERK

Supreme Court of the United States.

[No. 310.]

BENJAMIN H. MICOU AND OTHERS, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

Appeal from the Circuit Court of the U. States for the Middle District of Alabama.

BRIEF FOR APPELLEE, BY

DAVID CLOPTON, SAMUEL F. RICE, AND HILARY A. HERBERT.

Supreme Court of the United States.

[No. 310.]

BENJAMIN H. MICOU AND OTHERS, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF MONTGOMERY.

Appeal from the Circuit Court of the U. States for the Middle District of Alabama.

BRIEF FOR APPELLEE.

The case made by the bill is substantially as follows:—The First National Bank of Montgomery obtained, June 1, 1877, in the Circuit Court of the State of Alabama, a judgment against Benjamin H. Micou, Thomas M. Barnett and Nicholas D. Barnett for the sum of $16,114.69. This judgment was rendered upon several bills of exchange, made respectively November 6, 18 and 24, and December 1, 1873; which bills of exchange were given in extension of an indebtedness previously contracted. Execution was issued upon the judgment and returned "no property found," before the filing of the bill.

That Benjamin H. Micou was, at the time of the rendition of the decrees hereafter mentioned, and had been many years previously, the guardian of the estates of his daughters, Clara E. Boykin and Lucy B. Micou, and that he confederated and colluded with his said daughters and Frank S. Boy-

kin, the husband of Clara E., to procure decrees to be rendered against himself by the Probate Court of Tallapoosa county, Alabama, in the matter of his said guardianships, and to have all his property liable to sale under legal process, except such personal property as they might aid him fraudulently to convert to his own use, and also some property bought by one Pittman, sold and transferred to his daughters, with intent on the part of all of them to hinder, delay or defraud all the creditors of said B. H. Micou, and particularly appellee. That this purpose was consummated in the following manner:

Said B. H. Micou was, in the fall of 1873, and had been for many years previously, the President and managing agent of the Tallassee Manufacturing Company No. 1, and was also the managing partner of Barnett, Mic u & Co., a firm composed of said B. H. Micou, Thomas M. Barnett and Nicholas D. Barnett. Said Barnett, Micou & Company were liable in a very large amount for the accommodation of said manufacturing company, either as drawers, endorsers, or acceptors. Said manufacturing company suspended payment in December, 1873. A meeting of its stockholders and creditors was called and held at Montgomery, Alabama, in January, 1874, at which time it became notorious, and known to the appellants, that said Barnett, Micou & Company, and each member of said firm were in immediate danger of insolvency.

Soon after this fact became notorious and known to the appellants, said B. H. Micou, his said daughters, and Frank S. Boykin, conspired together to cause settlements and decrees to be made in the matters of his said guardianships in said Probate Court, whereby it was falsely and fraudulently made to appear that said B. H. Micou was indebted to said Clara E. Boykin in the sum of $88,300, for which sum a decree was rendered by said Probate Court in favor of said Clara E. Boykin and her husband Frank S. Boykin, February 10, 1874; and also that said B. H. Micou was indebted to Lucy B. Micou in the sum of $88,031.77, for which sum a decree was rendered by said Probate Court, February 24, 1874,

in favor of Henry A. Garrett, the person appointed guardian *ad litem* for her.

That said B. H. Micou allowed his account to be surcharged on said settlements with a large amount for hire of slaves and rent of lands, with which he was not chargeable, as was well known to himself, his daughters and Frank S. Boykin; and if rightly chargeable with any part thereof, was charged at too high a rate.

That said B. H. Micou did not contend for or desire fair and proper settlements, and made no real effort to introduce or inform his attorney of evidence, as was in his power to do, to show that he was not chargeable with such amounts.

That said B. H. Micou and the Barnetts owned severally a large amount of stock in said manufacturing company, and that the property, other than this stock, owned by them, consisted of houses and lots and plantations, horses, mules, plantation tools, crops and the proceeds of crops, lying in the counties of Elmore, Montgomery and Macon in the State of Alabama. That they owned in February, March and April, 1874, several mules and a large quantity of cotton, corn and fodder, then on their several plantations, and that the executions which were issued on said decrees were so fraudulently used, as to protect said mules, cotton, corn and fodder from their creditors, whereby they were hindered and delayed.

That soon after the rendition of said decrees, executions were issued thereon to the said counties of Elmore, Macon and Montgomery. Under the executions issued to the sheriff of said county of Montgomery, and other executions in his hands at the time, all the real property of said B. H. Micou and the Barnetts was sold on the first Monday in August, 1874, and except one tract of land which was bought by Pittman, plaintiff in one of the other executions, was bid off by Henry C. Semple, who was the attorney of said Clara E. Boykin, Frank S. Boykin and Lucy B. Micou, and a deed thereto was made to him by said sheriff. Under an execution issued to the sheriff of said county of Macon, the lands

of said B. H. Micou in said county of Macon were sold on the first Monday in February, 1875, and were bid off by said B. H. Micou, or some one for him, and a deed thereto was made by the sheriff to him as trustee. Under an execution issued to said county of Elmore, the real property of said B. H. Micou and the Barnetts was sold on the first Monday in February, 1875, was bid off by said Semple, and a deed thereto made to him by said sheriff.

That the delay in enforcing sales under the executions issued to Macon county, was in consequence of instructions by some one to the sheriff not to levy on the personal property on the plantation of B. H. Micou in that county; and that said personal property was, in the meantime, disposed of by said B. H. Micou; and that the delay in enforcing the sales under the executions issued to Elmore county, was for the purpose of enabling Thomas M. Barnett to convert to his own use the personal property on his plantation in that county.

That there was an agreement and understanding between all the parties, that said decrees should be had; that nothing more than a pretended opposition should be made to their rendition, and that everything done, or suffered to be done as stated in the bill, should be done to the pecuniary profit and interest of all the parties to said decrees, and to the hinderance and delay of the creditors of said B. H. Micou and the Barnetts.

That since the rendition of said decrees, there has been an agreement and understanding between the parties thereto, that said decrees and the executions issued thereon should be so used, as to enable said B. H. Micou and the Barnetts to hinder, delay and defraud their creaditors, in that they were to be permitted to convert, and aided in converting, property to their own use, and that everything done or suffered to be done by the plaintiffs in the executions, was done in pursuance of said understanding.

That said Semple has not made any conveyance of the property purchased by him, but does not claim in fact to be

the beneficial owner thereof. That the said B. H. Micou and the Barnetts have each remained in possession of their real property, which was sold under said executions, and enjoyed the use, profits, and benefits thereof, and if they have paid, or agreed to pay for the use of said property, such payments were made by virtue of some pre-arranged plan or understanding, the terms of which are unknown to appellee, but by which a secret use or benefit was reserved to them. That the effect of this agreement or secret understanding was that said decrees were rendered each for a larger amount than was due; and that the process issued thereunder was so used by the plaintiffs in execution, as to benefit the said B. H. Micou and the Barnetts; all which was in furtherance of said secret understanding and agreement, and of an intent to hinder, delay, or defraud their creditors.

The said Clara E. Boykin was, at the time of said settlements, a married woman, the wife of Frank S. Boykin, and the said Lucy B. Micou was about nineteen years of age, and both of them were nieces of the Barnetts.

Thomas M. Barnett and Nicholas D. Barnett are not made parties, and no relief is sought as to the property belonging to them. The purpose of the bill is to have condemned to the judgment of appellee the lands which were sold as the property of Benjamin H. Micou under the executions.

The bill sets forth minutely and explicitly the details and facts of the various transactions.

The answers, which were under oath, deny all the agreements and understandings charged in the bill, except the one annexed to the answer of Semple, and deny all the allegations of fraud, and set up certain matters in avoidance of the charges of fraud.

It is necessary to a full and complete understanding of the case, and of the proper relations of the parties to each other, and to a consideration of the facts disclosed by the pleadings and the evidence, to state that by the statutes of Alabama, "All final decrees against guardians have the force and effect

of judgments at law, upon which executions may issue against them and THE SECURITIES ON THEIR BONDS."

Section 2794 of the Code of Alabama.

By virtue of this statute, the executions were issued upon the decrees rendered against B. H. Micou upon his settlements as guardian, against him and Thomas M. Barnett and Nicholas D. Barnett, who were the sureties on his bond as such guardian.

The answers being under oath, the appellants invoke the rule, that such answers, so far as responsive to the bill, operate as evidence for the defendants, and must prevail unless overcome by two witnesses, or by one witness with corroborating circumstances. The rule is founded upon the reason, that the plaintiff, calling for answer under oath, makes it evidence, so far as responsive; and being evidence it is equal to the testimony of one witness, and, as the plaintiff can not prevail unless the whole proof is sufficient to establish his case, he must, in such case, have circumstances in addition to the testimony of a single witness. The rule does not absolutely and inflexibly require *two* witnesses or *one* witness with corroborating circumstances. As the positive testimony of a witness may be overcome by circumstances, so also circumstances may overcome the denials of a verified answer.

Clark's Executors v. Van Riemsdyk, 9 Cr. 153, *160.*

A positive denial of fraud in a verified answer, will not prevail against admissions of facts in the same answer, which show that the transaction was fraudulent.

Robinson v. Stewart, 10 N. Y. 193.

Neither does the rule apply to the matters set up in the answers in avoidance of the allegations of fraud: and so far as the answer is *responsive,* its weight as evidence must depend upon its character, whether or not it shows upon its face a full and frank disclosure of all the facts. In addition to answers under oath, all the defendants to the bill were examined as witnesses, and in determining upon the credi-

bility of their statements, whether contained in the answers or their depositions, both the answers and their testimony as witnesses proper must be compared and considered.

In view of the denials of fraud by the answers and the testimony of the parties immediately connected with the transactions, and of the circumstances developed by the evidence, we can not forbear to quote, as applicable to the whole case, the remarks of STORY, J., in Brig Short Staple and Cargo, 1 Gal. 106: "The story here told is a very extraordinary one, and yet is supported by positive direct testimony. It is certainly the duty of the court not to lightly suspect the truth of statements clothed with the sanctity of an oath, and supported by numerous concurring witnesses. But testimony, however positive, must in its nature be liable to control by strong presumptive circumstances, and must be weighed with care, when it comes loaded with the temptations of private interest and the impressions of personal penalties. It is a melancholy consideration for the court, that in the discharge of public duty, it finds itself often obliged to resist the influence of human declarations, and to rely upon the concurrence of probable circumstances."

It is true, that fraud is never presumed, and will not be imputed, when the facts and circumstances, from which it is supposed to arise, may reasonably consist with pure intentions; but notwithstanding this, it is not necessary that fraud must be proved by direct and positive evidence. It may be proved by circumstances, leading to a well-grounded, rational belief of its existence. It is seldom capable of being otherwise proved, for persons, contemplating and consummating a fraud, resort to concealment, and leave no positive evidence of their fraudulent intent. Publicity would render the fraud vain and useless, and would be the equivalent of a confession of its existence. Fraud, as any other fact, which may be the subject of controversy in a judicial proceeding, is the subject of proof by circumstantial, as distinguished from positive evidence.

Thames and Company v. Rembert, 63 Ala. 561, 567.
Harrell v. Mitchell, 61 Ala. 270, 281.
Bump on Fraud. Con. 581.
Rea v. Missouri, 17 Wall. 532, 543.

The decrees and proceedings assailed, and the transactions alleged to be fraudulent, were had in the State of Alabama, and their validity and *bona fides* must be determined by the laws of that State. The statute is: "All conveyances or assignments, in writing or otherwise, of any estate or interest in real or personal property; and every charge upon the same, made with intent to hinder, delay, or defraud creditors, purchasers, or other persons, of their lawful suits, damages, forfeitures, debts, or demands; and every bond or other evidence of debt given, suit commenced, *decree* or *judgment suffered* with a like intent, against the persons who are or may be so hindered, delayed, or defrauded, their heirs, personal representatives, and assigns, are void."

Section 2124, Code of Ala. 1876.

Under this statute it is held, that it is not sufficient to sustain a conveyance, as against creditors, that it should be upon a valuable consideration; it must also be *bona fide*.

Pulliam, Wills, Rankin & Co. v. Newberry, 41 Ala. 168.

The same rule applies to *a decree or judgment suffered*. Therefore, the fact that B. H. Micou was indebted to his daughters and wards, is not sufficient to sustain the decrees rendered against him in the Probate Court of Tallapoosa county, if the evidence shows that such decrees were obtained or suffered with a fraudulent intent. A judgment may be obtained on an honest debt, and yet obtained and used for a fraudulent purpose.

Hubbard v. Allen, 59 Ala. 283, 303.
Bun v. Ahl, 29 Penn. 387.

A debtor has the right to prefer one creditor over another, although such preference may leave the debtor without the means of paying his other debts; but the creditor must not go beyond the permissible purpose of securing his own de-

mand. If he go beyond this, and a benefit is secured to the debtor, his conveyance will be set aside for fraud.

This statement of a few leading and general principles, applicable to the present case, prepares the way, and leads to a consideration of the circumstances shown by the evidence.

The relationship of the parties, plaintiffs and defendants in the executions issued upon the decrees of the Probate Court, is an admitted fact—that of parent and child, and uncle and niece. Whilst this relationship may not be considered a badge of fraud, and is not, of itself, sufficient to show that the transactions were fraudulent, yet it is a circumstance that should stimulate the scrutiny of the court, and is to be considered in connection with all the suspicious and unexplained circumstances, if there be any, in order that the court may ascertain the true character of the transactions.

The insolvency of B. H. Micou and the Barnetts, at the time of the rendition of the decrees, is another admitted fact. Their insolvency, or, at least, the immediate danger of insolvency, became notorious and known to all the appellants certainly in January, 1874, when the meeting of the stockholders and creditors of the Tallassee Manufacturing Company was held. Suits were either commenced, or about to be commenced against them. By means of the decrees and the executions issued thereon, all the property of B. H. Micou and the Barnetts subject to levy and sale under legal process, except such portion of their personal property as was either used by them or otherwise disposed of during 1874, and except such portion of their real property used to satisfy the two creditors, Lanier and Pittman, who had obtained judgments before the levy of the executions, was transferred to H. C. Semple in trust, and for the benefit of those entitled under the instrument in writing, executed to him by Clara E. Boykin, F. S. Boykin, and Lucy B. Micou, on the 14th day of April, 1874.

It is true, that B. H. Micou in his *sworn* answer says, "Respondent *denies* that Thomas M. Barnett and Nicholas D. Barnett and respondent owned no other real property in 1873-4 subject to levy and sale, than that shown to have been bought in for the said daughters of respondent; and respondent avers the fact to be, that Nicholas D. Barnett owned a valuable residence in the city of Montgomery that was subjected to the payment of a debt due one Lanier; and the two Barnetts and respondent owned at the time a large and valuable plantation in the county of ————, in the State of Mississippi, and also *some real estate in the city of Montgomery, Alabama, that has not yet been sold or levied on.*"

This was his statement in an answer sworn to, on September 28, 1877, and filed in court on the succeeding day. But, in his depositions, when asked, by cross interrogatory, what lands the said Barnetts, or either of them, had in Mississippi, and what real or personal property in the State of Alabama or any other, he, Micou, had, which was not sold under said executions, or was not under mortgage, he answers, "Barnett, Micou & Co. owned a tract of land in Hinds county, Mississippi, and said tract of land was transferred to pay the debt of Barnett, Micou & Co. to Ferdinand Phinizy early in 1874, *before any decree was rendered against them.* I have none that I know of. I know of no property that is not under mortgage or (execution?) which has not been sold under that execution, except a few cows and sheep which were obtained by me of J. W. Walker in settlement of the Shorter Place, in the fall of 1874; *all other property, personal and real, not subject to mortgage, was sold under execution from the decree of the Probate Court of Tallapoosa county.*"

Ans. to 14th cross interrogatory, page 188.

This answer in his depositions sustains the averments of the bill, in reference to the sale and transfer of the property of B. H. Micou and the Barnetts subject to levy and sale; and this glaring conflict between his answer and depositions must seriously affect the credibility to be given to his testimony.

Pharis v. Leachman, 20 Ala. 662.
Gunn v. Brantley, 21 Ala. 633.

The relationship between the parties, the embarrassment of Micou and the Barnetts, the pendency of suits, or threatened suits, and the sale of so large amount of property, are circumstances which should cause the transactions to be looked on with suspicion, and in connection with other circumstances, making their fairness questionable, are sufficient to declare them fraudulent.

Borland v. Mayo, 8 Ala. 104, 117.

We have said, that the insolvency of Micou and the Barnetts became public in January, 1874; but the danger of their insolvency was known to the appellants prior to that time. Clara E. Boykin was married October 22d, 1873. On the morning of the day of her marriage, B. H. Micou delivered to her, in part payment of what he owed her as guardian, a certificate for three hundred shares of the stock of the Tallassee Manufacturing Company. This certificate she showed to her husband within a week after her marriage, who at once pronounced it *worthless*. Why he so pronounced it, is shown by his evidence, in which he says that he heard of Micou's borrowing money at large rates of interest, and buying meat to sell again to raise money. This was in September or October of 1873.—(Page 195). In November, 1873, Micou told him that he was ruined, as well as the factory. Mr. Semple states in his testimony that, in October and November, 1873, he learned from Mr. Morris, a banker in Montgomery, that there was an enormous amount of paper of the factory and of Barnett, Micou & Co. outstanding, much of it not provided for, and either under protest, or held up by order. Mr. Blakey testifies, that he knew that Micou was largely in debt, and much embarrassed for money; that the factory was borrowing money from the local banks at heavy rates of interest to buy cotton, and pledging the cotton as security; that one of the banks, in the Spring or early Summer of 1873, refused to advance any money to the fac-

tory without an exhibit of its condition; and that Micou had refused to make any such exhibit; and that during the Summer, Micou bought bacon in very large quantities, on a credit of from four to six months, and sold it for cash at less than it cost him, because it was cheaper than borrowing money. (Pages 151, 218).

From these facts, it is evident that, as early as the Spring of 1873, Micou knew that the manufacturing company, of which he was the president and managing agent, was heavily embarrassed, and that it would be compelled eventually to suspend. A knowledge of these facts, notwithstanding the pretence that his daughter, Clara, became of age about that time, was the inducement to his placing his accounts and vouchers as guardian in the hands of his attorney, Mr. Blakey, in the Spring of 1873, with instructions to make out a full and complete account, which his attorney prepared in April or May, 1873.—(Pages 183, 218). A knowledge of these facts further induced him to apply about the same time for the removal of the disabilities of Lucy B. Micou, who was then about nineteen years of age. Micou, however, evidently believed that he could keep the factory in operation, and its paper afloat, for some indefinite time thereafter; and he did succeed in maintaining its ostensible credit, until the financial panic in the fall of 1873, which he had not contemplated, necessitated its suspension in December of that year. Hence it was that, although his account for a settlement of his guardianship was prepared by his attorney, in April or May, 1873, he took no further steps in relation to making a final settlement until his insolvency became a fixed fact. Therefore, immediately thereafter, and on January 17, 1874, his account was filed in the Probate Court.—(Page 23). The account then filed showed a balance due to Clara E. Boykin of $53,715.26, which was surcharged so as to increase the balance to $88,300.00.

The bill distinctly charges that the decree rendered on this account was rendered for a sum much larger than was really due. B. H. Micou was appointed guardian of his

daughters November 28, 1857.—(Page 35). Being a man of large property, and of sufficient intelligence, knowledge of business, and business habits to be the president and managing agent, for many years, of so large a manufacturing establishment, it is reasonable to presume, if he was a faithful guardian, that he so kept his accounts as to be able to give, approximately, a correct statement of the amount due his wards at any time. Now, in the letter, which he addressed to his daughter, Clara E., enclosing her the certificate of stock, he states that the amount due her was about the sum of $35,000.00; and in his deposition, says the amount was the same in October as it was four months afterwards. Yet, when his account was filed in court, within less than three months thereafter, the amount shown thereby to be due to Clara E. Boykin was $53,715.26. The excuse for this difference in the amounts, as stated in his letter, and shown by his account, is that the amount stated in the letter "*was a simple estimate without having figures on it at all;*" when, by application to his attorney, who had prepared his account six months previously, he could easily have ascertained how it stood. It is not to be presumed that he was intentionally misleading his daughter. These facts create, at least, a suspicion that there were some disbursements or payments, or credits of some kind to which he was entitled, and which do not appear in his account as filed in court.

The account, thus filed by him, was surcharged so as to increase the sum to $88,300.00, by charging him with the hire of slaves and rents of land from 1859 to 1865, and for mules, corn, fodder, pork, stock, hogs and cattle. All these mules, except seven or eight, and the farming provisions, were purchased by him. His wards had no plantation previous to this purchase, and no means of growing corn or raising pork. Micou does not return in his inventory as guardian any mules, stock of any kind, corn or fodder. Micou, on his final settlement, was charged with all the moneys which he had ever received as such guardian, without, so far as shown by the evidence, receiving any credit for any money

expended by him in the purchase of mules or provisions. These mules, other stock, and provisions, must have been purchased by him for the use of, and about the time he bought the plantation for, his wards, under an order of court made December 20, 1858.—(Pages 187, 36). His account is surcharged with the sum of $13,484.40, including interest, without any pretence of showing by the evidence in this case that it was a correct charge, or that he had at any time received credit for the money expended in their purchase, which it was in their power easily to do, if true.—(Page 21).

The bill specially alleges an over-charge in the matter of hires of slaves and rents of land. The answer made to this allegation of the bill is, that these charges were submitted to the court, and argued by counsel, and that the court judicially determined that Micou was chargeable therewith. The effect which should be given to this judicial ascertainment of the court, is shown by the impression in relation thereto which was made upon the mind of the presiding judge. Judge Sturdivant testifies as follows: "The question as to charging said Micou with the hire of the negroes and rent of the lands of his wards was first raised by Elmore J. Fitzpatrick, by oral motion, as the attorney of Clara E. Boykin, on the day of said final settlement, February 10th, 1874. Opposition was made by Colonel Blakey, but after a short time and discussion, *he yielded the point*, and the charge was made against the guardian, Micou." As to the charge for the mules, he says: "That said Micou was charged with the value of mules and interest thereon from January 1st, 1859, on said oral motion made by Elmore J. Fitzpatrick, as the attorney of Clara E. Boykin and husband, on the ground that said Micou had converted said mules to his own use; at the time the motion was made, it was controverted by Colonel Blakey, but after a short discussion *he yielded the point.*"—(Pages 93, 94). However sincere Mr. Fitzpatrick was in making these motions, and however real the opposition made by Mr. Blakey, as testified to by them, and as to which we intimate

nothing to the contrary; yet it is apparent that the impression made upon the mind of the judge was, that Mr. Blakey yielded the point, and that the opposition was not real, and, therefore, allowed the charges. This impression destroys any force or weight to which the decision and judgment of the court would have been otherwise entitled upon the question of fairness of the settlement.

Lee v. Lee, 55 Ala. 590, 603.

The decrees rendered by the Probate Court are not evidence against the appellee that the amounts were justly and legally due by Micou, as guardian.

Tappan v. Beardsley, 10 Wal. 427.

Snodgrass v. Br. Bk. at Decatur, 25 Ala. 161, 175.

The debt, upon which the judgment of appellee was rendered, antedates the final settlements and decrees made in the Probate Court of Tallapoosa county. This fact the bill avers and the answers admit. The onus of proving that the decrees were rendered for sums legally and justly due was consequently cast upon the appellants. When a conveyance of property is assailed by a creditor as fraudulent, and it appears that his debt antedated the conveyance, the burthen is devolved upon the grantee to show that the conveyance is founded on a valuable and adequate consideration; and if he fails to do this, the conveyance must be regarded as merely voluntary and presumed to be fraudulent.

Hubbard v. Allen, 59 Ala. 283, 296.

In view of this principle, it is remarkable and significant, that the appellants introduced, on the trial of this cause, no evidence to show that the sums of the decrees rendered against Micou as guardian were justly and legally due. B. H. Micou was not only a defendant, but was also examined as a witness for appellants. No interrogatory was propounded to him by the appellants to prove the value of the hires of the negroes, or of the rents of the lands; and when, by the ninth cross interrogatory propounded by appellee, he was asked to append a statement of the names of the slaves

and their ages as they were in 1860, and to set opposite to each one the value of the hire of such slave for that year, and also a similar statement for the year 1863, he declined to do so, because he did not have a list of the slaves, which he had when he testified on the final settlement.—(Page 186). The only evidence, except that of Mr. Blakey, as to the value of the hires of the slaves and the rents of the land, was that introduced by appellee.

Thomas M. Barnett testified, that according to his recollection, there were about fifty negroes, about thirty of whom were able to do full work; and that the aggregate of their hires for the years 1859, 1860, 1861, was about $4,500 each year.

Jason G. Jones testified, that about 1863 negroes were hired out on the terms of paying physician's bill, feeding and clothing them, and paying their taxes.—(Page 134. See, also, depositions of B. W. Young and John C. Nicholson, pages 126, 128).

The amounts for the hires of slaves and the rents of lands, with which Micou was charged on the final settlements, was ascertained from his own evidence, and that of the attorney representing him on these settlements. The attorney for the ward was willing to depend on their testimony as to these values, and no witnesses were called by Micou. The attorney of Micou, in his depositions, says that according to his recollection, there were over fifty negroes in 1859, thirty-five of whom were field hands. His estimate of the value of the hire is $4,500 in 1859, $4,750 in 1860, $5,000 in 1861, same in 1862, with discount for Confederate money. After these years, he does not know enough about the value of hires to testify.—(Pages 216, 219). The evidence of the witnesses as to the values of hires is based upon their recollection that there were fifty slaves or more, when Micou returned only *twenty* slaves in his inventory as guardian, filed January 27, 1858.—(Page 220).

Comparing the values of the hires of the slaves, as shown by the evidence, and their values as fixed on the final settle-

ments of Micou as guardian, it is evident that there was an over-charge on this account of a very large sum, amounting to nearly if not quite $20,000. This excessive over-charge, in connection with the other circumstances, makes the transaction more than questionable, and demands full, clear, and satisfactory explanation.

This is the result even if Micou, as guardian, was legally chargeable with the hires of the slaves. But the question remains, was he so chargeable? November 22d, 1858, Micou, as guardian, made application to the Probate Court for an order to purchase certain lands for his wards. The reason stated in this application for such purchase is, that it was to the interest of his wards, that the slaves belonging to them be kept together, and worked on a plantation, instead of hired out, and for that purpose it was necessary to purchase a plantation. Commissioners were appointed to examine and report upon the value of the lands, and also upon the necessity of the purchase for the use of the minors, and for the purpose of keeping the slaves belonging to them together and working them on a plantation. The court made an order December 20th, 1858, authorizing the purchase of the lands, in which order is a recital, as follows: "And it appearing to the court, from the report of said commissioners, and from legal and proper evidence, that it is to the interest of said minors, that said slaves should be kept together and worked on a plantation, and that the purchase of the above described plantation is a necessary one."—(Page 36).

These proceedings show that the plantation was purchased by order of the court, and for the *express purpose* of keeping the slaves together and working them on a plantation, instead of hiring them out. Whilst it is true that there is no order of the court which, in so many words, directs the guardian to keep the slaves together, yet the order of the court for the purchase of the plantation, by fair and reasonable construction, gives such authority. Certainly, Micou, having purchased the plantation, under an order of court, which as-

certained that such purchase was for the benefit of his wards, and necessary, and having kept the slaves together, and worked them thereon, in good faith, a court, having the jurisdiction, would have sanctioned his acts in this respect, although they may not have been strictly legal.

Putnam v. Ritchie, 6 Paige, 390, 401.

Yet decrees were rendered, to which he made no further objection or opposition, charging him with not merely the highest value, but more than the highest value of the hire of the slaves, during a period of more than five years, during a large portion of which time no currency could have been collected for the hire, but confederate currency, and slaves were hired without further reward than taking care of, feeding, clothing them, and paying their taxes.

Moreover, in the account filed by him for final settlement, he is debited with two items—one for $4,512.48, and the other for $3,190—as received respectively July 18, 1870, and April 7, 1871, with interest thereon. If these were correct charges they were susceptible of easy proof; but no evidence whatever was offered, or pretended to be offered, to sustain these charges.

The learned counsel for the appellants well know that the decrees of the Probate Court were, as against appellee, a judgment creditor assailing them for fraud, evidence, only, that such decrees were rendered, and the amounts for which they were rendered; but not that such amounts were really and properly due. Counsel were further well advised that the appellee, having proven that its debt was contracted before the rendition of the decrees, it was incumbent upon those claiming under the decrees to prove that there was an adequate consideration for them, and also the existence of the debts for which they were rendered.

Harrell v. Mitchell, 61 Ala. 270, 280.

Hamilton v. Blackwell, 60 Ala. 545.

No one knew better the amount of his indebtedness as

guardian, the sums of money received by him for his wards, and the sources from which and times when received, and the amount of his disbursements in the management of their estates, than B. H. Micou. He is examined as a witness for appellants. His silence in respect to these, not only important, but necessary inquiries, speaks loudly. The only satisfactory reason which can be assigned is, a conviction that these matters could not stand judicial scrutiny.

B. H. Micou filed his accounts and vouchers for a final settlement of his guardianship of the estate of Lucy B. Micou, *February* 3, 1874. The account and vouchers then filed were the same as those previously filed for the settlement of the estate of Clara E. Boykin.—(Pages 29, 25). His attorney says, in his testimony, that when the settlement of his guardianship of Clara E. Boykin was made, this account was withdrawn and another filed, corresponding with the account allowed by the court in the case of Mrs. Boykin. The settlement of the estate of Lucy B. was had February 24, 1874, thus allowing Micou fourteen days between the two settlements, in which to fully consider any improper or overcharges made on the first settlement. The account last filed of Lucy B.'s estate was voluntarily filed by Micou, and was permitted to be passed and allowed without objection or even being present in person or by attorney. The same improper and excessive charges were made in this account as in the account with Mrs. Boykin, and what we have said in reference to hers, applies with equal or more force to this. The reason assigned by Micou for making application to have the disabilities of Lucy B. removed is, that he desired to be relieved entirely of the responsibility of his trust; and that he applied for the removal of her disabilities so that he might settle at the same time with both of his wards—his other daughter having just then become of age. But the reasons which he assigned to the chancellor, in a petition for this purpose, sworn to May 3, 1873, were, that said Lucy B. was possesed in her own right of a considerable estate, real

and personal, a large portion of which consisted of demands against him, which he was then able and willing to settle; but inasmuch as he was engaged in commercial and manufacturing pursuits, and as the result of such pursuits was proverbially uncertain, he might, by adverse fortune, be deprived of the means of making such full settlement after his daughter came of age; and that Thomas M. Barnett and Nicholas D. Barnett, the sureties on his bond, were engaged in the same pursuits, and liable to the same disaster.—(Page 30). These reasons, assigned in his petition, evidence what we have before said as to his apprehension, as early as the Spring of 1873, of pecuniary difficulties, and cast light upon the haste with which, after disaster had actually overtaken him, and his insolvency had become notorious, the settlements were made and decrees rendered. He did not wait until his daughter's disabilities were actually removed, which was not done until June, 1874; but made the final settlement without the appointment of a succeeding guardian to take care of the interests of his ward, and when his daughter, being a minor, could not relieve him from responsibility, and with no one to represent her, but a *guardian ad litem* without bond, and who was not authorized to receive or collect the amount of the decree rendered.

In reference to filing the account with the estate of Lucy B., Mr. Blakey, the attorney of B. H. Micou, in answer to the general interrogatory propounded by appellants—"state any other fact within your knowledge which will be of benefit to the respondents?"—after stating that the estate of Clara and Lucy was joint, and that the account with Clara could only be ascertained by making out the joint account and taking half of it, says: "After filing the account for a settlement with Clara, and before settlement, a citation was served on B. H. Micou, issued by the Judge of Probate of Tallapoosa county, citing him to a settlement of Lucy B. Micou's estate, and at the time of said filing I was informed that he would be required to give additional bond; in fact, Judge Sturdi-

vant asked me if the bondsmen were not broke. Upon consideration of all these matters, I advised Micou that he had better resign and make a final settlement of his guardianship of Lucy's estate as soon as he could; whereupon he directed me to proceed with that settlement."—(Page 217.) Mr. Blakey is certainly mistaken in his recollection that a citation was served on B. H. Micou *before his resignation* as guardian of Lucy B., for the record shows that Micou filed his resignation January 26th, 1874, in which he stated that *he believed that the interest of his ward required that he should resign and make settlement of his account as soon as possible.* His resignation was accepted on the same day, and by the same order accepting the resignation and as a part thereof, Micou was ordered to file his statements, accounts, vouchers and evidences for a final settlement within *thirty days* from that day, and that *citation issue accordingly.*—(Page 28.) The citation, instead of preceding, followed and was in consequence of the resignation. The Probate Judge had no authority to cite him to a final settlement at that time, except upon his resignation, even if the sureties on his bond had become insufficient. If his sureties became insolvent, the Probate Judge could only require him to renew his bond or give additional security, and upon his failure to do so remove him, and upon his removal he must make a final settlement. The guardian of a female ward is not required to make final settlement, except upon the ward coming of age, or upon her marriage, or upon the removal of the guardian.—Sections 2764, 2772 of Code of Alabama 1876.

In reference to the petition for the removal of her disabilities, we cannot fail to note that Lucy B. says in her testimony, "I was of age on the 30th of October, 1878, and I learned of the petition being filed a few months before I came of age; Mr. Boykin informed me that it had been filed. I don't recollect what reasons were given for it. I do not know who had the petition filed, or who paid the attorney, or who the attorney was." In reference to the same peti-

tion, B. H. Micou says, in his testimony, "I told her, as near as I can recollect, in March, 1873, that I would make such application as soon as the court met. I employed D. T. Blakey as counsel for that purpose."—(Pages 185, 199). We leave this conflict in testimony to be reconciled by them.

It must also be observed that, whilst B. H. Micou would impress the idea that he made the settlements voluntarily, and without any consultation or understanding with his daughters, or with Frank S. Boykin, that in the account filed by him for final settlement in January, 1874, he represented to the court that Clara E. Micou had arrived at the age of twenty-one years, and had inter-married with one Frank S. Boykin, "and *now demands* a settlement of the matters and things pertaining to the said guardianship of her said estate. (Page 16). This account was sworn to by him, and this representation is irreconcilable with the absence of any understanding or consultation in reference to such settlement.

The matter, as to an election having to be made between the profits of the plantation and hires and rents, was spoken of before the time set for the settlement. Mr. Fitzpatrick, speaking of an interview between him and Mr. Semple which continued for two hours or more, says, "He stated to me the general facts, and my recollection is, suggested, or it occurred to me, from the facts stated, that I should examine into the guardian's authority for carrying on the plantation, with a view to making an election between the parties and the hires and rents." Mr. Semple says that he is absolutely positive that Mr. Fitzpatrick is mistaken in this. Whether this was suggested to Mr. Fitzpatrick by Mr. Semple or not, it is manifest that it was suggested to him by some one; he may be mistaken as to the person. He had no information of the matters of the guardianship other than what was said to him before going to court. He did not see any of the records or papers until the day of the settlement, and made the exceptions and objections, as stated by him, which involved the election. Mr. Semple may be mistaken in his

recollection of the time when he first heard these facts, or Mr. Fitzpatrick may be mistaken as to the person from whom he heard them.

The inquiry as to the person from whom Mr. Fitzpatrick heard that an election would probably have to be made, is immaterial. It is manifest that it was contemplated, and it is certain that an election was made in the Probate Court. Now, it is held in Alabama that an infant is incapable of making an election, and that an election can be made for an infant only by the *Chancery Court* which is the proper forum for the settlement of an estate when an election has to be made for an infant.

Bush v. Cunningham, 37 Ala. 68, 73.

Yet, notwithstanding, an election was made for Lucy B. Micou, a minor, either by her *guardian ad litem*, who was without power to do so, or by the Probate Court, which is without jurisdiction to make such election, or by the guardian himself; and by this election, the guardian's indebtedness was increased to a very large amount. The fact, as it seems, is, that the election for Lucy B. was made by the guardian, B. H. Micou, when he withdrew the account first filed by him, and filed the one which was finally passed. If the settlement had been made in a court having jurisdiction to make an election, that court, whilst protecting the interests of the infant, would not have made an election oppressive to the guardian, when he had acted in accordance with the spirit and intent of an order of court previously made. But the *amounts* of the decree did not concern B. H. Micou so much as did *the time* of their rendition, when there was a race between creditors, and an anticipation that judgments would be rendered against him and the Barnetts, at the then 7th February term of the City Court.—*Ans. of Fitzpatrick to 7th interrog. p.* 205.

The subsequent arrangement and conduct of the parties, also, reflect light upon their intent and purpose in obtaining

the decrees. The use to which these decrees were applied is a circumstance, an instrument of proof, in determining the intent with which they were procured and suffered.

McWilliams v. Rogers, 56 Ala. 87, 93.

Constantine v. Twlves, 29 Ala. 607.

Frank S. Boykin, Clara E. Boykin, and Lucy B. Micou executed to Mr. Semple, April 4th, 1874, after executions had been issued upon the decrees, a transfer of the decrees and executions *upon certain trusts.* These trusts were: Mr. Semple was to proceed upon the decrees and executions so as to secure to the plaintiffs therein certain property specified in the transfer, and then to purchase as much of the remainder of the property as could be sold under the executions and purchased therewith, and to settle that part of it sold as the property of B. H. Micou, on his wife and children, and that part sold as the property of Thos. M. Barnett, on his wife and children, and that part sold as the property of N. D. Barnett, on his wife and children; but the property so settled on the families of the two last named was charged with the payment of specified sums of money to Clara E. Boykin and Lucy B. Micou.—(Page 73).

Mr. Semple says, in his testimony, that he suggested this arrangement to Frank Boykin, and that B. H. Micou and the Barnetts, were not informed of it, so far as he knew. We have no doubt of the truth of this statement, but it is equally clear that there was an understanding, without Mr. Semple's knowledge, that some provision would be made for the families of the defendants in the executions, although the particular provisions may not have been determined, or by what particular arrangement. Thos. M. Barnett says, that B. H. Micou told him and his brother N. D. Barnett, after the rendition of the decrees, that his (Micou's) daughters would be liberal with them, and *would be governed by what he (Micou) said.*—(Page 108). Mr. Semple says, that B. H. Micou came to his office, after the sale under the executions, asked about the transfer, said he had heard of it, and took a copy.—(Page 159). From whom did he hear of it? So far as the Far-

netts were concerned, they say that the matter was left to their attorneys, and that they did not know the terms of the arrangement for some time afterwards. And Fitzpatrick says that he thought it probable that the sureties of the guardian would attack the decrees. These circumstances indicate some previous understanding in respect to a provision being made for the sureties or their families. We do not mean that there was any promise or assurance given to the Barnetts previous to the rendition of the decrees, for they did not know that Micou was going to make his settlement as guardian. But we do mean to say that there must have been some understanding between Micou and his daughters whereby to prevent the apprehended attack upon the decrees by his sureties. The provisions for the benefit of the families of the debtors made by this transfer, so soon after the rendition of the decrees, when considered in connection with the foregoing circumstances, cast suspicion upon the decrees themselves, which can only be removed by clear evidence of fairness, good faith, and adequate consideration.

Harrell v. Mitchell, 61 Ala. 270, 280.

But this use of the decrees and executions is not merely a circumstance or fact showing the intent of the parties. No property had then been sold under the executions. They were in the officer's hands to be executed. They were to be used in effecting sales of the property of the defendants. They were large enough in amount to cover, and more than cover, all the property of the defendants subject to levy and sale, and protect their property from their other creditors. There were other creditors who were also pressing their demands. The transfer of the decrees and executions was made for the express and avowed purpose of preserving and securing to the families of the defendants a portion of their property. This transfer was the reservation of a *secret use* for the benefit of the debtors.

Counsel for appellants defend its validity upon the asserted right of the daughters of Micou to have their

decrees paid out of the property of the defendants, and to direct the application of the collections for the benefit of the families of their father and uncles; and propound the query, "Does the relation of debtor and creditor destroy the latter's right and dominion of property, or deny to him the consolation of benevolence?" We do not dispute the right of the plaintiffs in the executions to have them paid out of the property of the defendants and to direct the application of the money *when collected*, if the decrees are *bona fide*. What we do dispute is, the right of a plaintiff in execution to use the process of the law for the *secret benefit* of the debtor, and to the hinderance, embarrassment, and delay of the other creditors, by an arrangement between himself and the defendant. In Young v. Dumas, 39 Ala., the testimony showed that the debts were actually due and owing from Dumas to Horn, and that the price paid for the property was adequate. The court said, "Mr. Horn had the clear right to *collect* his demand, which we have seen was just, from his son-in-law, Mr. Dumas; and *after he thus became the owner of the property*, his right to give that property to the sole and exclusive use of his daughter, cannot be successfully controverted by the creditors of Mr. Dumas. As to them the gift was harmless." Horn had become the owner of the property itself, before he attempted to dispose of it. So, if the plaintiffs in the executions against Micou and the Barnetts *had collected* the money, or *had purchased* the property at sales under them, *without any previous secret arrangement* that the executions should be used in the interest and for the benefit of the defendants, they would have had a clear right to dispose of the money or property, as their whims or benevolence dictated.

A preferred creditor may give a portion of his debt, or the property received in payment of it, as a bounty to the family of the debtor; but the gift must be the *act of the creditor, independent of any arrangement between the debtor and the creditor at the time.*

Suppose Micou and the Barnetts had executed a mortgage

to the wards of Micou, or to Mr. Semple for them, to secure the indebtedness of Micou as guardian, in which mortgage the same benefits for the families of the mortgagors were reserved as in this transfer, and stipulating that, upon a sale of the mortgaged property, certain portions of it should be bought *with the mortgage debt*, and settled on their families, would any court hesitate to pronounce such mortgage fraudulent in law? Good faith requires that debtors shall honestly apply their property to the payment of their debts, and such stipulations or reservations make a conveyance void. The Supreme Court of Alabama, speaking of the statute of that State prohibiting secret trusts, and quoting from another, say, "It is not directed against trusts made with fraudulent intent, but against trusts themselves. There is not one word about intent or object, or purpose, or excluding, injuring, or delaying creditors. The effect of the trust is not a subject for consideration. Its mere existence avoids the transfer and destroys the title as against creditors, existing or subsequent. A conveyance by the owner of property to another in trust for himself, is, in effect, a conveyance to himself, and such a measure can never be necessary for any legal or honest purpose. He who, having the full title, desires to retain the control and use of his property, and yet transfers it to another, can, in the general course of human actions, have but one motive for that measure; and that motive must be to defeat or elude the claims of others. Hence, all conveyances to the use of the grantor are fraudulent and null against creditors and others having just claims upon the grantor or upon the property conveyed. In all the requirements of uses and trusts, in the midst of multiplied distinctions between legal and equitable interests, which have abounded in the province of Anglican jurisprudence, this principle has never been doubted, and the making of a transfer by a debtor of his property to be held for the use of the debtor, has never been allowed to defeat the rights or remedies of creditors."

Sandlin v. Robbins, 62 Ala. 477, 484, and numerous authorities cited.

Bump on Fraud. Con. 208.

In this same case, it is further said, "Section 2120 of the Code of 1876, and the statute of 3 Henry, 7, speak alone of goods, chattels, and things in action. It is a common law doctrine, however, and is applicable alike to realty. There never was a time when a debtor could convey his property, directly or in secret trust, for his own benefit, or for the use of his family, and thereby defeat his creditors of their lawful demands. Huggins v. Perrine, 30 Ala. 396."

"There is no distinction between a conveyance directly from the debtor and one from the sheriff or other public officer. In reality the conveyance is from the debtor through the sheriff or other public officer. It gives to the dealing the semblance of fairness, but nothing more than the semblance. It does not make it fair, though it increases the difficulty of detecting its unfairness, but when detected that avoids this as well as other transfers, however solemn. It is substantially as much a sale *inter partes*, as if there were no intervention of the sheriff or other public officer."

Bump. on Fraud. Con. 255.

The conveyances by the sheriffs to Semple, and the transfer by the plaintiffs in execution to him, constitute one transaction. The conveyances of the sheriffs were, in form, such as are usually made by them of property sold under execution.

They did not contain the trusts and reservations for the benefit of the defendants, but when the evidence discloses these secret trusts and reservations, and that the sales under the executions and the conveyances of the sheriffs were in their furtherance and consummation, the law pronounces the sales and conveyances fraudulent as against creditors. A judgment obtained even on an honest debt, may be kept on foot for a fraudulent purpose. Even if the decrees in the Probate Court were rendered for sums legally and justly due

by Micou as guardian, and honestly obtained, yet this transfer to Mr. Semple, and the sales under the executions, purchases of the property by him, and the conveyances of the sheriffs to him, must be held fraudulent as against creditors, notwithstanding he was actuated by feelings of friendship for old acquaintances, without any purpose to defraud creditors and notwithstanding that it was made at his suggestion; and must be so held without regard to the motives of humanity, generosity, or benevolence of the plaintiffs in execution, and without regard to their intent.

Montgomery v. Kirksey, 26 Ala. 172, *184*.

Although the executions were issued on the decrees in March, 1874, none of the property was sold until August, 1874, and a considerable portion not until 1875. The defendants had on their several plantations personal property subject to levy, but which they were permitted to remain in the possession and enjoyment of, and a portion of which must have been consumed in its use.

After the sales under the executions, B. H. Micou continued in the possession of the plantation known as the "prairie place," and the personal property thereon, up to the time of the filing of the bill. It is said that he was managing and controlling this plantation as agent for his daughter, but no satisfactory explanation is given why he should have done so. He was in possession of the Shorter place during 1875, and it is said that he was also cultivating this place for his daughters, without giving any further explanation of his retention of possession. He also continued in possession of his residence at Tallassee. We do not deem it necessary to refer to the retention of possession by the Barnetts, as it is sufficient for our purpose to show fraud in the sales of the property of B. H. Micou.

This retention of possession by B. H. Micou is *prima facie* evidence of fraud, and, without explanation, authorizes a judgment of condemnation. The explanation must show that the possession was consistent with good faith, and the

absolute disposition of the property, and that the transaction throughout was *bona fide*.

Mayer v. Clark, 40 Ala. 259.

In this connection it will not be improper to call attention to the fact that "the other" executions averred in the bill to be in the sheriff's hands at the time of the sale in August 1874, were executions in favor of Lanier and Pittman, on judgments obtained by them respectively at the February term, 1874, of the City Court. The enforcement of these executions in the Spring of that year, would have compelled an immediate sale of property. They were arranged, however, by yielding the legal priority which was claimed by virtue of the liens acquired by the first executions on the decrees of the Probate Court. Mr. Semple says these debts had been contracted under such circumstances as to make them of peculiar obligation on Micou and the Barnetts. What these circumstances were is not stated, and the arrangement and use made of the executions are fully detailed in the testimony of Mr. Semple.—(Page 150.)

We have endeavored to show, that the settlements made and the decrees rendered in the Probate Court of Tallapoosa county are surrounded by many suspicious circumstances, which required of the appellants a clear, full and complete explanation. In the absence of such explanation, these circumstances mark the transactions as fraudulent in their character, especially when, if there was any explanatory evidence, it was in their power to produce. The record will be searched in vain for any satisfactory explanation.

Callan v. Stathane, 23 How. 477.

Marshall v. Croom, 60 Ala. 121, *127*.

Appellants further insist that, even if Micou was guilty of fraud, there is no evidence that his daughters and son-in-law participated in his fraudulent intent.

The evidence shows that Clara E. Boykin resided with her father's family, at Tallassee, during 1873, until Decem-

ber of that year, when she came to Montgomery and kept house at her father's residence until November, 1874. Lucy B. Micou resided with her father during the entire year of 1873.—(Pages 197, 199.) It is true that it appears from their testimony that B. H. Micou maintained *in the midst of his family* a remarkable silence as to his financial embarrassments. They both say, they never heard him speak of it, and that they did not hear of it until December, 1873. Clara E. first heard of it from her husband, and Lucy B. from her mother. Mr. Boykin consulted with Mr. Semple, in the month of November, 1873, in relation to the payment to his wife of the Tallassee stock, at which time Mr. Semple inquired of him whether Micou had ever settled his account as guardian; and informed him that Micou had a heavy load of debt in connection with the Tallassee factory, and that he and the factory were both greatly embarrassed. Boykin was, at the same time, active in procuring a cancellation of the stock delivered to his wife, and which he told his wife, within a week after their marriage, was worthless, and in connection with this matter, Micou told him he was ruined. He knew of Micou being pressed for money as early as September or October, 1873. They all knew that Micou was and had been the guardian of his daughters, and had not settled his accounts. It seems entirely improbable, under these circumstances, that nothing was said in reference to these matters, when they were together for so long a time in such close domestic association. We think it may be safely assumed, that the daughters and Frank Boykin had information of the proceedings and intentions of Micou from their mother or some other source. They remained too quiet, seemingly indifferent and undisturbed, without some assurance as to the future, whether this assurance was given and an understanding had, by words from Micou himself or from some other person in communication with him, or by some tacit mode of communication. That they had information in reference to these matters, appears from the answer of Micou to the second cross-interrogatory, in which he says: "I gave

both the general information that I was endeavoring to settle their accounts. I had no particular consultation as to the terms of settlement."—(Page 185.) Thus he endeavors to evade a disclosure of the nature and character of the information by stating that there was *no particular consultation as to the terms of settlement.* In like manner his daughters and son-in-law seemed to have entertained the idea that they could truthfully deny in general terms that there was any understanding or agreement, because the particular terms—the amounts for which and the manner in which the decrees should be obtained, and the definite use to be made of them—were not agreed on.

Micou's wards and the husband of Clara E., the plaintiffs in the decrees, accepted them, expressing an actual indebtedness in each of more than $88,000; and have failed to prove that the amounts of said decrees were really due. The law condemns as wrongful *their acceptance,* particularly in connection with the use made of them, as shown by the transfer to Mr. Semple.

Hubbard v. Allen, 59 Ala. *supra,* on page 301.

It is not necessary that the grantee shall have actual knowledge of the debtor's intent to defraud his creditors. "A knowledge of facts sufficient to excite the suspicions of a prudent man and to put him on inquiry, or to lead a person of ordinary perception to infer fraud, or the means of knowing by the use of ordinary diligence, amounts to notice, and is equivalent to actual knowledge in contemplation of law. The nature and circumstances of the transaction may sometimes be such as must apprise the grantee of its character and object." A grantee can not purposely omit to make those inquiries which an ordinarily cautious and prudent man in the same situation would make, and if he does he is chargeable with participation in the fraud.

It does not require much evidence to prove that his intentions were known to his daughters and son-in-law. A knowledge, on their part, that there were other creditors who were

pressing their claims, that these decrees were rendered *so soon* after the insolvency of Micou became notorious; that in October 1873, Micou had informed his daughter Clara E., by letter, on the eve of her marriage, that he, as guardian, owed her about $35,000, and that in about three months thereafter two decrees were rendered for more than $88,000, each, thus increasing the amount of his indebtedness to her by over $50,000, and the other circumstances, heretofore referred to, which it is unnecessary to repeat, *were certainly* sufficient to *excite suspicion* and to put his daughters and son-in-law on inquiry.

Bump. on Fraud. Con. 200, and authorities cited in note.

Even if the evidence were insufficient to establish a formal or premeditated design to effect a fraud, and if the daughters and son-in-law had no intent of their own in procuring the decrees or in accepting them, yet if they were *passive* instruments in the hands of B. H. Micou, and procured and accepted the decrees to enable him to accomplish some purpose of his own, that purpose became their intention, although they may have made no inquiry and obtained no knowledge of such purpose.

It is evident from the evidence that Micou was the active and controlling person in having the settlements made, and the decrees so quickly rendered ; that, from some cause or other, he relied with confidence upon his daughters doing whatever he said, as he told T. M. Barnett they would do; that his daughters only employed an attorney to whom they imparted no information and gave no instructions; and that they accepted, without any inquiry or investigation whatever, the decrees rendered. The conclusion, most favorable to the daughters, which can be drawn from the evidence is, that they were passive instruments in the hands of their father to enable him to accomplish his fraudulent intent.

Warren v. Warren, 46 N. Y. (1 Sick.) 228, 233.

Bump. on Fraud. Con. 27.

As was said by BRICKELL, C. J., in Thames v. Rembert, 63 Ala., page 569, in reference to the circumstances of that case,

"These circumstances are unexplained—there is an absence of all evidence having a tendency to lessen their weight or the probability of the truth of the conclusions to which they lead. The vendor and vendee, it is true, in their testimony deny and disclaim all intent to hinder, delay and defraud the creditors of the grantor, and avow the fairness of the transaction. But these facts and circumstances outweigh all such general declarations—they speak an unequivocal language, which can not be answered by a mere denial of its truth, or protestations that the inferences to which they reasonably lead are not true and just."

In the brief of the counsel for appellants, it is said: "It seems, then, that if the decrees in favor of the wards were really rendered for too much by the fraudulent connivance of the guardian with the husband of the *feme covert* and with her lawyer, and with the guardian *ad litem* of the infant, the complainant should, at least, have alleged and proved the fraud of the lawyer of the *feme covert* and of the guardian *ad litem*." We have not charged the guardian *ad litem* and the attorney of the *feme covert* with any fraudulent connivance or intent. The guardian *ad litem*, it appears, filed his consent to act as such, and appeared for the first time on the day the final settlement of the guardianship of the estate of Lucy B. was made; he had nothing to do with fixing the *amount* of the indebtedness, and simply permitted the account to be passed *as filed by the guardian*. The attorney of the *feme covert*, like other attorneys, was actuated by the motive to procure as large a decree for his client as he could with safety, which, he thought, would be unassailable. His misfortune was that, to avoid a postponement of the time of the rendition of the decrees, he was compelled, as to the value of hires and rents and of the mules, to resort to the testimony of the guardian himself, *whose interest* it was, in effectuating his own purpose, to have the decrees rendered in as large amounts as possible. The means adopted by B. H. Micou to accomplish his intent, were to take protection under the formalities

of the law and the solemnity of decrees rendered by a court, and to interpose between his intent and the evidence of participation therein by the wards, their representation by an honorable attorney. But equity looks at substance and not at form. "It penetrates beyond externals to the substance of things, and it accounts as nothing, and delights to brush away barricades of written articles and formal documents, when satisfied that they have been devised to conceal or protect fraud," and even the decrees and judgments of the highest courts. Upon the whole evidence it is difficult "to characterize the transactions as any thing less than a great wrong perpetrated by the agency of legal forms"—a wrong which a court of equity will not permit to stand to the detriment of honest creditors.

Jackson v. Ludeling, 21 Wallace, 621.

Counsel for appellants, in his brief, as a *dernier resort*, is driven to assert and endeavors to maintain the proposition, that a married woman and an infant can not be guilty "of that fraudulent and *quasi* criminal intent and agency necessary to make a judgment in their favor on the settlement of the accounts of their guardian, void, as having been intended to hinder and delay other creditors." In support of this proposition, counsel, after referring to certain legal principles, such as that the legal existence of a married woman is merged in that of her husband; that she is always *sub potestate viri*, and incapable of acting for herself; that, in Alabama, there are two kinds of separate estates, the one equitable and the other statutory; and that she labors under all the disabilities of the common law, except in so far as statutes have expressly removed them, observes: "It results as a consequence, unless some law is shown removing the common law disabilities of married women, that Clara E. Boykin could no more conspire with her husband and father for the rendition of the decree on the final settlement of the guardianship of her estate, so as to impute *mala fides* to her, than if she had then been dead."

We are unable to discover the connection, which must certainly be very subtle, between the premises and the result, stated as a consequence; and have not heretofore learned, that the common law, by placing a married woman under disabilities as to property, contracts, and of like kind, has also imposed upon her incapacity to commit a fraud, and has granted to her a license to connive and conspire with her father to perpetrate a fraud upon his creditors with impunity; or that an infant, having arrived at years of discretion, and having intelligence sufficient to manage her own property, as her father represented Lucy B. when he was applying to remove her disabilities, is, on account of the disability of infancy, although participating with her father in the perpetration of a fraud on his creditors, protected against a visitation of the same consequences which would be visited upon others doing like acts. In Phipps v. Sedgwick, 5 Otto, cited by the counsel, it is said, "The books of reports are full of cases, in which real or personal property, conveyed to the wife in fraud of the husband's creditors, has been pursued and subjected to the payment of his debts, after it has been identified in her hands. * * * Equity has been ready, where such property remains in her hands, to restore it to its proper use."

In Humes v. Scruggs, 4 Otto, 22, the court declared fraudulent a conveyance for the benefit of the wife, although there was an amount due to her from the husband. It was said, "Fraud or no fraud is generally a question of fact to be determined by all the circumstances of the case. If the husband, in a state of absolute bankruptcy, conveys to his wife property fairly worth $15,000 to $20,000, with no present consideration passing, but with a recital of past indebtedness to her to less than a fifth of its value, the transaction is fraudulent and void as to creditors."

A transaction fraudulent as to part, is void IN TOTO. If a part of the consideration is merely a nominal or colorable one, contrived to hinder, delay, or defraud creditors, or if a

conveyance is made to secure a part of the property to the grantee, and to cover the residue for the use of the grantor the whole transfer or conveyance is void. So, also, if a creditor takes a judgment knowingly for more than is due, or accepts such judgment after it is taken, the fraud corrupts the entire judgment.

Marriott v. Givens, 8 Ala. 694.
Hall v. Hayden, 41 Ala. 242.
Pierce v. Partridge, 49 Mass. 44.
Whiting v. Johnson, 11 S. & R. 328.
Russell v. Winne, 37 N. Y. 591.

In Tatum v. Hunter & Thomas, 14 Ala. 557, it was held, that when the object and intent of a deed is to hinder and delay creditors, and both grantor and grantee participate in it, the deed is void as between a creditor and the fraudulent grantee, though there may be included in the deed a valid debt due to an infant ward of the grantee. It is true this was a case at law, and in the opinion delivered it was said: "It is not necessary to examine whether the infant ward could claim that the debt to which he was entitled in equity should be first paid out of the property conveyed by the fraudulent deed (if he could not otherwise collect it) by filing his bill for that purpose. However that may be, the deed, as between a creditor and the fraudulent grantee, must be declared void."

There may be cases in which a court of equity will permit a deed to stand as a security for the debt really due, if it was intended as a security for or payment of such debt, when right and justice require it. But these are cases in which the grantee is *innocent* of any participation in or knowledge of any fraudulent intent on the part of the grantor. There is, perhaps, no case in which any reimbursement or indemnity was afforded by a court of equity to a *particeps criminis* in a case of positive fraud. If the grantee is also a creditor he will not be allowed to retain for the debt actually due him; and in this respect it makes no difference whether there is actual fraud or the conveyance is void on account of

some provision contained therein. A fraudulent judgment can not be used, as against other creditors, to collect the amount that is due to the party to whom it is given.

Bunn v. Ahl, 29 Penn. 387.

Wiley, Banks & Co. v. Knight, 27 Ala. 336.

"The reason and foundation of the principle, that a right can not grow out of a wrong, is as applicable to the donee or vendee, guilty of actual fraud, as it is to the trespasser."

No decree *in personam* against any of the appellants was sought or rendered in this case. The only decree rendered, was to declare fraudulent the decrees of the Probate Court and the sales of the property had thereunder, and to condemn the property to the judgment of appellee. The decree merely deprives the daughters of Micou of the *fruits* of their fraud, for *the fruits* of an actual fraud are not merely the *excess* of the property after paying what may be really due. If they are not innocent of the fraud, either by actual participation therein or by accepting and receiving its benefits under circumstances calculated to excite suspicion of its existence, they can claim nothing on account of whatever may be due them. And even if they were innocent of the fraud, they are not entitled to the payment of what may be really due them when they are insisting upon and setting up a title to the entire property by virtue of the decrees and sales thereunder. They should by cross-bill, or some other appropriate proceeding, have asked such relief, setting out and claiming the amounts really due, and no more; or, at least, in their answers should have disclosed and claimed only the amount really due, repudiating the fraud. This, however, they had debarred themselves from doing, by executing the transfer or assignment, which created the trusts for the benefit of the families of the debtors.

The infirmity of this transfer or assignment goes to all the sales under the decrees and executions, and equally affects them all; and these sales effectually delay, hinder and defraud the creditors to the extent of the amount which may

have been really due, equally with the excess of the decrees over that amount.

Wiley, Banks & Co. v. Knight, 27 Ala. 336, *349*.

It is clear that the wards of Micou have, since the transactions which resulted in the decrees and sales, obtained knowledge of his fraudulent purpose, if they were previously ignorant. In legal contemplation it is as much against conscience to attempt to avail themselves of this fraud, after it is known, as if there had been preconcert. Fraud will not be permitted thus to place itself beyond the reach of the court and gain the mastery over the law. After it is known, they must either repudiate the fraud and insist only upon what is just and right, or take the legal consequences of insisting upon the enjoyment of its *entire fruits*.

Atwood v. Wright, 29 Ala. 346, *351*.

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☞ The references are to the pages of the printed transcript.

Field

14-547

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 329.

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THE CITY OF CHICAGO.

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Lillie's patent, dated April 14, 1860	133	50
McDougall's patent, dated March 24, 1868	139	51
Chappell's patent, dated April 19, 1864	141	53
Whitehead's patent, dated April 10, 1866	145	54
Miller's patent, dated April 23, 1867	150	56
Vancamp and Hodgman's patent, dated November 16, 1869	152	57
Cowing's patent, dated April 5, 1870	154	58
Gaytes's patent, dated October 25, 1870	156	59
Willet's patent, dated May 15, 1871	158	60
Prescott's patent, dated June 20, 1871	160	61
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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, on Wednesday, the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and first year.

WILLIAM H. BRADLEY, *Clerk.*

HENRY M. STOW
v.
THE CITY OF CHICAGO. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the 29th day of September, A. D. 1874, came the said complainant by Mes-rs. Carter, Becker, and Dale, his solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and bill of complaint in said
2 entitled cause, which said bond and bill are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, to the November term, A. D. 1874. In chancery.

HENRY M. STOW
vs.
THE CITY OF CHICAGO. }

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against any property for any costs taxed against them.

Dated this day of September, A. D. 1874.

WILLIAM H. STOW.

(Endorsed:) Filed Sept. 29th, A. D. 1874. Wm. H. Bradley, clerk.

Bill of complaint.

UNITED STATES OF AMERICA,
Northern District of Illinois:

3 United States circuit court, northern district of Illinois.

To the judges of the United States circuit court for the northern district of Illinois. In chancery sitting.

The bill of complaint of Henry M. Stow, of the city of San Francisco and State of California. Respectfully shows your orator that heretofore, to wit, on or before the first day of May, A. D. 1867, your orator, who was then a citizen of the United States, being the original

and first inventor of a certain new and useful improved pavement, not at that time in public use nor on sale with his consent or allowance for more than two years, made application in due form of law to the Government of the United States for its letters patent for such invention. Upon which application such proceedings were had that afterwards, to wit, on the tenth day of December, A. D. 1867, letters patent of the United States, dated the day and year last aforesaid, signed by the Acting Secretary of the Interior, and countersigned and sealed with the seal of the Patent Office by the Commissioner of Patents, were issued and delivered to your orator for the said invention, entitled wood
4 pavement, whereby there was granted to your orator, his heirs, administrators, or assigns, for the term of seventeen years from the said date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention, as in and by a certified copy of said letters patent, now in court produced and shown to your honors, will more fully appear, a copy of which is attached, marked Exhibit A.

That afterwards, to wit, on the 25th day of February, A. D. 1868, your orator being a citizen of the United States, as aforesaid, and the first inventor of another certain useful and new improved street pavement, and having made proper application therefor, other letters patent of the United States, dated the day and year last aforesaid, signed by the Acting Secretary of the Interior, and countersigned and sealed with the seal of the Patent Office by the Commissioner of Patents, were issued and delivered to your orator for the said invention, entitled, Improved Street Pavement, whereby there was granted to your orator, his heirs, administrators or assigns, for the term of seventeen years from the said date thereof, the full and exclusive right and liberty of making,
5 constructing, using, and vending to others to be used, the said invention, as in and by a certified copy of said letters patent now in court produced and shown to your honors, will more fully appear, a copy of which is attached, marked Exhibit B.

That afterwards, to wit, on the 19th day of January, A. D. 1869, your orator surrendered the letters-patent, dated the 10th day of December A. D. 1867, first above mentioned according to law, on account of a defective specification therein; and a new patent was duly issued to him on the same invention in accordance with his corrected description and specification, whereby was granted and secured to your orator, his heirs, administrators or assigns, for the full term of seventeen years from the said 10th day of December, A. D. 1867, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention, herein described and claimed, as in and by said reissued letters patent or a certified copy thereof here in court to be produced will more fully appear, a copy of which is annexed marked Exhibit C.

That afterwards, to wit, on the 6th day of April, A. D. 1869, one David L. De Golyer, being a citizen of the United States and the
6 first inventor of a certain improvement in laying wooden block pavement and having made proper application therefor obtained letters patent of the United States, dated the day and year last aforesaid, signed by the acting Secretary of the Interior, and countersigned and sealed with the seal of the United States Patent Office by the Commissioner of Patents for the said invention entitled "an improvement in laying wooden block pavement," whereby there was granted to the said De Golyer, his heirs, administrators, or assigns, for the term of seventeen years, from the date thereof, the full and exclusive right and liberty

of making, constructing, using and vending to others to be used, the said invention, as in and by a certified copy of said letters-patent, now in court produced and shown to your honors, will more fully appear, a copy of which is hereto annexed marked Exhibit D.

That prior to the issuing of said letters-patent, last above mentioned, on, to wit, the 30th day of March, A. D. 1869, by an agreement dated the day and year last aforesaid, and signed by the said David L. De Golyer, he, the said DeGolyer, for a consideration therein named, granted, bargained, sold and assigned unto your orator the ex-
7 clusive right to use the said invention of the said DeGolyer, for which said letters-patent, above described and dated the 6th day of April, A. D. 1869, were afterwards issued in the construction of all pavements which are laid or constructed directly upon a foundation of earth, loam, sand, or gravel, during the entire time for which said letters-patent were granted, which said articles of agreement were duly recorded in the records of the Patent Office on, to wit, the 29th day of April, A. D, 1869, as by a certified copy thereof, now in court produced and shown to your honors, will more fully appear, a copy of which is hereto annexed marked Exhibit E.

That, afterwards, to wit, on the 31st day of December, A. D. 1872, your orator being a citizen of the United States and the first inventor of another certain new and useful improvement in wood pavements, and having made proper application therefor, other letters-patent of the United States, dated the day and year last aforesaid, signed by the acting Secretary of the Interior and countersigned and sealed with the seal of the Patent Office by the Commissioner of Patents, were issued and delivered to your orator for the said invention, entitled "improvement in wood pavements," whereby there was granted to your orator, his
8 heirs, administrators, or assigns the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention, as in and by a certified copy of said letters-patent, now in court produced and shown to your honors, will more fully appear, a copy of which is hereto annexed marked Exhibit F.

Your orator further shows unto your honors that since the grant of the said several letters patent, in the exercise of the full and exclusive right and liberty so granted and assigned, as aforesaid, he has made, used, and vended to others to be used, the said various improvements so patented, and has had and maintained until the infringement hereafter complained of, exclusive possession of the said various improvements and inventions, under and by virtue of said letters patent and said agreement, and has never acquiesced in any invasion or infringement of his said rights.

Your orator further alleges that the Nicholson Pavement Company brought an action in the United States circuit court for the district of California, to recover damages from your orator and others for an infringement of a patent for an improvement in wooden pavements,
9 granted to said Nicholson in August, A. D. 1854, and reissued in December, 1863. That said pretended infringement consisted in the use of your orator's invention described in the letters patent first herein described, of which a copy is hereto annexed marked Exhibit A.

That thereupon a denial of said infringement was filed in said court by your orator, and the cause being brought to final hearing on the merits and fully argued before the Hon. Stephen J. Field, circuit judge, the said court, in an opinion, filed the 9th day of October, A. D. 1869, decided that the said improvement in the letters patent of your orator, dated the 10th day of December, A. D. 1867, before mentioned, did not

infringe upon the letters patent or reissue thereof of said Nicholson, and ordered judgment for the defendant.

Your orator further shows that the city of Chicago, incorporated under and by virtue of the laws of the State of Illinois, having full knowledge of the premises, and in violation of your orator's exclusive right and privilege, as aforesaid, and utterly disregarding the same, has since the first day of January, A. D. 1870, without the license of your orator, at the said city of Chicago, State of Illinois, and district
10 aforesaid, manufactured and used and still manufactures and uses a wooden pavement embracing the improvements and inventions described in said letters patent of your orator and said assignment to your orator by said DeGolyer.

And your orator further shows unto your honors that he will be subject to great and irreparable injury unless he shall obtain from your honors the relief hereby sought.

To the end, therefore, that the said city of Chicago may, if it can, show why your orator should not have the relief hereby prayed, and may, without oath (oath being waived), according to the best and utmost of its knowledge, remembrance, and belief, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated, and may be decreed to account for and pay over to your orator all such gains and profits as have accrued to it from its said infringement of your orator's right, and also to pay to your orator, in addition to said profits, the damages which have been sustained by your orator by reason of the said infringement; and that it, the said city,
11 may be restrained by an injunction issuing out of this honorable court from making, using, or vending to others to be used, any wooden pavements embracing the improvement so secured to your orator as aforesaid, and, also, that an injunction issue so restraining the defendant pending this cause, and for such other and further relief as the nature of the case may require, and to your honors may seem meet, may it please your honors to grant unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also the writ of subpœna directed to the said city of Chicago, commanding it to appear and answer to this bill of complaint, and to do and receive what to your honors shall seem meet.

And your orator will ever pray.

HENRY M. STOW.

CARTER, BECKER and DALE,
Com'pl't's Sol'rs.

UNITED STATES OF AMERICA,
State of Michigan, County of Eaton, ss:

Henry M. Stow being duly sworn says he is the complainant in the foregoing bill; that he has read the same and knows the contents thereof; that the things therein alleged are true of his own knowl-
12 edge, except those alleged on information and belief, and those this affiant believes to be true.

HENRY M. STOW.

Subscribed and sworn to before me this 29th day of August, A. D. 1874.

JOHN E. WINN,
Notary Public, Eaton Co., Mich.

(Endorsed:) Filed Sept. 29, 1874. Wm. H. Bradley, cl'k.

13 And on the same day, to wit, the 29th day of September, A. D. 1874, a writ of subpœna issued out of said clerk's office against said defendant in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the city of Chicago, greeting:

We command you that you appear before our judges of our circuit court of the United States of America for the northern district of
14 Illinois, at Chicago, in said district, on the first Monday in the month of November next, to answer the bill of complaint of Henry M. Stow, this day filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 29th day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the 99th.

[SEAL.] WM. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Chicago, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

15 I have served the within writ in the following manner, to wit: Upon the city of Chicago therein named, on the 30th day of September, A. D. 1874; also, by personally delivering to H. D. Colvin, mayor of the said city, a true copy of the same on the aforesaid day.

B. H. CAMPBELL,
U. S. Marshal,
By A. C. CAMPBELL, *Deputy.*

(Endorsed:) Filed Oct. 5th, A. D. 1874. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 4th day of January, A. D. 1875, said defendant, by T. Lyle Dickey, its solicitor, filed in said clerk's office its answer in said entitled cause, which said answer is in the words and figures following, to wit:

Answer.

United States circuit court, northern district of Illinois. In equity.

HENRY M. STOW
vs.
THE CITY OF CHICAGO.

The answer of the city of Chicago, defendant, to the bill of complaint of Henry M. Stowe, complainant.

16 This defendant, reserving all right of exception to the said bill of complaint, for answer thereto, says as follows:

First. That upon information and belief it admits that letters patent

of the United States were granted to Henry M. Stow for a certain improvement in wood pavements, which said patent was granted to said Stow on the 10th day of December, A. D. 1867.

Second. That said patent was surrendered and reissued to the said complainant on a new specification on the 19th day of January, A. D. 1869.

Third. Upon like information and belief it admits that other letters patent of the United States were granted and issued to the said complainant on the 25th day of February, A. D. 1868, for a new and improved street pavement.

Fourth. And that afterwards certain other letters patent of the United States were granted and issued to the said complainant, to wit, on the 31st day of December, A. D. 1872, for certain new and useful improvements in wood pavements.

Fifth. This defendant, upon like information and belief, admits that certain letters patent of the United States were granted and issued to David L. De Golyer on the 6th day of April, A. D. 1869, for a cer-
17 tain improvement in laying wooden block pavement, as set forth in said bill of complaint.

Sixth. This defendant denies that the complainant is the owner or holder of the legal title of the said patent to David L. De Golyer dated April 6th, A. D. 1869, and says that it has no knowledge of any assignment of said patent save that derived from the bill of complaint and the Exhibit E, thereto attached, which said exhibit appears to be an agreement for an exclusive license, and as to such matters it leaves the complainant to make his proofs.

Seventh. This defendant denies that the said complainant has had, used, and maintained the exclusive use and possession of the several improvements and inventions mentioned and described in the said several patents set forth in said bill of complaint.

Eighth. This defendant, further answering, says that it has no knowledge of any suit or action in the United States circuit court for the district of California upon a patent granted to Samuel Nicholson in August, A. D. 1854, and reissued in December, A. D. 1863, but says that it in no way established or tends to establish the validity of the patent
18 issued to the complainant on the 10th day of December, A. D. 1867, for the reason it by no means follows that a patent is necessarily a valid one because the devices therein described are held not to infringe a prior patent.

Ninth. This defendant admits that it is a corporation, duly incorporated under and by virtue of the laws of the State of Illinois.

Tenth. This defendant denies that it has, since the 1st day of January, A. D. 1870, manufactured and used, or is still manufacturing or using, a wooden pavement embracing the improvements and inventions described in said letters patent of the said complainant.

Eleventh. This defendant denies, upon information and belief, that the said Henry M. Stow or the said David L. De Golyer were the original and first inventors of the things described and claimed in the several patents set forth in said bill of complaint, and avers that prior to the supposed invention by the said Henry M. Stow and the said David L. De Golyer of the things mentioned and described in the said several letters patent set forth in the complainant's bill of complaint, the same or substantially the same improvements or things had been shown
19 and described in the following named letters patent of the United States, to wit:

Letters patent No. 75780, to Hugh McDougall, assignor to himself,

Robert Stewart, and Con McDougall, dated March 24th, 1868, for wooden pavement.

Letters patent No. 101590, to Turner Cowing, assignor to Tallmadge E. Brown, dated April 5th, 1870, for an improvement in wood pavement, the application upon which said patent was issued having been filed in the Patent Office on the day of , A. D. 1865.

Letters patent No. 64126, to Benjamin F. Miller, dated April 23rd, 1867, for pavement.

Letters patent No. 56303, to Edward Whitehead, dated July 10th, 1866, for pavement.

Letters patent No. 42347, to William H. Chappell, dated April 19th, 1864, for wooden pavement.

Twelfth. That the same or substantially the same pavement as has been laid by or for this defendant has been and was put into public use by or for this defendant for more than two years prior to the application filed in the Patent Office by the complainant, or by the said David L. De Golyer, upon which the patents named in said bill of complain t were issued and granted.

20 Thirteenth. That the several inventions and improvements mentioned in the said complainant's patents were known to and used by this defendant prior to the alleged invention thereof by either the said complainant or the said David L. De Golyer, of the said city of Chicago, and prior to the alleged invention thereof were known to and used by the said officers of the said city of Chicago, more particularly to one J. K. Thompson, heretofore city superintendent and now member of the board of public works of the said city of Chicago, residing in said city of Chicago, and having his office at the office of the board of public works at the city hall, corner of La Salle and Adams streets in said city.

Fourteenth. That as to complainant's patent, dated December 31st, 1872, this defendant avers that the same or substantially the same improvements were shown and described in the complainant's patents granted and dated, one December 10th, 1867, and the other February 25th, 1868.

Without this, that there is any other matter or thing in the complainant's bill contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently an-

21 swered, confessed, traversed, and avoided or denied, true to the knowledge or belief of this defendant, all which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

T. LYLE DICKEY,

Counsel to the Corporation of the City of Chicago, for Respondent.

T. LYLE DICKEY, *Sol.*
WEST and BOND,
Of Counsel.

(Endorsed:) Filed Jan'y 4, 1875. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 18th day of January, A. D. 1875, said complainant, by his solicitors, filed in said clerk's office his replication to the answer of the defendant in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

United States circuit court, northern district of Illinois. In chancery.

HENRY M. STOW
v.
THE CITY OF CHICAGO.

22 Replication of complainant to the answer of said defendant.

This repliant saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

HENRY M. STOW,
By C., B. & D., *His Sol'rs.*

CARTER, BECKER and DALE,
Compl't's Sol'rs.

(Endorsed:) Filed Jan'y 18, 1875. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 15th day of April, A. D. 1875, in
23 the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
v.
CITY OF CHICAGO. } In chancery.

On motion, Charles L. Drièsslein is appointed special examiner herein under the amended sixty-seventh rule in equity of the Supreme Court of the United States, and leave is given defendant to file an amended answer herein.

And on the same day, to wit, the 15th day of April, A. D. 1875, said defendant, by its solicitor, filed in said clerk's office its amended answer in said entitled cause, which said amended answer is in the words and figures following, to wit.

Amendment to answer.

United States circuit court, northern district of Illinois. In equity.

HENRY M. STOW
vs.
THE CITY OF CHICAGO.

Amendment to the answer of said defendant to the bill of complaint of said complainant.

24 And now comes said defendant, by leave of the court for that

purpose first had and obtained, and amends its answer in the following respects, viz:

On the fifth page of said answer and next after the thirtieth line, insert the following:

Letters patent No. 114895 to Richard H. Willett, dated May 16th, 1871, for wooden pavement.

Letters patent No. 96849 to A. Van Camp and M. M. Hodgman, dated November 16th, 1869, for wooden pavement.

Letters patent No. 116217 to Shubeal C. Prescott, dated June 20th, 1871, for wooden pavement.

Letters patent No. 121544 to R. C. Phillips, dated December 5, 1871, for wooden pavement.

Letters patent No. 132682 to E. P. Morong, dated October 29th, 1872, for wooden pavement.

Letters patent No. 112945 to G. A. May, dated March 21st, 1871, for improved wooden block pavement.

Letters patent No. 108582 to Carol Gaytes, dated April 5, 1870, for wooden pavement.

Also, in the following foreign patents, to wit:

English patent No. 8041 to David Stead, dated April 23, 1839,
25 and enrolled August 23, 1839, for an improved method of making or paving public streets and highways, &c.

English patent No. 8657, to Thomas Wood, the younger, dated October 7th, 1840, and enrolled April 2nd, 1841, for improvement in paving streets, &c.

English patent No. 9737, to Henry Austin, dated May 25th, 1843, and enrolled November 25th, 1843, for improvements in wood pavements, flooring, and veneers.

English patent No. 943, to Sir John Scott Lillie, dated April 14th, 1860, and enrolled October 11th, 1860, for improvement in carriage ways.

CITY OF CHICAGO,
By T. LYLE DICKEY,
Counsel for the Corporation.

L. L. BOND,
Of Counsel.

(Endorsed:) Filed April 15, '75. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 30th day of October, A. D. 1875, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
vs.
THE CITY OF CHICAGO. } In chancery.

26 On motion of West and Bond, solicitors for the defendant herein, the complainant is ruled by the court to close his proofs herein by the first day of January next.

Afterwards, to wit, on the 8th day of May, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
v.
THE CITY OF CHICAGO. } In chancery.

On motion of defendant, by L. L. Bond, esq., its solicitor, it is ordered by the court that this cause be set down for hearing upon the pleadings and proofs herein.

Afterwards, to wit, on the 22d day of March, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
vs.
THE CITY OF CHICAGO. } In chancery.

Now come the parties, by their solicitors, and upon motion of defendant, upon affidavit filed, time to take proofs mentioned in said
27 affidavits is extended ten days, and complainants have five days thereafter to rebut said proofs.

Afterwards, to wit, on the 25th day of April, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
v.
THE CITY OF CHICAGO. } In chancery.

Now come the parties, by their solicitors, and this cause now coming on to be heard upon the pleadings and proofs and exhibits herein, and after hearing the same in part, the further hearing of the same is postponed until to-morrow morning.

Afterwards, to wit, on the 26th day of April, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
vs.
THE CITY OF CHICAGO. } In chancery.

Now come again the parties, by their solicitors, and after hear-
28 ing further arguments of counsel until the hour of adjournment, the further hearing of the same is postponed until to-morrow morning.

Afterwards, to wit, on the 27th day of April, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
vs.
THE CITY OF CHICAGO. } In chancery.

Now come again the parties, by their solicitors, and the court, after

hearing the concluding arguments of counsel, not being now sufficiently advised in the premises, takes the cause under advisement.

Afterwards, to wit, on the 13th day of June, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HENRY M. STOW
vs.
THE CITY OF CHICAGO. } In chancery.

Now come the parties, by their solicitors, and the court having considered and being now fully advised upon the matters submitted
29 herein, finds the equities herein with the defendant.

It is thereupon considered, adjudged, and decreed by the court that this cause be dismissed for want of equity, and that the defendant have and receive of and from the complainant its costs and charges herein expended, amounting to the sum of one hundred and seventy-three dollars and sixty cents, and that execution issue therefor.

And thereupon the complainant prays an appeal to the Supreme Court of the United States, which is allowed upon giving bond herein in the penal sum of fifteen hundred dollars, with security to be approved by the court.

And afterwards, to wit, on the 31st day of July, A. D. 1877, the said complainant filed in said clerk's office his bond in appeal in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Henry M. Stow, as principal, and Charles L. Woodman, as security, of the county of Cook and State of Illinois, are held and firmly bound unto the city of
30 Chicago in the penal sum of two (2) thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 30th day of July, A. D. 1877.

The condition of the above obligation is such, that whereas the said Henry M. Stow has prayed for and obtained an appeal to the United States Supreme Court from a decree of the United States circuit court for the northern district of Illinois, in a certain chancery suit wherein said Henry M. Stow was complainant and said city of Chicago was defendant, by which said decree said suit was dismissed at complainant's costs, which said decree was entered on the thirteenth day of June, A. D. 1877.

Now, therefore, if the said Henry M. Stow shall prosecute his appeal to effect, and if he fail to make his plea good shall answer all costs, then the above obligation to be void, otherwise to remain in full force and virtue.

HENRY M. STOW. [SEAL.]
CHARLES L. WOODMAN. [SEAL.]

Taken and entered into before me this 30th day of July, A. D. 1877.

31 H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 31, 1877. Wm. H. Bradley, cl'k.

32 On the same day, to wit, on 31st day of July, A. D. 1877, the following certificate of evidence, with a stipulation attached thereto, was filed in said clerk's office, to wit:

Certificate of evidence.—Plaintiff's exhibits.

A. Stow patent No. 72110, dated Dec. 10, 1867.
B. Stow patent No. 74862, dated Feb'y 25th, 1868.
C. Stow reissued patent No. 3274, dated January 19, 1869.
D. De Golyer patent No. 88765, dated April 6, 1869.
E. Agreement between De Golyer and Stow, dated March 30, 1869.
F. Stow patent No. 134404, dated Dec. 31, 1872.
G. Model A and C (original to be certified to).
H. Model B (original to be certified to).
J¹. Model of F, gravel going only to foundation (original to be certified to).
J². Model F, gravel going into foundation (original to be certified to).
K¹. Record of suit in San Francisco, entitled The Nicholson Pavement Company vs. Thomas H. Hatch et al., and Henry M. Stow shows declaration for infringement of Samuel Nicholson's patents, dated August 8, 1854, and December 1, 1863, which declaration was filed
33 July 31, 1867; also, demurrer filed August 12, 1867; also, order overruling demurrer made October 16, 1867; also, defendant's answer, filed January 10, 1367; also, hearing and order that plaintiff take nothing by his action, and that defendants go hence without day, and that they recover their costs herein, dated Sept. 21, 1868; also, motion to set aside above general finding, filed October 2, 1868; also, denial of said motion on November 4, 1868. (The record need only be inserted as above.)
K². Opinion of court in above case.
L. Contractor's bond, contract, and specifications for paving, May 21, 1875.
L¹. Contractor's bond, contract, and specifications for paving, August 6, 1872. Both L and L to be inserted in substance as follows:
The first being in the sum of $5,000, and the second in the sum of $10,000, both conditioned to the performance of the accompanying contracts according to their terms and plans and specifications therein referred to, and to indemnify the city of Chicago from loss, damage, etc. The first contract refers to the paving of North Union street, and the second to the paving the approaches to State, Wells, and Adams street bridges. Both contracts provide that the work shall be done un-
34 der the immediate direction and superintendence of the board of public works of Chicago. The specifications of both provide that the pavement (wooden block) shall consist of—
First. A bed of lake shore sand, four inches in thickness, laid upon the top of the filling and smoothly rounded to the shape of the street, etc.
Secondly. Rows of sound live four-inch Norway or white pine blocks, free from sap, loose or rotten knots, or other defects, eight inches long, placed on end upon the sand, the rows running diagonally across the street and being left an inch apart; the blocks in the different rows of the pavement to break joints in a similar manner as in brick masonry.
The blocks shall be fitted so as to make close joints, and shall be uniformly laid, not varying in thickness more than a quarter of an inch in the same row; all rot, sap, and other defects to be trimmed off.
The spaces or joints between the rows of blocks shall be filled with

clean bank paving gravel and compactly tamped down by means of a paver's tamping iron, prepared to fit the joints, so that all parts of the same shall be thoroughly rammed; the whole surface shall also be smoothly rammed by means of a smoothing iron and pavers' rammer; the whole surface shall then be covered with roofing gravel or gravel screened from that used to fill the spaces between the blocks, said covering to be put on not less than 1½ inches thick and rolled with a roller of not less than five tons weight.

M. Model showing gravel extending below the bottom of the blocks.

W. H. S[1]. Corrected model of patents A and C.

W. H. S. G. Board from Kinzie street crossing (original to be certified to).

Thompson 1. Diagram of approach to State st. bridge (omit here).

Thompson 2. Patent dated March 1, 1870.

Thompson 3. Notice to mayor, &c., by W. H. Stow, dated Feb'y 23, 1874.

Watson 1. Tamping rammer diagram.

Munday 1. Arched gravel diagram.

(Both above to be omitted here.)

Wilson 1. Special assessment notice.

Application of De Golyer and Thompson for patent in wood pavement, filed January 2d, 1868, which, it is admitted, was rejected.

Applications of J. K. Thompson for patent in wood pavement, filed Nov. 8, 1870, and August, 23d, 1870, which, it is admitted, was rejected.

36 *Defendant's Exhibits.*

No. 1.	Stead's	patent, dated	April 23, 1839.
" 2.	Wood's	" "	Oct. 7, 1840.
" 3.	Austin's	" "	May 5, 1843.
" 4.	Lillie's	" "	April 14, 1860.
" 5.	McDougall's	" "	M'ch 24, 1868.
" 6	Chappell's	" "	April 19, 1864.
" 7.	Whitehead	" "	April 10, 1866.
" 8.	Miller's	" "	April 23, 1867.
" 9.	Vancamp and Hodgman	" "	Nov. 16, 1869.
" 10.	Cowing's	" "	April 5, 1870.
" 11.	Gaytes'	" "	Oct. 25, 1870.
" 12.	Willet's	" "	May 15, 1871.
" 13.	Prescott's	" "	June 20, 1871.
" 14.	Phillips'	" "	Dec. 5, 1871.
" 15.	May's	" "	M'ch 25, 1871.
" 16.	Morong's	" "	Oct. 29, 1872.

Nos. 17 to 26. Certified copies of file wrappers in the patents of McDougall, Gaytes, May, Cowing, Vancamp and Hodgman, Phillips, Prescott, Willett, Morong, and Miller.

No. 27. Model of Thompson pavement of 1864.

No. 28. Five receipts for payment of royalty.

United States circuit court, northern district of Illinois.

HENRY M. STOW
vs.
THE CITY OF CHICAGO.

37 I, Henry W. Blodgett, judge of the United States circuit court

for the northern district of Illinois, hereby certify that the foregoing testimony and the exhibits heretofore enumerated were introduced in evidence upon the hearing of said cause and no other evidence whatever.

H. W. BLODGETT, *Judge.*

United States circuit court, northern district of Illinois.

HENRY M. STOW
vs.
CITY OF CHICAGO.

It is hereby stipulated and agreed that all the models used at the hearing of the above entitled cause by either party may be kept by the party and used upon the hearing before the Supreme Court.

WEST AND BOND,
Sol'rs for Defendant.
BECKER AND DALE,
Compl't's Sol'rs.

(Endorsed:) Filed July 31, 1877. Wm. H. Bradley, cl'k.

Complainant's exhibits.

38 A.

UNITED STATES PATENT OFFICE.

Henry M. Stow, of San Francisco, California. Improvement in street-pavements.

Specification forming part of letters patent No. 72110, dated December 10, 1867.

To all whom it may concern:

Be it known that I, Henry M. Stow, of the city and county of San Francisco, and State of California, have invented a new and useful improvement in wooden pavements for streets, sidewalks, and ground and cellar floors; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, and to the letters and figures of reference marked thereon.

Figure A is a perspective view of a section of my street-pavement, that part of the figure designated by the letter C representing the pavement in process of construction, and that designated by C′ representing it as completed. Fig. B is a perspective view of a section of my improved pavement as adapted to sidewalks, ground and cellar floors.

The nature of my invention consists in putting down a wooden pavement upon a foundation bed of sand or loose earth, and packing the sand or earth by means of wedge-shaped blocks, driven down into the same, and forming a part or whole of the pavement.

In constructing the street pavement the street is first filled with clear sand, loam, or loose earth, free from stones, to within about four or six inches of the desired street-grade, (according to the length of blocks,) and smoothed off, so as to conform to the desired arch or crown of the street. Then wooden blocks, marked No. 1 in the drawings, are set on their ends in a tier across the street, these blocks being cut square at

both ends. Next a tier of blocks, marked No. 2 in the drawings, made wedge-shaped at their lower ends by beveling on one side, is set across the street close against the first tier of square-ended blocks, and then another tier of square-ended blocks is set up as before, and so on alternate tiers of square and wedge-shaped blocks are placed until a space of ten feet or more is covered. Then the wedge-shaped blocks are driven down into the sand or earth with a rammer and swage until their upper ends are below the upper ends of the square-ended blocks No. 1, and the foundation is of the desired compactness. The said wedge-shaped blocks No. 2 may be made of the same length as the blocks No. 1, and may be driven down until their upper ends reach about the center of said blocks No. 1, as shown in Fig. A of the drawings, in which case the open spaces above them, between the blocks No. 1 are to be filled with gravel; or the said blocks No. 2 may be made some two or three inches longer than the blocks No. 1, and driven down until their upper ends are only half or three-fourths of an inch, or thereabout, below the upper ends of blocks No. 1, leaving shallow grooves merely to give a foot-hold for horses and others animals traveling on the pavement. The said blocks No. 1 should be from four to six inches long, (or deep,) about three inches thick, and of any convenient width. The blocks No. 2 may be about one inch thick and of any convenient width. But I do not limit myself to these dimensions.

The blocks should be so set as to break joints. The driving down of the wedge-shaped blocks, as described, packs the sand or earth so compactly that the most heavily-ladened wagons passing over the pavement will never occasion any unevenness in the surface thereof. The sand or earth forming the foundation-bed should be thoroughly wet when the blocks are put down. The blocks are to be so formed and set in the pavement that the grain of the wood will be vertical, and they may be saturated with coal or gas tar, or any liquid hydrocarbon or other resinous substance which will tend to preserve the wood from decay, before being set in the pavement. When the blocks are sufficiently hammered down the whole surface of the pavement should be thoroughly saturated with boiling-hot coal-tar, asphaltum, pitch, oil and asphaltum, or other pitchy substance, and covered with clean sand at least half an inch in thickness.

For sidewalks and ground or cellar floors I make all the blocks of the same length and thickness, and make the lower ends of all in wedge form by beveling one side, as shown in Fig. B. For sidewalks I make the blocks from two to four inches in thickness and from four to six inches long; but for floors of buildings I prefer to make them larger—say from four to six inches wide and from six to twelve inches long
39 But I do not limit myself in either case to any specific dimensions. The blocks should be so set as to break joints in all cases, whether for street pavements, sidewalks, or floors.

I do not claim leaving a space between the upper portions of the square-ended blocks No. 1, and filling said space with gravel, as I am advised that is not new, but is covered by the patent granted Samuel Nicolson, August 8, 1854, and the reissues thereof; but

What I do claim as my invention, and desire to secure by letters pat-, is—

1. A wooden pavement composed of alternate tiers of square-ended and wedge-shaped blocks, the wedge-shaped ends of the latter being driven down into a foundation-bed of sand or earth, substantially as and for the purpose described.

for the northern district of Illinois, hereby certify that the foregoing testimony and the exhibits heretofore enumerated were introduced in evidence upon the hearing of said cause and no other evidence whatever.

H. W. BLODGETT, *Judge.*

United States circuit court, northern district of Illinois.

HENRY M. STOW
vs.
CITY OF CHICAGO.

It is hereby stipulated and agreed that all the models used at the hearing of the above entitled cause by either party may be kept by the party and used upon the hearing before the Supreme Court.

WEST AND BOND,
Sol'rs for Defendant.
BECKER AND DALE,
Compl't's Sol'rs.

(Endorsed:) Filed July 31, 1877. Wm. H. Bradley, cl'k.

Complainant's exhibits.

38 A.

UNITED STATES PATENT OFFICE.

Henry M. Stow, of San Francisco, California. Improvement in street-pavements.

Specification forming part of letters patent No. 72110, dated December 10, 1867.

To all whom it may concern:

Be it known that I, Henry M. Stow, of the city and county of San Francisco, and State of California, have invented a new and useful improvement in wooden pavements for streets, sidewalks, and ground and cellar floors; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, and to the letters and figures of reference marked thereon.

Figure A is a perspective view of a section of my street-pavement, that part of the figure designated by the letter C representing the pavement in process of construction, and that designated by C′ representing it as completed. Fig. B is a perspective view of a section of my improved pavement as adapted to sidewalks, ground and cellar floors.

The nature of my invention consists in putting down a wooden pavement upon a foundation bed of sand or loose earth, and packing the sand or earth by means of wedge-shaped blocks, driven down into the same, and forming a part or whole of the pavement.

In constructing the street pavement the street is first filled with clear sand, loam, or loose earth, free from stones, to within about four or six inches of the desired street-grade, (according to the length of blocks,) and smoothed off, so as to conform to the desired arch or crown of the street. Then wooden blocks, marked No. 1 in the drawings, are set on their ends in a tier across the street, these blocks being cut square at

both ends. Next a tier of blocks, marked No. 2 in the drawings, made wedge-shaped at their lower ends by beveling on one side, is set across the street close against the first tier of square-ended blocks, and then another tier of square-ended blocks is set up as before, and so on alternate tiers of square and wedge-shaped blocks are placed until a space of ten feet or more is covered. Then the wedge-shaped blocks are driven down into the sand or earth with a rammer and swage until their upper ends are below the upper ends of the square-ended blocks No. 1, and the foundation is of the desired compactness. The said wedge-shaped blocks No. 2 may be made of the same length as the blocks No. 1, and may be driven down until their upper ends reach about the center of said blocks No. 1, as shown in Fig. A of the drawings, in which case the open spaces above them, between the blocks No. 1 are to be filled with gravel; or the said blocks No. 2 may be made some two or three inches longer than the blocks No. 1, and driven down until their upper ends are only half or three-fourths of an inch, or thereabout, below the upper ends of blocks No. 1, leaving shallow grooves merely to give a foot-hold for horses and others animals traveling on the pavement. The said blocks No. 1 should be from four to six inches long, (or deep,) about three inches thick, and of any convenient width. The blocks No. 2 may be about one inch thick and of any convenient width. But I do not limit myself to these dimensions.

The blocks should be so set as to break joints. The driving down of the wedge-shaped blocks, as described, packs the sand or earth so compactly that the most heavily-ladened wagons passing over the pavement will never occasion any unevenness in the surface thereof. The sand or earth forming the foundation-bed should be thoroughly wet when the blocks are put down. The blocks are to be so formed and set in the pavement that the grain of the wood will be vertical, and they may be saturated with coal or gas tar, or any liquid hydrocarbon or other resinous substance which will tend to preserve the wood from decay, before being set in the pavement. When the blocks are sufficiently hammered down the whole surface of the pavement should be thoroughly saturated with boiling-hot coal-tar, asphaltum, pitch, oil and asphaltum, or other pitchy substance, and covered with clean sand at least half an inch in thickness.

For sidewalks and ground or cellar floors I make all the blocks of the same length and thickness, and make the lower ends of all in wedge form by beveling one side, as shown in Fig. B. For sidewalks I make the blocks from two to four inches in thickness and from four to six inches long; but for floors of buildings I prefer to make them larger—say from four to six inches wide and from six to twelve inches long
39 But I do not limit myself in either case to any specific dimensions. The blocks should be so set as to break joints in all cases, whether for street pavements, sidewalks, or floors.

I do not claim leaving a space between the upper portions of the square-ended blocks No. 1, and filling said space with gravel, as I am advised that is not new, but is covered by the patent granted Samuel Nicolson, August 8, 1854, and the reissues thereof; but

What I do claim as my invention, and desire to secure by letters pat-, is—

1. A wooden pavement composed of alternate tiers of square-ended and wedge-shaped blocks, the wedge-shaped ends of the latter being driven down into a foundation-bed of sand or earth, substantially as and for the purpose described.

2. A wooden pavement composed of blocks with lower ends wedge-formed, and all driven down into a foundation-bed of sand or earth, substantially as shown and described.

HENRY M. STOW.

Witnesses:
J. J. COOMBS.
JOS. L. COOMBS.

(Here follows diagram, marked page 39.)

40 The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Henry M. Stow, dated February 25th, 1868, No. 74862, for "Improved Street Pavement."

In testimony whereof, I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this fourth day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

No. 74862.

The United States of America to all to whom these letters patent shall come:

Whereas Henry M. Stow, of San Francisco, California, has alleged that he has invented a new and useful improved street pavement, and has made oath that he is a citizen of the United States, that he verily believes he is the original and first inventor or discoverer of the said invention, and that the same hath not to his knowledge and belief been previously known or used, has paid into the Treasury of the United
41 States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor.

These are therefore to grant to the said Henry M. Stow, his executors, administrators, or assigns, for the term of seventeen years from the twenty-fifth day of February, one thousand eight hundred and sixty-eight, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention, a description whereof is given in the amended schedule and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent Office to be hereunto affixed.

Given under my hand, at the city of Washington, this twenty-fifth day of February, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-second.

W. T. OTTO,
Acting Secretary of the Interior.

[SEAL.]

A. M. STOUT,
Acting Commissioner of Patents.

42 B.

UNITED STATES PATENT OFFICE.

Henry M. Stow, of San Francisco, California, improved street pavement.

Specification forming part of letters patent No. 74362, dated February 25, 1868.

To all whom it may concern:

Be it known that I, Henry M. Stow, of San Francisco, in the county of San Francisco and State of California, have invented a new and useful improvement in street pavements; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawing, forming a part of this specification, and to the letters of reference marked thereon:

The nature of my invention consists in driving down into a foundation bed of sand or loose earth tiers of wedge-shaped wooden blocks, with spaces between said tiers filled with gravel, as hereinafter more fully set forth.

In the accompanying drawings, Figure 1 is a section of my pavement completed, shown in perspective; and Fig. 2 is a side elevation of a section of said pavement in process of construction.

A A, Figs. 1 and 2, are wooden blocks as they stand in the completed pavement, their lower ends being made in wedge form, by leveling one side only, and said wedge shaped ends driven down into the foundation-bed of sand or earth. B is a gravel packing between the tiers of wooden blocks. A′ A′, Fig. 2, are similar wooden blocks, as set in process of constructing the pavement, before being driven down into the foundation-bed; and B′ is a space between the tiers of blocks, to be filled with gravel, or sand and gravel. C C are removable strips to be used in constructing the pavement, but forming no part thereof when finished. These strips are placed between the tiers of paving-blocks in constructing the pavement, simply to keep said tiers a proper distance apart in straight rows, and the blocks in a true vertical position. They are made in two parts, of wedge form, lapping together, as is clearly shown in the drawings, to facilitate their withdrawal from between the tiers of blocks when the latter are driven home.

These strips may be made of wood or metal. The paving-blocks may be about three inches thick, from six to ten inches long (or deep), and of any desired width; but I do not limit myself to any specific dimensions. The removable strips should be about one inch thick.

To prepare the street for the putting down of this pavement, it should first be filled with a bed of sand or loose earth, to within, say, five inches of the desired top of the pavement (but varying according to the length of the paving-blocks to be used), and then graded to correspond with the desired arch or crown of the pavement. The sand or earth should be thoroughly saturated with water. Then the paving-blocks, with the intervening removable strips, are placed as shown in the drawings—first, a tier of wedge-shaped blocks across the street, from curb to curb, and then a tier of strips (which may be of any convenient length), and so on alternately, a tier of blocks and a tier of strips, until a section of, say, ten feet or more of the pavement has been thus laid. The blocks are then driven down evenly with a heavy beetle or rammer, until a firm

foundation is made by the packing of the sand or earth effected by the wedge shape of the blocks. The section of pavement, before driving down the blocks, should be secured, by proper means against spreading as the blocks are driven down. The paving-blocks are to be so constructed and set in the pavement that the grain of the wood will be vertical. When the said blocks are properly driven down, the removable strips are to be withdrawn, and the spaces between the tiers of blocks are to be filled with clean gravel, the pebbles averaging, as near as may be, from one-fourth to one inch in diameter, the said gravel to be well packed by rammer and swage. Or, instead of filling said spaces with all gravel, they may be filled to within about an inch and a half of the top of the blocks with sand well packed in with rammer and swage, and the residue of the space filled with gravel as aforesaid. When the pavement is thus completed, the whole surface should be subjected to a boiling-hot coating of coal-tar and asphaltum, or oil and asphaltum, or any other kind of suitable pitchy substance, and then covered with a thin layer of coarse sand or very fine gravel. The blocks, before being put down in the pavement, may be saturated with coal or gas tar, or any liquid hydrocarbon, or other resinous substance which will tend to preserve the wood from decay.

43 Having thus fully described my invention, with the method of carrying it into effect, what I claim as my invention, and desire to secure by letters patent, is:

A pavement composed of tiers of wedge shaped wooden blocks, driven into a foundation-bed of sand or earth, with spaces between said tiers packed with gravel, or sand and gravel, substantially as shown and described.

HENRY M. STOW.

Witnesses:
R. H. DUELL.
J. J. COOMBS.

(Here follows diagram, marked page 43.)

44 The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the reissue letters patent granted Henry M. Stow, dated January 19th, 1869, No. 3274, for "improved pavement."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this fourth day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

No. 3274. Reissue.

The United States of America to all to whom these letters patent shall come:

Whereas Henry M. Stow, of San Francisco, California, has alleged that he has invented a new and useful improved pavement (for which letters patent were issued to him dated December 10, 1867, which letters having been surrendered by him, the same have been cancelled,

and new letters ordered to issue to him on an amended specifica-
45 tion), and has made oath that he is a citizen of the United States, that he verily believes he is the original and first inventor or discoverer of the said invention, and that the same hath not to his knowledge and belief been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor:

These are, therefore, to grant to the said Henry M. Stow, his executors, administrators, or assigns, for the term of seventeen years from the tenth day of December, one thousand eight hundred and sixty-seven, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention, a description whereof is given in the annexed schedule, and made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office to be hereunto affixed.

Given under my hand, at the city of Washington, this nineteenth day of January, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-third.

46 W. T. OTTO,
Acting Secretary of the Interior.

[SEAL.] ELISHA FOOTE,
Commissioner of Patents.

47 C.

UNITED STATES PATENT OFFICE.

Henry M. Stow, of San Francisco, California. Improved pavement.

Specification forming part of letters patent No. 72110, dated December 10, 1867; reissue No. 3274, dated January 19, 1869.

To all whom it may concern:

Be it known that I, Henry M. Stow, of the city and county of San Francisco, in the State of California, have invented a new and useful improvement in pavements for streets, sidewalks, and ground and cellar floors; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, and to the letters and figures of reference marked thereon.

Figure A is a perspective view of a section of my street pavement, that part of the figure designated by the letter C representing the pavement in process of construction, and that part designated by C′ representing it as completed. Fig. B is a perspective view of a section of my improved pavement as adapted to sidewalks, ground and cellar floors.

The nature of my invention consists in putting down a pavement of wood or other suitable material upon a foundation-bed of sand or loose earth, and packing the sand or earth by means of wedge-blocks driven down into the same, and forming a part or the whole of the pavement.

In constructing the street pavement the street is first filled with clear sand, loam, or loose earth, free from stones, to within about four to six inches of the desired street grade (according to the length of blocks), and smoothed off so as to conform to the desired arch or crown of the

street. Then blocks of wood or other suitable material, marked No. 1 in the drawings, are set on their ends in a tier across the street, these blocks being cut square at both ends. Next a tier of blocks marked No. 2 in the drawings, made wedge-shaped at their lower ends by beveling on one side, is set across the street close against the first tier of square-ended blocks, and then another tier of square ended blocks is set up, as before, and so on alternate tiers of square and wedge-shaped blocks are placed until a space of ten feet or more is covered. Then the wedge-shaped blocks are driven down into the sand or earth with a rammer and swage until the upper ends are below the upper ends of the square-ended blocks No. 1, and the foundation is of the desired compactness. The said wedge-shaped blocks No. 2 may be made of the same length as the blocks No. 1, and may be driven down until their upper ends reach about the center of said blocks No. 1, as shown in Fig. A of the drawings, in which case the open spaces above them, between the blocks No. 1, are to be filled with gravel; or the said blocks No. 2 may be made some two or three inches longer than the blocks No. 1, and driven down until their upper ends are only half or three-fourths of an inch, or thereabout, below the upper ends of blocks No. 1, leaving shallow grooves, merely to give a foothold for horses and other animals traveling on the pavement. The said blocks No. 1 should be from four to six inches long (or deep), about three inches thick, and of any convenient width. The blocks No. 2 may be about one inch thick and of any convenient width. But I do not limit myself to these dimensions.

The blocks should be set so as to break joints. The driving down of the wedge-shaped blocks, as described, packs the sand or earth so compactly that the most heavily laden wagons passing over the pavement will never occasion any unevenness in the surface thereof. The sand or earth forming the foundation-bed should be thoroughly wet when the blocks are put down. The blocks, when of wood, are to be so formed and set in the pavement that the grain of the wood will be vertical, and they may be saturated with coal or gas tar, or any liquid hydrocarbon or other resinous substance which will tend to preserve the wood from decay, before being set in the pavement. When the blocks are sufficiently hammered down, the whole surface of the pavement should be thoroughly saturated with boiling-hot coal-tar, asphaltum, pitch, oil and asphaltum, or other pitchy substance, and covered with clean sand at least half an inch in thickness.

When the foundation-bed is composed of sand or loose sandy earth, it will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square-ended blocks will operate as wedges, and on being driven down into the foundation-bed will pack the same sufficiently. I prefer, however, to make the blocks to be driven down into the foundation-bed wedge-shaped at their lower ends, as described.

48

Nor is it absolutely necessary that the blocks, when of wood, be sawed or dressed into regular forms and set in regular tiers, as a very good, cheap pavement, involving the principle of my invention, may be made of blocks of split wood of irregular form, set on their ends, and a proper proportion of them, at regular intervals (as near as may be), driven down into the foundation-bed so as to produce the requisite packing of the same.

While I regard my invention as most appropriately applicable to wooden pavements, it is manifest that said blocks No. 1 may be of dressed stone, or of a concrete composition, molded into the form of blocks of dimensions similar to those shown in the drawings, or into

the form of continuous blocks or ribs running clear across the street, or any portion of said distance, and the blocks No. 2 may be of dressed stone, brick, or wood, or of any suitable material that will bear driving down into the foundation-bed.

For sidewalks and ground or cellar floors I make all of the blocks of the same length and thickness, and make the lower ends all of wedge form, by beveling one side, as shown in Fig. B. For sidewalks, I make the blocks from two to four inches in thickness and from four to six inches long; but for floors of buildings I prefer to make them larger, say, from four to six inches wide and from six to twelve inches long. But I do not limit myself in either case to any specific dimensions.

The blocks should be set so as to break joints in all cases, whether for street pavements, sidewalks, or floors.

I do not claim leaving a space between the upper portions of the square-ended blocks No. 1 and filling said space with gravel, as I am advised that is not new, but is covered by the patent granted to Samuel Nicolson, August 8, 1854, and the reissues thereof; but

What I do claim as my invention and desire to secure by letters patent, is—

1. A pavement composed of alternate tiers of square-ended and wedge-shaped blocks, the wedge-shaped ends of the latter being driven into a foundation-bed of sand or earth, substantially as and for the purpose described.

2. A pavement composed of blocks with lower ends wedge-formed, and all driven down into a foundation-bed of sand or earth, substantially as shown and described.

3. A pavement composed of wood, or in whole or in part of other suitable material, laid on a foundation-bed of sand or loose earth, as described, and a portion of the blocks driven down into said foundation-bed to pack the same, substantially as and for the purpose specified.

HENRY M. STOW.

Witnesses:
J. J. COOMBS.
JOS. L. COOMBS.

(Here follows diagram, marked page 48.)

49 The U. S. Patent-Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the reissue letters patents granted Henry M. Stow, dated January 19th, 1869, No. 3274, for "improved pavement."

In testimony whereof, I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed, this fourth day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

No. 3274. Reissue.

The United States of America to all to whom these letters patent shall come:

Whereas Henry M. Stow, of San Francisco, California, has alleged that he has invented a new and useful improved pavement, for which

letters patent were issued to him dated December 10, 1867, which letters having been surrendered to him, the same have been cancelled
50 and new letters ordered to issue to him on an amended specification, and has made oath that he is a citizen of the United States; that he verily believes he is the original and first inventor or discoverer of the said invention, and that the same hath not to his knowledge and belief been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor:

These are therefore to grant to the said Henry M. Stow, his executors, administrators, or assigns, for the term of seventeen years from the tenth day of December, one thousand eight hundred and sixty-seven, the full and exclusive right and liberty of making, using, and vending to others to be used the said invention, a description whereof is given in the annexed schedule and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent-Office to be hereunto affixed.

Given under my hand, at the city of Washington, this nineteenth day of January, in the year of our Lord one thousand eight hundred
51 and sixty-nine, and of the Independence of the United States of America the ninety-third.

W. T. OTTO,
Acting Secretary of the Interior.

[SEAL.] ELISHA FOOTE,
Commissioner of Patents.

52 D.

UNITED STATES PATENT-OFFICE.

David L. De Golyer, of Chicago, Illinois. Improvement in laying wooden-block pavement.

Specification forming part of letters patent No. 88,765, dated April 6, 1869.

To all whom it may concern:

Be it known that I, D. L. De Golyer, of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful improvements in wooden-block pavements for roadways, &c.; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making part of this specification, and to the letters of reference thereon, like letter indicating like parts, wherever they occur.

To enable others skilled in the art to construct and use my invention, I will proceed to describe it.

My invention relates to wooden pavements for streets and roadways, and consists in a new method of so constructing and arranging rows of wooden blocks upon a continuous foundation, laid directly upon the roadbed, as to form continuous channels across the roadway, by the use of an auxiliary strip extending to the foundation to determine both the parallelism of the rows of blocks and the width and depth of the channels, and in afterward removing this auxiliary strip and filling the space or channel occupied by it with gravel, broken stone or other suitable material and tar, as hereinafter described.

In the drawings, Figure 1 is a top plan view, and Fig. 2 is a cross-section on the line *x x* of Fig. 1.

The earth of the roadway upon which my wooden pavement is to be constructed must first be suitably prepared and graded. This may be done in any of the usual methods. When thus prepared, I first lay wooden sleepers C, as shown in Fig. 2, transversely across the roadway. These sleepers C I make of suitable size, and place them at the required distances from each other to receive the ends of the boards A, which I lay longitudinally along the roadway, and so as to form a continuous foundation, as shown in Figs. 1 and 2. The boards A, used for the foundation, should be of the same thickness and of any kind or quality suitable for the purpose.

Upon this continuous foundation, thus constructed, I arrange rows of wooden blocks B, so as to form continuous channels across the roadway, as shown in Fig. 1. In doing this I first arrange one row, fixing it rigidly or firmly in position by any convenient means, and then placing next to this row of blocks the auxiliary strip E, as shown in Fig. 2, and then against it another row of blocks, as shown in the same figure. This auxiliary strip E I make wide enough to extend to the foundation-boards A, and still be sufficiently far enough above the upper surface of the blocks for convenience in removing it. Its thickness should be made to correspond with the desired width of the channel. Its position causes the rows of blocks on each side of it to run parallel with each other, and when the second row is thus arranged it can, in the process of being arranged, be fixed in position. After this is done, I remove the auxiliary strip E, which leaves a channel of the depth of the blocks extending continuously across the roadway. In like manner I construct and arrange another parallel row of blocks, with the aid of the auxiliary strip, and make another continuous channel across the roadway, and so on indefinitely. In the process of constructing and arranging the rows of blocks and the continuous channels, it is obvious that they may be made in whole or in part as the work progresses. These continuous channels, thus made, I fill with gravel, broken stone, or slate, or other suitable material, and then pour upon the filling hot tar in sufficient quantities to penetrate and entirely fill all the cavities or vacant spaces that may exist in and between the particles of the material used for filling, and then pack or ram the filling by means of an iron blade conforming with the width of the channels, driven down by a rammer. The tar, before being used, I boil long enough so that it will become stiff, but not hard and brittle, when cold. When the hot tar is poured upon the filling the pavement is completed.

The wooden blocks used in the construction of my pavement are cut with parallel sides, lines, or surfaces, from joist or other suitable timber, in cross-sections of the shape shown in the drawings, and of any desired dimensions. These blocks are placed end upward upon the foundation, and as they are all cut of the same size and with parallel
53 sides, when placed in lines they form compact, continuous rows, with intervening channels extending to the foundation.

The simplicity of the construction of my pavement enables laborers of ordinary skill to construct it easily and rapidily, and therefore cheaply.

As there is nothing above the foundation but the rows of the blocks and the filling in the intervening channels, it forms a very compact and uniform body, and possesses all the qualities of durability and utility that can be given to any wooden-block pavement.

I am aware of the English patent granted to one Henry Austin, in

the year 1843, and numbered 9737, and do not claim a wooden pavement constructed as therein described; but

What I do claim as my invention, and desire to secure by letters patent, is—

The method herein described of constructing a wooden pavement, consisting of wooden blocks set in rows, with spaces or channels between, filled with gravel, broken stone, or other suitable material, and tar, which method consists in the use of an auxiliary removable strip or board, to determine parallelism of the rows and the width of the channels, but forming no part of the completed pavement, substantially as herein described.

DAVID L. DE GOLYER.

Witnesses:
J. J. COOMBS.
H. B. MUNN.

(Here follows diagram marked page 53.)

54 The U. S. Patent-Office to all to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted David L. De Golyer, dated April 6th, 1869, No. 88765, for "Imp't in laying wooden block pavement."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed, this fourth day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

No. 88765.

The United States of America to all to whom these letters-patent shall come:

Whereas Daid L. De Golyer, of Chicago, Illinois, has alleged that he has invented a new and useful improvement in laying wooden block pavement, and has made oath that he is a citizen of the United
55 States; that he verily believes he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to his knowledge and belief, been previously known or used, has paid into the Treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor:

These are therefore to grant to the said David L. De Golyer, his executors, administrators, or assigns, for the term of seventeen years from the sixth day of April, one thousand eight hundred and sixty-nine, the full and exclusive right and liberty of making, using, and vending to others to be used, the said improvement, a description whereof is given in the annexed schedule and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent-Office to be hereunto affixed.

Given under my hand, at the city of Washington, this sixth day of April, in the year of our Lord one thousand eight hundred and sixty-

nine, and of the Independence of the United States of America the ninety-third.

W. T. OTTO,
Acting Secretary of the Interior.

56 Countersigned and sealed with the seal of the Patent-Office.
[SEAL.] ELISHA FOOTE,
Commissioner of Patents.

57 E.

(O, page 352.)

This agreemant, made at Chicago, in the State of Illinois, on the 30th day of March, A. D. 1869, by and between David L. De Golyer, of said Chicago, party of the first part, and Henry M. Stow, of San Francisco, in the State of California, party of the second part, witnesseth:

Whereas the party of the first part has applied for and expects soon to obtain letters-patent for a certain improvement in wooden block pavements, the chief feature of which improvement consists in the use of removable strips between the rows of blocks;

And whereas the said party of the first part has agreed to give to the party of the second part the exclusive right to use the said patented invention in the construction of all pavements which have no foundation of wood, concrete, cement, or metal, but are laid or constructed directly upon a sand, loam, or gravel foundation:

Now, therefore, the said party of the first part, for and in consideration of the sum of one hundred dollars to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and assigned, and does by these presents grant, bargain, sell, and assign unto the said party of the second
58 part the exclusive right to use the said patented invention and improvement of the said party of the first part, in the construction of all pavements which are laid or constructed directly upon a foundation of earth, loam. sand, or gravel, during the entire term for which the said letters-patent are granted; provided, however, and it is expressly agreed and understood, that nothing herein contained shall be so construed as to give to said Stow the right to use the said improvement in the construction of any pavement which contains or is laid or constructed upon a foundation of wood, metal, cement, concrete, or other like material.

And the said party of the first part further agrees that as soon as the said letters patent for said improvement shall be issued to him, or to his assigns, that he or they shall and will make unto the party of the second part such other and further assignment or conveyance as may be necessary or proper in the premises to convey to and vest in the party of the second part a good right and title to the exclusive right herein and hereby agreed to be conveyed.

D. L. DE GOLYER.

Recorded Ap'l 29, 1869.

L. F. S.

[5-cent int. rev. stamp.]

59 F.

UNITED STATES PATENT OFFICE:

Henry M. Stow, of San Francisco, California.—Improvement in wood pavements.

Specification forming part of letters patent No. 134404, dated December 31, 1872.

CASE 1.

To all whom it may concern:

Be it known that I, Henry M. Stow, of San Francisco, in the county of San Francisco and State of California, have invented a new and useful improvement in wooden pavements; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawing and to the letters of reference marked thereon.

The nature of my invention relates to that class of wooden pavements in which the blocks are laid directly upon the sand foundation; and it consists in laying the blocks in rows with spaces between the rows, and in filling or partially filling said spaces with sand or gravel and driving or swaging the same into the sand foundation below in order to pack or compress the sand under the blocks, for the purpose of sustaining the weight of heavy vehicles passing over the pavement.

In the drawing, Figure 1 represents a sectional view of the pavement in course of construction, and Fig. 2 a sectional view of the finished pavement constructed according to my invention.

In constructing my pavement I first grade the street and cover it to a depth of not less than three inches with sand or loam, which I wet and pack with a maul or rammer until the whole is of sufficient compactness. I then strike the surface to a proper grade and lay the blocks A in rows transversely across the street, placing between the rows a removable strip of wood, B, of sufficient thickness to form the necessary spaces between the blocks, as shown in Fig. 1. After a sufficient number of rows have been laid in this manner, I remove the strips B and partially fill the spaces with sand or gravel. I then drive the gravel or sand in said spaces into the sand foundation below by means of a swage, maul, or other suitable instrument until the foundation under the blocks is sufficiently compressed. I then fill the spaces with gravel or sand and coal-tar or other cement, or with gravel or sand alone, and go over the whole with a smoothing iron or other suitable instrument to finish the surface.

What I claim is—

A pavement composed of blocks laid in rows directly upon the sand foundation with spaces between the rows filled with sand or gravel, which is swaged or driven into said foundation, substantially as and for the purpose specified.

HENRY M. STOW.

Witnesses:
RICH'D S. ROBERTSON.
JNO. R. WHITE.

(Here follows diagram marked page 60.)

61 The U. S. Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Henry M. Stow dated December 31st, 1872, No. 134404, for "Imp't in Wood Pavements."

In testimony whereof I, J. M. Thacher, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this fourth day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.]

J. M. THACHER,
Acting Commissioner.

No. 134404.

The United States of America to all to whom these presents shall come:

Whereas Henry M. Stow, of San Francisco, California, has presented to the Commissioner of Patents a petition, praying for the grant of letters patent for an alleged new and useful improvement in wood pavements, a description of which invention is contained in the specification,
62 of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided.

And whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said Henry M. Stow, his heirs or assigns, for the term of seventeen years from the thirty-first day of December, one thousand eight hundred and seventy-two, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand, and caused the seal of the Patent Office to be affixed, at the city of Washington, this thirty-first day of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-seventh.

B. R. COWEN,
Acting Secretary of the Interior.

Countersigned:
[SEAL.]

M. D. LEGGETT,
Commissioner of Patents.

63 K[1].

Record of suit in San Francisco entitled "The Nicolson Pavement Company vs. Thomas H. Hatch et al. and Henry M. Stow," shows declaration for infringement of Samuel Nicholson's patents, dated August 8, 1854, and December 1, 1863, which declaration was filed July 31, 1867; also demurrer filed August 12, 1867; also order overruling demurrer made October 15, 1867; also defendant's answer filed January 10, 1867; also hearing and order that plaintiff take nothing by his action, and that defendants go hence without day, and that they recover their costs herein, dated Sept. 21, 1868; also motion to set aside above general finding, filed October 2, 1868; also denial of said motion on November 4, 1868.

64 K².

Opinion of Judge Field.

Circuit court U. S., district of California.

THE NICHOLSON PAVEMENT COMPANY
vs.
THOMAS H. HATCH AND OTHERS.

This is an action to recover damages for an alleged infringement by the defendants of a patent granted by the United States to Samuel Nicholson for an improvement in wooden pavements. A patent was originally issued to Nicholson, in August, 1854. This being surrendered, a new patent to him was issued in December, 1863. The right to use the invention in the city and county of San Francisco has passed from Nicholson by various intermediate transfers to the plaintiff, a corporation created under the laws of this State.

65 The nature of the improvements which the patentee claims as his invention can only be understood from a description of the pavement and its mode of construction. The specifications accompanying the patent give such description with much fulness and detail. A brief description, however, will be sufficient for our purpose and will exhibit the matter in dispute between the parties. The improved pavement is constructed in this wise: The earth of the roadway or street upon which the pavement is to be made is first graded; the grade is generally made in a slightly arched shape, so that the elevation at the centre of the road is a trifle higher than at the sides. The earth thus prepared is then covered with tarred paper or lime, mortar or hydraulic cement about two inches in thickness, or with a thin flooring upon which tar is poured.

Upon the foundation thus made, two sets of wooden blocks are placed. These blocks are cut with parallel sides, from timber about four inches square in cross sections; those of one set are about eight inches
66 in length, and those of the other are about half that length. These blocks are placed end upward, and are arranged both transversely and longitudinally, so that the long and short blocks stand alternately in each direction.

By this arrangement, there is formed above each short block a cell or cavity bounded by four of the large blocks. Into each of these cells a small quantity of coarse salt is poured, the cells are then filled with broken stone or coarse, clean gravel, the whole being firmly rammed until the upper surface becomes firm and level. Mineral or vegetable tar or pitch is then poured over the whole surface of the pavement and into the cells containing the broken stone or gravel, so as to penetrate between the pieces and cement them together. The tar penetrating into the cells makes the entire mass of stone or gravel adhere firmly to the surrounding blocks, and also allows an expansion of the mass from the pressure of carriages, such expansion serving to fill up any spaces which may be formed from shrinkage of the wooden blocks. To
67 prevent the blocks from being forced below one another, they are sometimes connected together by wooden pins, and instead of the broken stone and tar in the cells any other suitable cementing material may be used.

Instead of the two sets of blocks described, the improved pavement is sometimes constructed entirely with the long blocks and a strip of

board between them. In such case the blocks are placed side by side in rows transversely of the roadway, with a strip an inch in width between them, in which the strip of board is introduced edgewise or vertically. The width of the board is about one-half the length of the blocks. These boards resting on the foundation there is formed above them, between the blocks, long cells or graves extending across the roadway; these cells are filled with broken stone or gravel and tar as already described. It is generally, if not always, in this form that the pavement has been constructed in San Francisco; it is in this way, as we have briefly described it, the improved pavement which is
68 generally called the Nicolson pavement is made. It is a pavement of great neatness, is easily kept clean, is, from its nature, free from mud, offers a safe footing for horses, and by its use the noise of carriages and carts so annoying in the busy streets of a large city is, to a great extent, avoided; it is also represented by the patentee to be a desirable structure, its durability being secured, in his view, by the elastic extremities of the fibres of the blocks, and by the exclusion of moisture and consequent rot from the blocks by the material employed for the foundation and the tarry covering poured over the surface.

This pavement is not the entire invention of Nicolson, nor is it claimed so by him. Wooden pavements were invented and in use in different parts of the world many years before his attention was directed to the subject. He makes no claim to the exclusive use of the blocks or of the gravel and tar between them or over them, nor of any of the separate parts which go to make up the structure; what
69 he claims as his invention, is the combining of the foundation of the pavement with the blocks or the long blocks and the strip of board, these being arranged so as to form cells or channels with modern bottoms for the reception of broken stone or gravel and tar as already described, hereby, to quote his own language, "the particles of pounded stone or gravel are prevented from working under the lower ends of the longer blocks, and whereby water is prevented from passing from the surface of the pavement downwards through the joints of said wooden blocks, and also moisture is prevented from being absorbed upwards from the ground by said wooden blocks."

The claim here stated is not for the invention of any of the several parts which go to make up the structure, but for their combination, and the particular improvement for which the patent was solicited was the arrangement of the foundation with the blocks so as to exclude moisture from the bottom, and prevent the broken stone or gravel from working under them; the patent is not infringed unless these two parts
70 of the structure, the foundation and blocks, are used by the defendants in a similar combination. The use of one without the other, though all the other necessary elements in the formation of the pavement are employed, violates no right of the patentee. A patent for a combination of two things is not, of course, a patent for a combination of one of the two with a third and a different thing; the authorities on this subject are all one way.

In Prouty and Mears vs. Ruggles (16 Peters, 341) the patent was for the combination of certain parts of a plough, they being so arranged as to produce a certain effect. The action was for an alleged infringement. The court below instructed the jury that unless the whole combination was substantially used in the plough of the defendants there was no violation of the plaintiff's patent, although one or more of the parts specified were used in the combination by them. The jury found for
71 the defendants, and the instruction was held correct by the

Supreme Court. "None of the parts referred to," said Mr. Chief Justice Taney, in delivering the opinion of the court, "are new, and none are claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plough in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts." (P. 341.)

72 In Ivans vs. Godfrey (1 Wallace, 79), this case from Peters is cited with approval, and its ruling followed. In Brooks vs. Fiske (15 Howe, 112), the patent was for a planing machine, and the invention claimed was a combination of three elements. The machine which was alleged as an infringement did not use all of these three, and the court stated the rule of law in such case to be "that if a combination has, as here, three different parts, and the result is proposed to be accomplished by the union of all the parts arranged with reference to each other, the use of two of these parts only, combined with a third which is substantially different in the manner of its arrangement and connection with the others, is not the same combination and no infringement." (P. 216.)

If we apply these principles to the case presented for determination, the result which must follow is obvious. The pavement constructed by the defendants is termed by them the Stow pavement.

73 In this pavement no foundation beyond the grading of the earth is prepared for the support of the blocks as in the Nicolson pavement. No tarred paper, nor lime mortar, nor hydraulic cement, nor flooring, with or without tar, is employed. The blocks are placed in parallel rows, directly upon the graded earth, which is formed into a solid and compact form by a wedge driven between the blocks. This wedge is made of a board two or three feet in length, and nearly of the width of the blocks, and is driven some inches below them. The Stow pavement presents an external appearance similar to that of the Nicolson pavement; it exhibits the same neatness, is with equal care kept clean, furnishes the same sure footing for horses, and by its use the noise of carriages and carts is equally avoided. But in the foundation used the resemblance ceases; in that particular there is nothing in com-

74 mon between them. And the special benefits ascribed by the parties to the foundation of their respective pavements are different.

The exclusion of moisture from the blocks is one of the principal benefits ascribed by Nicolson to the foundation of his pavement. The defendants, on the other hand, insist that more or less moisture penetrates the blocks from above and below, and that the absence of any wooden or tarred foundation to their pavement allows it to readily escape, and thus the blocks are preserved from decay. They also assert that their pavement has many advantages over that of the Nicolson, particularly in the facility with which the pavement can be taken up and replaced when this becomes necessary, as it often does, in the streets of a large city, to lay down water or gas pipes, or to repair them. But all this, whether true or otherwise, is a matter which can have no bearing upon the decision of the case. On the merits

75 of the two systems we are not called upon to pass. It is sufficient

letermine the issue presented, that the combination for which olson obtained his patent has not been used in all its parts by the ndants. Hence they are not guilty of infringing any rights under patent.

he decision of the circuit court of the United States for the district llinois, to which we have been referred, does not affect this case. at decision only determined the reality of the patent to Nicolson d the infringement of his rights by the city of Chicago.

We do not deny the reality of his patent or the legality of the trans- to the plaintiff. We only adjudge that the patent has not been fringed by the defendants in the construction of what is termed by em the Stow pavement.

Judgment ordered for defendants.

FIELD, *J.*

L AND L.

6.

Two contractors' bonds, dated, respectively, May 21, 1875, and August 6, 1872, contracts and specifications for paving, the first being in the sum of $5,000, and the second in the sum of $10,000, both conditioned to the performance of the accompanying contracts according to their terms and plans and specifications therein referred to, and to indemnify the city of Chicago from loss, damage, etc.

The first contract refers to the paving of North Union street, and the second to the paving the approaches to State, Wells, and Adams street bridges. Both contracts provide that the work shall be done under the immediate direction and superintendence of the Board of Public Works of Chicago. The specifications of both provide that the pavement (wooden block) shall consist of—

First. A bed of lake shore sand four inches in thickness, laid upon the top of the filling, and smoothly rounded to the shape of the street, etc.

Secondly. Rows of sound live four-inch Norway or white-pine blocks, free from sap, loose or rotten knots or other defects, eight inches long, placed on end upon the sand, the rows running diagonally across the street, and being kept an inch apart. The blocks in the different rows of the pavement to break joints in a similar manner as in brick masonry. The blocks shall be fitted so as to make close joints, and shall be uniformly laid, not varying in the thickness more than a quarter of an inch in the same row; all rot, sap, and other defects to be trimmed off.

The spaces or joints between the rows of blocks shall be filled with clean bank paving gravel, and compactly tamped down by means of a pavers' tamping-iron prepared to fit the joints so that all parts of the same shall be thoroughly rammed. The whole surface shall also be smoothly rammed by means of a smoothing-iron and pavers' rammer. The whole surface shall then be covered with roofing gravel or gravel screened from that used to fill the spaces between the blocks, said covering to be put on not less than 1½ inches thick, and rolled with a roller of not less than five tons' weight.

77½ *Thompson* 2.

UNITED STATES PATENT OFFICE.

James K. Thompson, of Chicago, Illinois. Letters patent No. 100339, dated March 1, 1870. Improvement in wooden pavement.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, James K. Thompson, of the city of Chicago, in the county of Cook and State of Illinois, have invented a new and useful improvement in wooden pavements; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings and the letters of reference marked thereon.

Upon any road-bed, graded or prepared in any of the usual methods for laying a pavement thereon, I place longitudinally a foundation of common boards or planks, close but not fastened together, and resting upon wooden strips or sleepers. Upon this foundation I set wooden blocks of different dimensions, with the grain vertical, as shown in the accompanying drawings, in which—

Figure 1 is a top view of a section of pavement made pursuant to my invention, and

Figure 2 is a section of the same on line *x*—*x*, fig. 1, in elevation.

A A are the larger blocks, which may be six inches high, three inches thick, and nine inches wide.

These blocks are set in rows across the roadway from curb to curb, close together, and at every joint a smaller block, *b*, of the same height, about one inch thick and three inches wide, is set, as shown in the drawings.

These smaller blocks *b b* are secured to each of the larger blocks with nails, in such manner as to take a bearing on each, as shown in the drawings.

The rows of blocks A across the roadway will be thus kept about one inch apart, leaving open spaces, *c*, between them from the surface to the foundation. These open spaces, however, are not continuous across the roadway, being divided at intervals by the smaller blocks *b b*, so as to form rectangular cells from the surface of the pavement to the foundation upon which the blocks stand.

d is the plank foundation.

e e, the strips or sleepers on which it rests.

The open spaces or cells *c* I fill with gravel or broken stone, or other suitable material for forming a concrete, and then pour upon the filling hot tar in sufficient quantities to penetrate and entirely fill all the cavities or interstices that may be between the particles of material used for filling, and then ram the filling by the means of an iron rammer made in convenient form for such purpose.

The tar, before being used, I boil long enough so that it will become stiff, but not hard and brittle when cold. When the tar is poured upon the filling and the filling rammed, the pavement is complete.

I do not limit myself to the use of blocks of the dimensions herein set forth, although the thick and thin blocks should be of the same length, the width of the thick blocks being immaterial.

What I claim as my invention, and desire to secure by letters patent, is—

A pavement consisting of thick and thin blocks of wood, placed together, as shown on drawings, one sustaining and bracing the other, and resting upon a board foundation, substantially in the manner herein described.

JAMES K. THOMPSON.

Witnesses:
GEO. W. WILSON.
O. H. QUINLY.

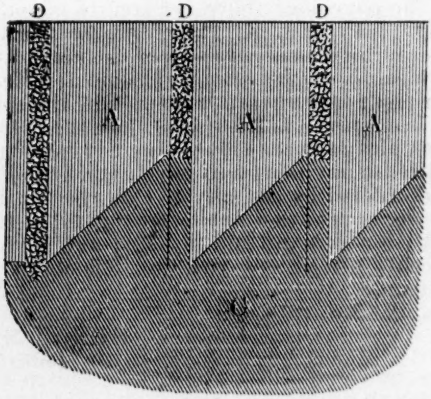
(Here follows diagram marked page 78.)

79 *Thompson* 3.

20313.

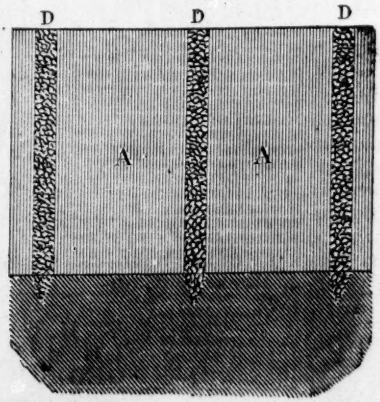
Patent No. 74862 *for Stow's improved street pavement.*

Invented 1866. Patent issued to Henry M. Stow, San Francisco, Cal., 1868.



Patent No. 134404 *for Stow's improved wooden block pavement.*

Invented 1870. Patent issued to Henry M. Stow, San Francisco, Cal., Dec. 31, 1872.



To the mayor, board of public works, and property owners of the city of Chicago:

GENTLEMEN: You will please take notice that I have several letters patent granted to me by the United States Patent Office that cover and include the exclusive right to construct any and all wood block pavements that are laid directly upon a sand, gravel, or earth foundation, with the spaces or interstices filled with gravel, coal-tar, sand, or cement-gravel; and I hereby notify each of you that I will hold you in damages and royalty on each and every piece or parcel of pavement laid down, or contracted to be laid down, by or in said city since January, 1870, for infringement on my patent pavement without authority from me.

For the information of the public I annex two cuts of my patents. As no patent has ever been granted to any other person than myself, or a pavement of this description ever been in use in the United States until since this patent was granted to me, it is not "sublime impudence" on my part in claiming royalty, as the newspapers say of a former circular issued by me, as the pavement above referred to is not the kind laid in this city in A. D. 1864, by J. K. Thompson, for the board of public works (referred to in the masterly report of the committee on judiciary of the city of Chicago), as the pavement laid by Mr. Thompson was made of seven or eight inch square timber, laid close together on the ground, and has been in use in Russia for more than two hundred years.

W. H. Stow, of Chicago, is the only person now having authority from me to permit or license any person to pave with, or use this pavement, it being the kind ordered by the city of Chicago for its streets; and when there is an assessment and public letting for a street by the city, I hold the city only for damages and royalty; and I hereby give notice that I shall prosecute all parties that infringe on my patent for damages as well as royalty.

Chicago, February 23rd, 1874.

HENRY M. STOW,
Patentee and Owner.

80 *Exhibit Wilson* 1.

Special assessment notice.

Notice is hereby given to all persons interested, that the city council of the city of Chicago having ordered * * * Fulton street * * * to be graded to within ten inches of the grade of the pavement, and paved with wooden block pavement; said wooden blocks to be of sound Norway or white pine, six inches long, placed on end upon a bed of sand four inches deep, the rows of blocks to run diagonally across the street, being kept one inch apart, the spaces between the rows of blocks to be filled with clean bank paving gravel, compactly rammed down, by means of a paver's tamping iron prepared to fit the joints so that all parts shall be thoroughly rammed, the entire surface to be smoothly rammed by means of a smoothing iron and paver's rammer, and covered with fine, clean, sharp gravel to the depth of one inch—have applied to the county court of Cook County for an assessment, etc.

Chicago, April 4, A. D. 1874.

W. H. CARTER,
HERMAN BENZEE,
GEORGE D. TALBOT,
Commissioners.

81 *De Golyer & Thompson application, Jan'y 2d*, 1868.—*Rejected.*

To the Commissioner of Patents of the United States of America:

The petition of David L. De Golyer and James K. Thompson, of Chicago, in the county of Cook and State of Illinois, respectfully sheweth, that your petitioners have invented a new and useful improved combination pavement for streets or ways which they verily believe has not been known or discovered by any other person or persons prior to their invention thereof.

Your petitioners, therefore, desire that letters patent may be granted to them, securing to them and their legal representatives for the term of fourteen years an exclusive property in the above-mentioned invention, or right to make and use it, and to vend it to others by them to be made, used, or sold, as it is described in the accompanying and written specifications.

Your petitioners being citizens of the United States and hav-
82 ing paid thirty dollars ($30.00) into the Treasury of the United States and complied with all the other conditions expressed in the acts of Congress for such cases made and provided.

Signed at Chicago, in the State of Illinois, the ninth day of September, in the year of our Lord eighteen hundred and sixty-seven.

DAVID L. DE GOLYER.
JAMES K. THOMPSON.

Witness:
P. A. HOYNE.
J. L. COOK.

(Indorsed:) Petition for letters patent for De Golyer and Thompson's improved combination pavement. Edward Martin, Chicago.

83 To all to whom these presents shall come:

Be it known that we, David L. De Golyer and James K. Thompson, of the city of Chicago, in the county of Cook, in the State of Illinois, have invented a certain new and useful improved combination pavement for streets and ways. And we do hereby declare that the same is fully described and represented in the following specification and the accompanying drawings, letters, and figures thereof; that is to say, upon any road-bed, graded or prepared in any of the usual methods for laying a pavement thereon, we place longitudinally a foundation of common boards or planks, close but not fastened together, and resting upon transverse strips, or sleepers, of the same material.

It is not intended that such foundation shall contain any preventive to moisture, the object thereof being merely to sustain the superincumbent blocks and filling, and not to prevent the absorption of moisture from the ground by the blocks; upon this foundation of common
83*a* boards or planks, wooden blocks (which may be six inches high, three inches thick, and nine inches long, cut at a right angle to the fibre or grain of the wood, or of any other convenient size, thickness, length, or form) are stood in rows and upwards across the street or way, and close together at the ends, but without any permanent fastening to the foundation, leaving between every two rows of blocks an interval or space an inch wide, or thereabouts, and of the entire depth of the blocks, which intervals or spaces are filled either with broken stone or gravel cemented with tar so boiled down and thickened that when cool it shall be tough and fibrous, or with cement gravel only, without tar.

To the mayor, board of public works, and property owners of the city of Chicago:

GENTLEMEN: You will please take notice that I have several letters patent granted to me by the United States Patent Office that cover and include the exclusive right to construct any and all wood block pavements that are laid directly upon a sand, gravel, or earth foundation, with the spaces or interstices filled with gravel, coal-tar, sand, or cement-gravel; and I hereby notify each of you that I will hold you in damages and royalty on each and every piece or parcel of pavement laid down, or contracted to be laid down, by or in said city since January, 1870, for infringement on my patent pavement without authority from me.

For the information of the public I annex two cuts of my patents. As no patent has ever been granted to any other person than myself, or a pavement of this description ever been in use in the United States until since this patent was granted to me, it is not "sublime impudence" on my part in claiming royalty, as the newspapers say of a former circular issued by me, as the pavement above referred to is not the kind laid in this city in A. D. 1864, by J. K. Thompson, for the board of public works (referred to in the masterly report of the committee on judiciary of the city of Chicago), as the pavement laid by Mr. Thompson was made of seven or eight inch square timber, laid close together on the ground, and has been in use in Russia for more than two hundred years.

W. H. Stow, of Chicago, is the only person now having authority from me to permit or license any person to pave with, or use this pavement, it being the kind ordered by the city of Chicago for its streets; and when there is an assessment and public letting for a street by the city, I hold the city only for damages and royalty; and I hereby give notice that I shall prosecute all parties that infringe on my patent for damages as well as royalty.

Chicago, February 23rd, 1874.

HENRY M. STOW,
Patentee and Owner.

80 *Exhibit Wilson* 1.

Special assessment notice.

Notice is hereby given to all persons interested, that the city council of the city of Chicago having ordered * * * Fulton street * * * to be graded to within ten inches of the grade of the pavement, and paved with wooden block pavement; said wooden blocks to be of sound Norway or white pine, six inches long, placed on end upon a bed of sand four inches deep, the rows of blocks to run diagonally across the street, being kept one inch apart, the spaces between the rows of blocks to be filled with clean bank paving gravel, compactly rammed down, by means of a paver's tamping iron prepared to fit the joints so that all parts shall be thoroughly rammed, the entire surface to be smoothly rammed by means of a smoothing iron and paver's rammer, and covered with fine, clean, sharp gravel to the depth of one inch—have applied to the county court of Cook County for an assessment, etc.

Chicago, April 4, A. D. 1874.

W. H. CARTER,
HERMAN BENZEE,
GEORGE D. TALBOT,
Commissioners.

81 *De Golyer & Thompson application, Jan'y 2d, 1868.—Rejected.*

To the Commissioner of Patents of the United States of America:

The petition of David L. De Golyer and James K. Thompson, of Chicago, in the county of Cook and State of Illinois, respectfully sheweth, that your petitioners have invented a new and useful improved combination pavement for streets or ways which they verily believe has not been known or discovered by any other person or persons prior to their invention thereof.

Your petitioners, therefore, desire that letters patent may be granted to them, securing to them and their legal representatives for the term of fourteen years an exclusive property in the above-mentioned invention, or right to make and use it, and to vend it to others by them to be made, used, or sold, as it is described in the accompanying and written specifications.

Your petitioners being citizens of the United States and having
82 paid thirty dollars ($30.00) into the Treasury of the United States and complied with all the other conditions expressed in the acts of Congress for such cases made and provided.

Signed at Chicago, in the State of Illinois, the ninth day of September, in the year of our Lord eighteen hundred and sixty-seven.

DAVID L. DE GOLYER.
JAMES K. THOMPSON.

Witness:
P. A. HOYNE.
J. L. COOK.

(Indorsed:) Petition for letters patent for De Golyer and Thompson's improved combination pavement. Edward Martin, Chicago.

83 To all to whom these presents shall come:

Be it known that we, David L. De Golyer and James K. Thompson, of the city of Chicago, in the county of Cook, in the State of Illinois, have invented a certain new and useful improved combination pavement for streets and ways. And we do hereby declare that the same is fully described and represented in the following specification and the accompanying drawings, letters, and figures thereof; that is to say, upon any road-bed, graded or prepared in any of the usual methods for laying a pavement thereon, we place longitudinally a foundation of common boards or planks, close but not fastened together, and resting upon transverse strips, or sleepers, of the same material.

It is not intended that such foundation shall contain any preventive to moisture, the object thereof being merely to sustain the superincumbent blocks and filling, and not to prevent the absorption of moisture from the ground by the blocks; upon this foundation of common
83*a* boards or planks, wooden blocks (which may be six inches high, three inches thick, and nine inches long, cut at a right angle to the fibre or grain of the wood, or of any other convenient size, thickness, length, or form) are stood in rows and upwards across the street or way, and close together at the ends, but without any permanent fastening to the foundation, leaving between every two rows of blocks an interval or space an inch wide, or thereabouts, and of the entire depth of the blocks, which intervals or spaces are filled either with broken stone or gravel cemented with tar so boiled down and thickened that when cool it shall be tough and fibrous, or with cement gravel only, without tar.

Plate No. 1, figure 1, is a transverse section shewing (*b*) a tier of the blocks, (*c*) the foundation, and (*d*) the supporting strip or sleeper. Figure No. 2 shows (*b b*) tiers of blocks, (*c*) the foundation, and (*a*) the filling between the blocks.

For the convenience of construction merely each fourth or fifth block may be lightly toe-nailed to the foundation.

Instead of placing the blocks in close rows across the street or
83*b* roadway, said blocks may be stood transversely and longitudinally, so that each block standing transversely will be supported at each end by a like block of similar height, about an inch in thickness, or of any other convenient thickness, standing at right angles with the transverse blocks and long enough to reach to the adjoining rows of blocks on each side; in this case the transverse rows of blocks should break joints. In that case each longitudinal block supports three transverse ones.

The intervals or spaces between these blocks are to be filled as above.

The foundation may also be made double instead of single, if desired.

Plate No. II shews (*b*) the transverse blocks, (*e*) the longitudinal blocks, (*c*) the foundation, and (*a*) the filling between the blocks.

In witness whereof we have hereunto set our signatures this day of September, A. D. 1867.

DAVID L. DE GOLYER.
JAS. K. THOMPSON.

Witnesses:
P. A. HOYNE.
J. L. COOK.

84 STATE OF ILLINOIS,
Cook County, ss:

On this ninth day of September, A. D. 1867, before me, the undersigned, Philip A. Hoyne, a notary public in and for said county, personally appeared the above named David L. De Golyer and James K. Thompson, who being first duly sworn did severally make oath and say that they do verily believe that they are the original and first inventors for the invention of which they solicit a patent; that they do not know or believe the same was ever before known or used (except by them, for the purpose of experiment only). And that they are citizens of the United States of America; and that their aforesaid invention is referred to and described in the above written specifications.

[SEAL.] PHILIP A. HOYNE,
Notary Public.

[U. S. Inter. Revenue. Certificate. Nov. 9, 1867. P. A. H. Five cents.]

Ex.—J. A. W.

Filed January 2d, 1868, and rejected.

(Here follows diagram marked page 84.)

(Indorsed:) Specifications of De Golyer and Thompson. Improved combination pavement. Edward Martin, Chicago.

85 *Thompson application, Nov.* 8, 1870.—*Rejected.*

To the Commissioner of Patents:

Your petitioner prays that letters patent may be granted to him for the invention set forth in the annexed specification; and he hereby ap-

points Lewis L. Coburn, of Chicago, Illinois, his attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected herewith.

JAMES K. THOMPSON.

86 *Specification.*

I, James K. Thompson, of Chicago, in the county of Cook and State of Illinois, have invented certain improvements in wooden pavements, of which the following is a specification:

My invention relates to wooden pavements for streets and roadways, constructed of blocks set upon end in rows, and having interstices filled with tar and gravel or other material, and it consists in the novel form of the blocks, as will be more fully hereafter set forth.

It has heretofore been customary to make use of an auxilliary strip or board in laying pavements of this class to form an interval between the rows of blocks, which interval is filled with the tar and gravel or other like substance. This strip is sometimes made of a less height than the rows of blocks and is left to form part of the pavement. A pavement is also made, as will be seen upon reference to letters patent No. 100339 dated March 1st, 1870, granted to me, with alternate rows of larger and
87 smaller blocks whereby cells are formed for the tar and material above mentioned. The principal object of my invention is to dispense entirely with auxilliary strips and small blocks, by constructing the larger blocks of a form hereafter specified.

In the accompanying drawings Fig. 1 represents a plan view of my invention; Fig. 2 a transverse vertical section or elevation of the same.

General description.

A represents the ordinary foundation of sleepers and boards used in similar pavements. B are the blocks set in rows parallel one to the other, and having the grain of the wood running vertically. Upon one side of each of these blocks is formed a cavity C, made by cutting away a portion of the block. I usually make the cavity of a nearly semicircular form, and find that to be, by experience, the most easily made; but I do not limit myself to the peculiar form of cavity shown, as there are many forms which would answer the same purpose.

88 In constructing this invention the blocks are laid in rows in contact with one another, with the cavities C all facing one way, care being taken to break joints in laying the blocks so that as nearly as possible the cavities C, &c., of one row shall come opposite the joints of the succeeding row of blocks; after the blocks are laid, gravel or other material is filled into the cavities C, and tamped down with a tamper of proper form, and finally tar or other like substance is poured upon the gravel as is ordinarily done.

What I claim and desire to secure by letters patent is—

The block B having a cavity C at one side when used in the construction of wooden pavements substantially as described and shown.

JAMES K. THOMPSON.

Witnesses:

J. W. MUNDAY.

L. L. COBURN.

89 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

James K. Thompson, the above-named petitioner, being duly sworn deposes and says that he verily believes himself to be the original and first inventor of the improvement in wooden pavement described in the foregoing specification; that he does not know and does not believe that the same was ever before known or used, and that he is a citizen of the United States.

JAMES K. THOMPSON.

Sworn to and subscribed before me this 5th day of Aug., 1870.
[L. S.] JAMES M. MARSHALL,
N'ty Public.

Ex'd—J. A. W.

Filed Nov. 8, 1870, and rejected.

(Here follows diagram marked page 89.)

90 *Thompson application, Aug. 23d, 1870.—Rejected.*

Petition.

To the honorable Commissioner of Patents:

The petition of James K. Thompson, of Chicago, in the county of Cook and State of Illinois, respectfully shows unto your honor that your petitioner has invented a new and useful improvement in laying street pavements, which he verily believes has not been known nor used prior to the invention thereof by your petitioner. He therefore prays that letters patent of the United States may be granted to him therefor, vesting in him and his legal representatives the exclusive right to the same, in accordance with the provisions of the act of Congress in that case made and provided, he having paid fifteen dollars into the Treasury of the United States and complied with all the other requirements of said act.

And your petitioner does hereby constitute and appoint Lewis L. Coburn, of Chicago, Illinois, or authorized agent, his true and law-
91 ful attorney, for and in his name to present this application, to amend or withdraw the same, as the case may require, to sign his name to the drawings, and to receive the patent when granted, hereby ratifying and confirming all his said attorney may lawfully do by virtue hereof.

JAMES K. THOMPSON.

[Inter. revenue United States. Orig. process. Fifty cents.]

92 *Specification.*

I, James K. Thompson, of Chicago, in the county of Cook and State of Illinois, have invented a new and useful improvement in laying street pavements, of which the following is a specification, reference being had to the accompanying drawings:

NATURE AND OBJECT OF THE INVENTION.

My invention consists in the arrangement of blocks of wood or other material in a block pavement in such a manner as to keep each block firmly in position, and at the same time dividing the channels between

the rows of blocks in separate compartments to be filled with gravel or other suitable material.

DESCRIPTION OF THE DRAWINGS.

Figure 1 is a top-plan view of my invention.
Figure 2, a section thereof, taken at the line *x x*.

93 GENERAL DESCRIPTION.

A represents one of the sleepers which receive the ends of the boards B, laid longitudinally along the roadway. C are the blocks forming parallel rows across the street. E are short cross-blocks extending from center to center of the blocks C, as shown, holding them in place. F are cells formed between the blocks.

The earth of the roadway upon which my pavement is to be constructed must first be suitably prepared and graded. This may be done in any of the usual methods. When thus prepared I first lay wooden sleepers, A, as shown in Fig. 2, transversely across the roadway. The sleepers A I make of suitable size, and place them at the required distances from each other to receive the ends of the boards A, which
94 I lay longitudinally along the roadway so as to form a continuous foundation. The boards A, used for the foundation, should be of the same thickness and of any kind or quality suitable for the purpose. Upon this continuous foundation I arrange the blocks C and E. In doing this I lay one row of the blocks C, each one of which is separated by the short blocks E, which extend on both sides of the blocks C. The center of each block C, laid in the next following row, rests against the ends of one of the blocks E, and spaces or compartments F are formed of the depth of the blocks C and E. The width and length of these spaces F depend upon the length of the blocks C and E. The spaces F thus made I fill with gravel, broken stone, or slate, or other suitable material, and then pour upon the filling hot tar in sufficient quantities to penetrate and entirely fill all the cavities or vacant spaces that may exist in and between the particles of the material used for filling, and then pack or ram the filling.

95 The tar, before being used, I boil long enough so that it will become stiff, but not hard and brittle when cold. When the hot tar is poured upon the filling the pavement is completed.

Each of the blocks C is held firmly in place by four of the blocks E, and again each block E, by four of the blocks C, so that when the cells or spaces E are solidly packed the blocks are held immovable, and a very firm and durable pavement is made.

CLAIMS.

What I claim as my invention, and desire to secure by letters patent, is—

I claim as my invention the combination of the short blocks E with the blocks C when arranged and constructed in a pavement substantially as described and shown.

JAMES K. THOMPSON.

Witnesses:
LEWIS L. COBURN.
J. W. MUNDAY.

96 STATE OF ILLINOIS,
County of Cook, City of Chicago:

James K. Thompson, the above named petitioner, being duly sworn, deposes and says that he verily believes himself to be the original and first inventor of the improvement in laying block pavements, described in the foregoing specification; that he does not know or believe that the same was ever before known or used; and that he is a citizen of the United States.

JAMES K. THOMPSON.

Sworn to and subscribed before me this 28 day of July, 1870.
[SEAL.] JAMES M. MARSHALL,
Notary Public.

Ex.—J. A. W.

Filed August 23d, 1870, and rejected.

(Here follows diagram marked page 96.)

DEFENDANT'S EXHIBITS.

97 No. 1.

A. D. 1839. No. 8041. Paving roads, bridges, &c.

Stead's specification.

To all to whom these presents shall come, I, David Stead, of Great Winchester street, in the city of London, merchant, send greeting:

Whereas her most excellent Majesty, Queen Victoria, by her letters patent under the great seal of Great Britain, bearing date at Westminster, the twenty-third day of April, in the second year of her reign, did, for herself, her heirs and successors, give and grant unto me, the said David Stead, her special license that I, the said David Stead, my ex'ors, adm'ors and assigns, or such others as I, the said David Stead, my ex'ors, adm'ors and assigns, should at any time agree with,
98 and no others, from time to time, and at all times during the term of years therein expressed, should and lawfully might make, use, exercise and vend, within that part of her said Majesty's United Kingdom of Great Britain and Ireland, called England and Wales, and the town of Berwick-upon-Tweed, and also in all her said Majesty's colonies and plantations abroad, my invention, partly a communication from a foreigner and partly my own discovery and invention, of "An improved mode or method of making or paving public streets and highways, and public and private roads, paths, courts and bridges, with timber or wooden blocks"; in which said letters patent there is contained a proviso obliging me, the said David Stead, by an instrument in writing under my hand and seal, particularly to describe and ascertain the
99 nature of my said invention, and in what manner the same is to be performed, and to cause the same to be inrolled in her said Majesty's high court of chancery, within four months next and immediately after the date of the said recited letters patent, as in and by the same, reference being thereunto had, will more fully and at large appear.

Now know ye, that in pursuance of the said proviso and in compliance therewith, I, the said David Stead, do hereby declare the nature of the said invention and the manner in which the same is to be performed,

are fully described and ascertained by the following description thereof, reference being had to the drawings and figures marked thereon, that is to say:

The invention consists in the paving and formation of the roadway of public and private ways and passages by means of wooden
100 blocks, so shaped and placed as to support each other in a close and compact manner, the foundation being first suitably prepared to the required figure by the usual well known means to receive such wooden blocks, which are so disposed as to present an even and uniform surface, and always having their fibre in a vertical position whether the roadway has a curved, inclined or horizontal face. The blocks which I use for the improved paving are cut transversely out of fir or other suitable timber, or they may be composed of deal plank ends or small pieces of timber firmly cemented together to any of the required figures hereinafter described by means of asphalte or any other suitable material.

And when it is required to form a roadway upon a steep acclivity, I propose to place the blocks, or to have them of such form or forms
101 as are hereinafter described, so that channels and cavities shall be left to afford a surer footing or hold for the feet of the animals traversing over such inclinations.

The following is a description of the drawing annexed hereto, and which is to be considered as part of this my specification:

Figure 1, and figure 2, is a plan and elevation of a road formed with inclined surfaces from the centre of the road, such road being mainly composed of hexagonal shaped blocks *a a*, placed with the fibre vertical against and supporting each other, the sides or parts nearest the curbstone of such roadway being squared, made parallel, and finished to the curbstone by means of the required portions *b b* of such hexagons as before described, and the whole keyed and made firm to the incli-
102 nation of the roadway by means of the pyramidal hexagonal wedges *c c*, which are to be introduced and driven tight between the hexagons forming and nearest to the centre of the road, or the roadway may be constructed without such wedges, by a series of hexagons, as represented at figure 3, by cutting off the upper and under surfaces of the same to such a bevil as will correspond with the required inclination; the portions of such hexagonal blocks which are intended to be cut away are colored red in this figure.

Figures 4 and 5 represent a plan and elevation of a portion of an improved paving, suited to a road having a curved surface, being formed of quadrangular blocks diminishing from their upper to their lower surfaces and slightly spherical on the top.

Figures 6 and 7 is a plan and elevation of another kind of level
103 roadway formed of blocks in shape resembling two parallelopipedons placed transversely, although cut out from one solid piece; the upper portion of such block is so formed, that the greatest width *d d*, figure 6, extends beyond the narrower width of the lower portion of the block *e e*, and thereby both the upper and under part of such block provides rebates or ledges *f f*, figure 7, for the adjoining block to fit under and rest upon, each making the other firm and secure.

Figures 8 and 9 represent a plan and elevation of a portion of a road constructed with improved road blocks resembling two hexagons. These are formed in a similar manner out of one piece to the figure last described, and have corresponding projections, both above and below, to sustain each other.

Figures 10 and 11 is a plan and elevation of another portion

the improved paving which consists of a lower course of hexagons placed beneath and supporting an upper layer. The lower hexagons *g g*, being only about one-third of the depth of those which rest upon them, are fitted according to the black lines in the plan view, figure 10, and the upper hexagons represented by the red lines, figure 10, are so placed that one angle *h*, of each rests on the centre of that immediately beneath, and thereby causes one of the upper hexagons to hold down and overlay a portion of three of those immediately beneath.

Figures 12 and 13 represent a plan and elevation of a similar kind of paving to the last described, and consists of an upper and lower course, the lower course being formed of triangular blocks placed according to the black lines in Figure 12, and the upper layer of a series of parallelopipedon-shaped blocks represented by the red lines, Figure 12, laid upon them, with the fibrous or smaller end upwards, the upper course holding down and firmly securing the triangularly-formed base upon which it rests.

Figures 14 and 15 is a plan and perspective view of triangular-shaped blocks for forming a roadway without a lower course.

Figures 16 and 17 is a plan and end view of another kind of the improved paving, which is formed by a series of circular blocks *i*, *i*, *i*, placed as represented in the drawing, and made parallel to the curb-stone of the footway by the semicircular and quadrant pieces *j* and *k*; the smaller interstices or cavities between such circular blocks may be either filled with wooden pieces suited to their shape, or fitted up with cement or asphalte, as may be found convenient; and when this kind of paving is laid upon an inclined surface, I should recommend the cavities to be not filled up (provided the circular blocks are not too large, so as to render such cavities inconveniently large), as additional hold may be thereby afforded to the feet of draught animals ascending such inclined way, as already alluded to.

Figures 18 and 19 is a plan and side view of a portion of a roadway formed by a series of octangular blocks L, L, placed with the fibre vertical, so as to leave a square recess or interval between them, into which may be inserted a corresponding piece *m*. When this kind of paving is laid upon a road formed upon a newly-made embankment or shrinking base, I should recommend a pile to be driven into the earth through the square recess or interval, of about the size and form represented by the dotted lines, Figure 19, in order to support and keep the blocks firm in their position. When the octangular-block paving is used for acclivities, I should recommend the before-mentioned cavities either to be left unfilled or not filled up to the surface to afford an assistance to animals ascending the same as before described.

Figure 20 is another manner of placing an improved roadway when constructed of hexagonal blocks, being placed angle to angle instead of side to side, so as to leave triangular spaces between them if used for inclined or other roadways, which may be filled up or left partly unfilled for the purposes hereinbefore alluded to; or a series of deal ends, composed of portions of a plank cut transversely, may be introduced between the hexagons, as represented *v*, *v*, so as to leave a portion projecting above the surface to afford the hold for the feet of horses or other animals, as before stated.

Figures 21 and 22 is a plan and perspective view of a portion of another kind of roadway, formed of a series of parallelopipedon-shaped blocks *w*, *w*, placed with the fibre vertical, and having a portion of the upper part of each side cut away, so as to form continuous longitudinal and transverse channels extending over the whole surface of roadway

in lines parallel to each other, whether the blocks be laid at right angles to each other or in a diagonal direction; these channels may be left open, or so filled up with cement, as to leave a slight space unfilled beneath the top surface to afford the hold to the horses' feet, as already described.

Figure 23 is a perspective representation of several other kinds of blocks suited to form a roadway; these consist of blocks of the
109 parallelopipedon shape before described, or they may be cubical, having a portion of the upper part of one side cut away, as seen at *o*, or with a portion of the upper part of two sides cut away, as at *p*, *p*, and *q*, *q*, or with the undersides cut away, either horizontally or obliquely, as seen at *r*, *r*, all of which blocks are so contrived that they adjust and correspond to each other, and may be used wholly to construct a roadway, or with advantage to close and key up parallel to the curbstone, when the greater portion of a roadway is formed by any of the other shapes herein set forth and described.

Figures 24 and 25 are perspective and plan views of several oblong road blocks of different forms, which have one or more sides formed by angles or curves, and which sides fit into corresponding angular
110 or curved cavities, as seen at *s*, *s*, or only one side may be angular or curved, and the other side or sides have horizontal or oblique projections formed, as seen at *t*, *t*, corresponding with and fitting each other, and all of which are so constructed as to easily fit and combine into a whole surface, or a portion only of any of the forms may be used and adapted to finish the sides of a road, as hereinbefore set forth and described.

Having now fully described the nature of the said invention and the manner in which the same is to be carried into effect, I wish it to be understood that I claim as the invention the formation of a road inclined from the centre to the sides thereof, constructed by hexagons and keyed at the highest part thereof by the half pyramidal hexagonal wedges as represented at figures 1 and 2; and I wish it to be understood
111 that although I only mention the polygonal figure known as a hexagon, yet I do not mean to confine myself to that precise form, as any other polygonal-shaped block may be used, and come within the principle of the invention for the purpose herein described.

I also claim the construction of a roadway by polygonal or rhomboidal shaped blocks as represented at figure 3.

I also claim the formation of a public or private road or passage-way, by means of the upper and lower courses of blocks, as shewn at figures 10, 11, 12, and 13, whether formed of polygonal-shaped blocks, or blocks resembling cubes, parellelopipedons, triangles, or rhomboids, or of other forms.

I also claim the road-blocks represented in figures 23, 24, and
112 25, having angular or curved sides, or angular and concave sides, or having horizontal or oblique projections, or both united in one block, whether for the purpose of forming an entire road, or finishing and squaring up a road parallel to the curbstone when such road is formed of blocks of different shapes.

I also claim the formation of a road by means of blocks as represented at figures 21 and 22, with a portion of the upper sides so cut away as to form cavities for the purposes hereinbefore described, whether such blocks are parallelopipedons, cubes, or polygons.

I also claim the formation of a roadway by means of such blocks as I have described and set forth in figures 6, 7, 8, and 9.

In witness whereof I, the said David Stead, have hereunto set

113 my hand and seal this twenty-third day of August, in the year of our Lord one thousand eight hundred and thirty-nine.

D. STEAD. [L. S.]

(On the margin:) Brougham.

And be it remembered that on the twenty-third day of August, in the year of our Lord 1839, the aforesaid David Stead came before our said lady the Queen, in her chancery, and acknowledged the specification aforesaid, and all and everything therein contained and specified in form above written. And also the specification aforesaid was stamped according to the tenor of the statute made for that purpose.

Inrolled the twenty-third day of August, in the year of our Lord one thousand eight hundred and thirty-nine.

Ex'd.—H. M. H. C. K.

(Here follows diagram marked page 113.)

114 No. 2.

A. D. 1840. No. 8657. Blocks for paving.

Wood's specification.

To all to whom these presents shall come, I, Thomas Wood, the younger, of the Wandsworth road, in the parish of Clapham, in the county of Surrey, gentleman, send greeting:

Whereas, Her most Excellent Majesty Queen Victoria, by her letters patent, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, the seventh day of October, in the fourth year of her reign, did, for herself, her heirs and successors, give and grant unto me, the said Thomas Wood, the younger, her especial licence that I, the said Thomas Wood, the younger, my ex'ors, adm'ors, and assigns, or such others as I, the said Thomas Wood, the younger, my ex'ors, adm'ors, and assigns, should at any time agree with, and no others, from time to time and at all times during the term of years therein expressed, should, and lawfully might, make, use,
115 exercise, and vend within England, Wales, and the town of Berwick-upon-Tweed, my "Improvements in paving streets, roads, bridges, squares, paths, and such like ways," in which said letters patent there is contained a proviso obliging me, the said Thomas Wood, the younger, by an instrument in writing, under my hand and seal, particularly to describe and ascertain the nature of my said invention and in what manner the same is to be performed, and to cause the same to be enrolled in Her Majesty's high court of chancery within six calendar months next and immediately after the date of the said recited letters patent, as in and by the same, reference being thereunto had, will more fully and at large appear.

Now know ye, that in compliance with the said proviso, I, the said Thomas Wood, the younger, do hereby declare that the nature of my said invention and the manner in which the same is to be performed are described and ascertained by the drawings in the margin hereof and the words following, that is to say:

The blocks I use for paving are of two forms, viz, the section
116 of the pyramid having either a square base (Fig. A), or an elongated base (Fig. B), and the double wedge cut from either a similar square base (Fig. C), or a similar elongated base (Fig. D). I con-

fine myself to no particular dimensions for the blocks, neither to any particular angle, only the sections of pyramids and the double wedges must all be cut at the same angle.

The most advantageous angles at which to cut or mould the blocks range from 70 to 88 and ½ degrees.

I do not confine myself to any particular substance or material for the blocks. They may be of stone, wood, or any other substance or material suitable for pavings.

The peculiar construction, combination, or arrangement I adopt, is as follows: I dispose the block so that every other block, in one series of blocks, is the section of the pyramid standing on its smaller end (Fig. E), and every other block, in another series of blocks, is the section of the pyramid standing on its base (Fig. F). The intervening blocks of both series (*a*, *a*, *a*, *a*, *a*) are the double wedges, which, from their peculiar form, combine equally well with the sections of pyramids, whether
117 these latter be placed on their smaller end or on their base; and a number of such alternate series of blocks being placed across a road, all the blocks are made to lean and press on each other on all sides in mutual support (Fig. G). The half-blocks, *b*, *b*, *b*, *b*, *b*, are introduced to break joint. In putting down this pavement, I leave those series of blocks which have the bases of the sections of pyramids upwards a little elevated, say half an inch, more or less, above the other series, which have the basis of the sections of pyramids downwards. When the whole space to be paved is covered to the abutments (viz, curbstones, walls, or other usual and secure boundaries) with blocks put closely together, as described above, I then drive those series which were left elevated down to the general level, taking care, moreover, to drive those blocks which are sections of pyramids with their bases upwards last. In this manner I can wedge the road together with any degree of intensity, so as to prevent all displacement and give it a complete firmness and solidity, even when put down on a foundation of mere shingle, gravel,
118 or sand. Those blocks which are sections of pyramids with the bases upwards being drawn, the road is unlocked, and may be taken up in whole or in part.

I sometimes adopt modifications of the above construction of pavement. The first modification (Fig. H) has the twofold advantage of affording a secure foothold to horses, and of throwing the weight and pressure of the traffick on those blocks which (being the sections of pyramids with the bases upwards), when pressed or driven, tend to consolidate the road. This is effected by making those blocks taller than the rest, say half an inch, more or less.

The second modification (Fig. I) takes the weight and pressure of the traffic of those blocks which, by their form and position, sustain the blocks around them, and, in consequence, here again the very traffic tends to consolidate the road. This is effected by making those blocks which are the sections of the pyramids standing on their bases somewhat shorter than the rest, say half an inch, more or less.

The third modification (Fig. K) has the twofold advantage of
119 affording a secure foothold to horses, especially on an inclined plane, and of throwing the whole weight and pressure of the traffic on those blocks which (having the larger surface upwards), on being pressed or driven, tend to consolidate the road. This is effected by making those series somewhat taller than the rest, say half an inch, more or less.

I sometimes make those series considerably taller, say from one inch to three inches, more or less, and I then fill in the space, *c*, *c*, *c*, *c*, be-

tween the alternate series with concrete or coal tar, asphalte, or other bituminous substance, heated, and mixed with gravel, sand, or such like material.

I do not claim as my invention the two forms of blocks which I have described as above, and which I use in my method of paving, because they are mathematical forms, and are known to scientific men in general; but I claim as my invention the peculiar combination, construction, or arrangement of blocks of those forms which I have specified and described herein.

And I claim, likewise, as my invention the modifications of that
120 peculiar combination, construction, or arrangement, which modifications I have also specified and described herein.

In witness whereof I, the said Thomas Wood, the younger, have hereunto set my hand and seal the thirtieth day of March, in the year one thousand eight hundred and forty-one.

THO. WOOD, JUN'R. [L. S.]

(On the margin:) Farrer.

And be it remembered that, on the thirtieth day of March, in the year of our Lord 1841, the aforesaid Thomas Wood, the younger, came before our said lady the Queen, in her chancery, and acknowledged the specification aforesaid and all and everything therein contained and specified in form above written; and, also, the specification aforesaid was stamped according to the tenor of the statute made for that purpose.

Inrolled the second day of April, in the year of our Lord one thousand eight hundred and forty-one.

Ex'd.—H. M. H. C. K.

(Here follows diagram marked page 120.)

121 No. 3.

A. D. 1843. No. 9737. Wood pavements, floorings, and veneers.

Austin's specification.

To all to whom these presents shall come, I, Henry Austin, of No. 87 Hatton Garden, in the county of Middlesex, civil engineer, send greeting:

Whereas Her present most Excellent Majesty hath granted unto me her letters patent bearing date at Westminster, the twenty-fifth day of May, in the sixth year of her reign, for making, using, exercising, and vending within that part of the United Kingdom of Great Britain and Ireland called England, her dominion of Wales, and town of Berwick-upon-Tweed, and also within all Her Majesty's colonies and plantations abroad any invention of "Improvements in wood pavements, floorings, and veneers," subject to the usual proviso obliging me to particularly describe and ascertain the nature of my said invention, and in what manner the same is to be performed by an instrument in writing
122 under my hand and seal, and to cause the same to be enrolled in the high court of chancery within six calendar months next after the date of the said letters patent.

Now know ye that, in compliance with the said proviso, I, the said Henry Austin, do hereby describe and ascertain the nature of my said invention, and in what manner the same is to be performed, as follows, that is to say:

The nature of my invention consists in glueing or cementing, in the manner after described, blocks of wood cut and placed, as after described, on to planks or slabs, or other pieces of wood, or on to stone, slate, or iron for wood pavements, and in glueing or cementing in like manner, as after described, veneers or surfaces of wood for floorings and other building purposes, cut and placed as after mentioned, on to wood, metal, slate, stone, cement, tile, or any other suitable substance. The wood, stone, slate, or iron on which I glue or cement the blocks for pavements I denominate the bed or foundation of the blocks. The wood for the blocks and veneers or surfaces is to be cut at a
123 right angle or any considerable angle less than that to the fibre or grain of the wood. The bed or foundation, when of wood, of the pavement blocks is to be placed or laid down on the earth or road with the fibre or grain of this wood running horizontally, and any wood on which the veneers for floorings or other building purposes are to be laid or fixed, as after mentioned, must in a similar manner run in the opposite direction or angle to the fibre or grain of the veneer.

To make my wood pavement with wood foundations for roads, I take any suitable number of planks or slabs, or pieces of wood of convenient size and thickness for the foundation, and this foundation is to be glued, cemented, keyed, pinned, or otherwise fastened together in compartments, upon which foundations I glue or cement the wooden blocks of any convenient shape and size without any fastening or connection together of the blocks, and with intervals or spaces between them to the entire depth of the blocks; these intervals or spaces may be of
124 the width of an inch and a half or thereabouts, and are to be filled in with broken stone, refuse, or broken slate, grit, gravels, sand, or any hard or any fibrous substances, this filling in being cemented or concreted together with liquid lime or cement poured in, or with pitch or lac and caoutchouc dissolved in naphtha, melted and poured in, or with any other adhesive liquid materials. The pavement thus formed will present a constant secure footing, and avoid that slipperiness which is prevalent in other wood pavements when worn; and the great advantage which will be found in this mode of pavement is that the footing in its wear will keep pace with the wear of the blocks and still present the same secure foothold. The compartments are to be strengthened by means of ledges, glued or otherwise, secured across them underneath; and for the purpose of securing the whole paving together when wood is the foundation the compartments should fit into each other or be glued, nailed, or screwed, or otherwise fastened on to separate pieces of timber laid underneath; they may also be tied
125 down where necessary by means of iron ties, or in any other convenient mode. If the blocks be square or oblong, the ends may be laid together without the intervals or spaces between the ends, but forming parallel lines and intervals in the lengths only to be filled in as herein described. When the foundation is stone, slate, or iron the blocks are to be glued or cemented on to such foundations in like manner as on to wood foundations, and the pieces or slabs are then to be laid down and embedded on the earth or road.

The method of making foot-pavements is precisely similar to road-pavements, except that I prefer not to leave intervals between the blocks, and the materials used may be of lighter substance, and the blocks of less depth than for carriage-roads.

To make my floorings, I cut in the same manner, in respect of the angle as to the fibre, as before described with respect to the blocks for pavements, the wood to form the veneers or surfaces of the floors, this

tween the alternate series with concrete or coal tar, asphalte, or other bituminous substance, heated, and mixed with gravel, sand, or such like material.

I do not claim as my invention the two forms of blocks which I have described as above, and which I use in my method of paving, because they are mathematical forms, and are known to scientific men in general; but I claim as my invention the peculiar combination, construction, or arrangement of blocks of those forms which I have specified and described herein.

And I claim, likewise, as my invention the modifications of that
120 peculiar combination, construction, or arrangement, which modifications I have also specified and described herein.

In witness whereof I, the said Thomas Wood, the younger, have hereunto set my hand and seal the thirtieth day of March, in the year one thousand eight hundred and forty-one.

THO. WOOD, JUN'R. [L. S.]

(On the margin:) Farrer.

And be it remembered that, on the thirtieth day of March, in the year of our Lord 1841, the aforesaid Thomas Wood, the younger, came before our said lady the Queen, in her chancery, and acknowledged the specification aforesaid and all and everything therein contained and specified in form above written; and, also, the specification aforesaid was stamped according to the tenor of the statute made for that purpose.

Inrolled the second day of April, in the year of our Lord one thousand eight hundred and forty-one.

Ex'd.—H. M. H. C. K.

(Here follows diagram marked page 120.)

121 No. 3.

A. D. 1843. No. 9737. Wood pavements, floorings, and veneers.

Austin's specification.

To all to whom these presents shall come, I, Henry Austin, of No. 87 Hatton Garden, in the county of Middlesex, civil engineer, send greeting:

Whereas Her present most Excellent Majesty hath granted unto me her letters patent bearing date at Westminster, the twenty-fifth day of May, in the sixth year of her reign, for making, using, exercising, and vending within that part of the United Kingdom of Great Britain and Ireland called England, her dominion of Wales, and town of Berwick-upon-Tweed, and also within all Her Majesty's colonies and plantations abroad any invention of "Improvements in wood pavements, floorings, and veneers," subject to the usual proviso obliging me to particularly describe and ascertain the nature of my said invention, and in what manner the same is to be performed by an instrument in writing
122 under my hand and seal, and to cause the same to be enrolled in the high court of chancery within six calendar months next after the date of the said letters patent.

Now know ye that, in compliance with the said proviso, I, the said Henry Austin, do hereby describe and ascertain the nature of my said invention, and in what manner the same is to be performed, as follows, that is to say:

The nature of my invention consists in glueing or cementing, in the manner after described, blocks of wood cut and placed, as after described, on to planks or slabs, or other pieces of wood, or on to stone, slate, or iron for wood pavements, and in glueing or cementing in like manner, as after described, veneers or surfaces of wood for floorings and other building purposes, cut and placed as after mentioned, on to wood, metal, slate, stone, cement, tile, or any other suitable substance. The wood, stone, slate, or iron on which I glue or cement the blocks for pavements I denominate the bed or foundation of the blocks. The wood for the blocks and veneers or surfaces is to be cut at a
123 right angle or any considerable angle less than that to the fibre or grain of the wood. The bed or foundation, when of wood, of the pavement blocks is to be placed or laid down on the earth or road with the fibre or grain of this wood running horizontally, and any wood on which the veneers for floorings or other building purposes are to be laid or fixed, as after mentioned, must in a similar manner run in the opposite direction or angle to the fibre or grain of the veneer.

To make my wood pavement with wood foundations for roads, I take any suitable number of planks or slabs, or pieces of wood of convenient size and thickness for the foundation, and this foundation is to be glued, cemented, keyed, pinned, or otherwise fastened together in compartments, upon which foundations I glue or cement the wooden blocks of any convenient shape and size without any fastening or connection together of the blocks, and with intervals or spaces between them to the entire depth of the blocks; these intervals or spaces may be of
124 the width of an inch and a half or thereabouts, and are to be filled in with broken stone, refuse, or broken slate, grit, gravels, sand, or any hard or any fibrous substances, this filling in being cemented or concreted together with liquid lime or cement poured in, or with pitch or lac and caoutchouc dissolved in naphtha, melted and poured in, or with any other adhesive liquid materials. The pavement thus formed will present a constant secure footing, and avoid that slipperiness which is prevalent in other wood pavements when worn; and the great advantage which will be found in this mode of pavement is that the footing in its wear will keep pace with the wear of the blocks and still present the same secure foothold. The compartments are to be strengthened by means of ledges, glued or otherwise, secured across them underneath; and for the purpose of securing the whole paving together when wood is the foundation the compartments should fit into each other or be glued, nailed, or screwed, or otherwise fastened on to separate pieces of timber laid underneath; they may also be tied
125 down where necessary by means of iron ties, or in any other convenient mode. If the blocks be square or oblong, the ends may be laid together without the intervals or spaces between the ends, but forming parallel lines and intervals in the lengths only to be filled in as herein described. When the foundation is stone, slate, or iron the blocks are to be glued or cemented on to such foundations in like manner as on to wood foundations, and the pieces or slabs are then to be laid down and embedded on the earth or road.

The method of making foot-pavements is precisely similar to road-pavements, except that I prefer not to leave intervals between the blocks, and the materials used may be of lighter substance, and the blocks of less depth than for carriage-roads.

To make my floorings, I cut in the same manner, in respect of the angle as to the fibre, as before described with respect to the blocks for pavements, the wood to form the veneers or surfaces of the floors, this

wood being properly prepared and seasoned, and cut thin in the nature of a veneer; this I call my surface veneer, and I prefer for most
126 purposes for this surface veneer the thickness of about a quarter of an inch, but I use other thicknesses, as circumstances may require. I glue or cement this veneer on to the floor boards, or other materials composing the floor, in a similar manner as before described with respect to the glueing or cementing of the blocks for pavements on to their foundations. This then forms the surface of the flooring; and it will sometimes be convenient first to form and lay the veneer on a thin bedding or foundation of planking, instead of the immediate floor in compartments, to be nailed, screwed, glued, or otherwise fastened on to the floor; the veneer being glued or cemented on to this thin bedding or foundation of planking in the mode described, where it is to be glued or cemented on to the floor boards or flooring direct.

For ornamental floors I use various colored woods, natural or artificial; and after the wood has been cut into the required thicknesses for the surface veneer, I, for the most part, stamp or cut the pieces into
127 any forms desired by means of stamps or cutters; but sometimes the pieces of wood for the veneers are shaped by suitable planes to the forms required throughout their length, and are then cut across with fine saws of the thicknesses required. If the pattern consists of very small parts, the pieces of wood to form it I glue together in lengths, and I then cut the piece so formed into lengths across with fine saws into the required thicknesses as veneers, and with the veneers, so cut, I form different patterns, by arranging and glueing or cementing them as veneers, according to the pattern, on to the flooring boards or other floors or bedding, as already described; and, in the operation of glueing, I apply pressure to the parts by any convenient means, in order to obtain as close a joint as practicable. When the work will admit, I glue the surface veneer on to the floor or bedding, as the case may be, as above described, in as large pieces or sections as practicable; and in order to guard against and avoid warping from damp or heat, which might occur, and at the same time to produce more decidedly the
128 effect or resemblance of mosaic work, I divide these large pieces or sections, after they are glued to the floor or bedding, as described, into smaller parts, either by stamping them or by cutting them through in opposite directions by a series of fine saws; I then fill up the spaces or joints which will be thus formed with glue or suitable cement. The surface veneer, prepared in manner hereinbefore described, I lay or fix in the required position upon, and so as to form the surface of the flooring, with glue or cement, as above described, where there is no intermediate bedding, as above mentioned; and where there is such a bedding, then, by fastening that by nails, screws, glue or other suitable means, on to the floor boards or floor. The surface veneer being laid and fixed, should be planed and scraped, or rubbed to an even surface, and polished if required, by sand or glass paper, or by other desirable means.

My method of veneering and preparing veneers for other building purposes than floorings, and which I use for staircases, wainscoting, ceilings and other building purposes, is precisely similar to my flooring, above described.

129 For joining my wood pavements together, and my surface veneers to any foundation except wood, I prefer to make use of glue composed of crude naphtha and caoutchouc and lac, boiled together until perfectly amalgamated, and to be used in a heated state; and the proportions of these materials may be two ounces of caoutchouc dis-

solved in one gallon of crude naphtha, and three times the quantity of those two articles by weight of lac. The glue I prefer to make use of for my flooring and other veneers where wood is the foundation, is composed of one part of isinglass and two parts of shellac, boiled together in alcohol until perfectly amalgamated, and to be used in a heated state; but for either of these purposes any glue sufficiently strong, and not so effected by moisture or such a degree of heat as to injure the joints, would effect the object.

I have described the method to be pursued with my improvements in wood pavements, floorings, and veneers, which is most simple, in my apprehension, though it must be evident that there are other
130 ways of effecting some of the details pointed out. I am aware that small pieces of wood, cut in some such way as to resemble what is before described, have been at times applied in the manufacture of small ornamental furniture and fancy articles, and I do not claim this, but I do claim as my invention—

First. The glueing or cementing of wood, cut at such angle as to its fibre as before described, on to planks or slabs or other pieces of wood, or on to stone, slate, or iron, for wood pavements; or on to wood, metal, slate, stone, cement, tile, or any other suitable substance, for the purposes of veneers for flooring and other building purposes.

Second. The securing of wood paving blocks on to planks or slabs or other pieces of wood, or on to stone, slate or iron, without any fastening to each other, with intervals or spaces between the blocks, except at the ends where the blocks are square or oblong, as before described, and the intervals to be filled in, in the manner hereinbefore described.

Third. The application of such veneers, as hereinbefore de-
131 scribed, to flooring and other building purposes.

And such my said invention being, to the best of my knowledge and belief, entirely new, and never before used for the same purpose or purposes within that part of Her said Majesty's United Kingdom of Great Britain and Ireland, called England, Her said dominion of Wales, or town of Berwick-upon-Tweed, or in Her said Majesty's colonies or plantations abroad, and I do hereby declare this to be my specification of the same, and that I do verily believe this, my said specification, doth comply in all respects fully and without reserve or disguise with the proviso in the said hereinbefore in part recited letters patent contained; wherefore, I hereby claim to maintain the exclusive right and privilege of or to my said invention.

In witness whereof, I have hereunto set my hand and seal this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and forty-three.

HENRY AUSTIN. [L. S.]

132 (On the margin:) Lynch.

And be it remembered that on the twenty-fifth day of November, in the year of our Lord 1843, the aforesaid Henry Austin came before our said Lady the Queen in Her Chancery, and acknowledged the specification aforesaid, and all and everything therein contained and specified in form above written. And also the specification aforesaid was stamped according to the tenor of the statute made for that purpose.

Enrolled the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and forty-three.

Ex'd.—

H. M., E. H. K.

133 No. 4.

Specification in pursuance of the conditions of the letters patent, filed by the said Sir John Scott Lillie, in the Great Seal Patent Office, on the 13th October, 1860.

To all to whom these presents shall come, I, Sir John Scott Lillie, companion of the Most Honorable Order of the Bath, of No. 105 Pall Mall, in the county of Middlesex, send greeting:

Whereas her most excellent Majesty Queen Victoria, by her letters patent, bearing date the fourteenth day of April, in the year of our Lord one thousand eight hundred and sixty, in the twenty-third year of her reign, did, for herself, her heirs, and successors, give and grant unto me, the said Sir John Scott Lillie, her special licence, that I, the said Sir John Scott Lillie, my executors, administrators, and assigns, or such others as I, the said Sir John Scott Lillie, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein
134 expressed, should and lawfully might make, use, exercise, and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands and Isle of Man, an invention for "improvements in carriage ways," upon the condition (amongst others) that I, the said Sir John Scott Lillie, my executors or administrators, by an instrument in writing under my, or their, or one of their hands and seals, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calender months next and immediately after the date of the said letters patent:

Now know ye, that I, the said Sir John Scott Lillie, do hereby declare the nature of my said invention, and in what manner the same is to be performed, to be particularly described and ascertained
135 in and by the following statement, that is to say:

This invention relates to the laying of carriage ways in a manner and of a material not hitherto adopted for that purpose.

In order to explain my said invention as completely as possible, I now proceed to describe the best means I am acquainted with for carrying the same into practical effect, as follows:

My invention consists in having small stones cemented together by any suitable cement, and casting them in moulds of a convenient size, and of an equilateral or quadrilateral shape, so as to admit (when formed into such blocks) of their being laid on streets and having three additional surfaces to be presented to the traffic when repairs are necessary; also in introducing between such blocks alternate rows of wooden blocks, as well as between solid stone blocks, for the purpose of diminishing the noise arising from the traffic.

136 This combination of wood and stone may be carried into effect on roads or streets without rendering it necessary to have the above material cast into blocks. I render the wood thus employed impervious to water by impregnating it with bituminous, oleaginous, or other such like fluids. I form the foundation on which such materials are to be laid into inclined planes, gently rising from the sides of the street or road towards the centre, instead of being of a convex form as heretofore.

Having now described the nature and objects of my said invention of "Improvements in Carriage Ways," and the manner in which the same is to be performed, I would remark, in conclusion, that I do not confine

or restrict myself to the precise details herein described, as many slight variations may be made in the shapes of such blocks and the materials of which they may be formed, without in any way departing from
137 the principle of my invention; but what I claim as my invention, and therefore wish to have secured to me by the herein in part recited letters patent, is—

Firstly, the combination of wood and stone by having wooden blocks placed in the alternate rows between the quadrilateral or equilateral blocks formed as above described.

Secondly, placing alternate rows of wooden blocks on streets or roads between blocks of solid stone, or placing such blocks of small stones on roads or streets without being cast into blocks.

Thirdly, rendering the wood thus employed impervious to water, as above described.

Fourthly, forming the foundations for such surfaces in the manner described.

And, lastly, the forming of carriage ways for streets and roads by a combination of materials in the manner herein described for the purposes set forth.

In witness whereof I, the said Sir John Scott Lillie, have here-
138 unto set my hand and seal this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and sixty.

J. S. LILLIE. [L. S.]

Witness:

ALEX. PRINCE,
Patent Agent, 4 *Trafalgar Square*, *Charing Cross*.

Ex'd.—H. M. H.
C. K.

139 No. 5.

UNITED STATES PATENT OFFICE.

Hugh McDougall, of Chicago, Illinois, assignor to himself, Robert Stuart, and Coll McDougall, of same place. Letters patent No. 75780, dated March 24, 1868. Improved wooden pavement.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Hugh McDougall, of the city of Chicago, in the county of Cook, and State of Illinois, have invented certain new and useful improvements in the mode of constructing wood pavements, and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings, making a part of this specification, in which—

Figure 1 is a cross-section of the street, showing the slotted guide in place, and

Figure 2 a top or plan view of a portion of paved street.

Like letters refer to the same parts in both figures.

Heretofore great difficulty has been experienced in laying pavements upon the streets where the cells or channels for the reception of concrete extended to the foundation upon which the wooden blocks rest, for the reason that when filling the channels coarse gravel would topple over the unsupported blocks, unless they were all nailed or otherwise fastened to the foundation. The nature of my invention consists in

remedying this difficulty by using a slotted guide, having a sufficient number of openings to admit of partially filling the channels before the guide, by which the blocks are laid in rows across the street, is withdrawn, so that when the guide is withdrawn the filling of the channels with concrete can be completed, or rammed down without displacing the blocks, and without securing the blocks to the foundation, and in the construction of a slotted guide to facilitate the laying of pavements when the cells or channels extend to the foundation.

To enable others skilled in the art to construct pavements by my improved mode, I will proceed to describe it and the construction of the guide:

The earth, B, is suitably graded to the desired configuration, and upon this is placed a board or other suitable foundation, D. Before laying the blocks C, I construct a slotted guide, A, by taking boards, ten feet, more or less, in length, and about four inches in width, and nailing or otherwise securing thereto small pieces of wood, *a*, which are made of a thickness to correspond with the desired width of the channel, and about one inch in width, and about two inches apart, so as to leave about two-thirds of the channel open when the blocks are laid. For the purpose of greater ease in withdrawing the guide, these projections or fingers *a a* may be tapered at the inside towards the point, although it is not essential to its working. I prepare enough of these to lay from three to six rows across the street, and if a sufficient or large amount of work is to be done, it will be advisable to make them of metal, for then the fingers *a a* can be made very thin, so as to leave scarcely any filling to be done after the guides are drawn out. The fingers should project two or three inches above the height of the blocks C, so that the gravel can be shovelled under the bar A into the channels.

I lay the first row of blocks across the street, against any suitable support. I then place in front of such row a sufficient number of my guides to reach across the street or roadway. I then lay a second row of blocks against the fingers of the guides, and then place another row of guides across the street, so on alternating with guides and blocks until four or five rows are laid. I then fill the channels between the fingers of the guides, leaving about two rows in front unfilled. When the channels are filled the guides are withdrawn from the rear row and placed in front, and so on, repeating the operation until the pavement is laid. When the guides are withdrawn the filling of the channels is completed, and hot tar or other suitable material is poured in to form a concrete in the cells or channels, and rammed down in the usual way. By this mode I am enabled to lay pavement with cells or channels extending to the bottom or foundation of the pavement, very rapidly, without securing or attaching the separate blocks to the foundation.

I do not claim the pavement, when completed, as of my invention, as that may be found in the patent heretofore issued to Samuel Nicholson, and to a certain extent described in the English patent of Henry Austin; but

What I claim as new, and desire to secure by letters patent, is—

The guide A, when provided with fingers *a a*, or open spaces for the admission of gravel, substantially as specified.

HUGH McDOUGALL.

Witnesses:

J. B. TURCHIN.

COLL McDOUGAL.

(Here follows diagram marked page 140.)

141 No. 6.

William H. Chappell, of St. Louis, Mo. Letters patent No. 42347, dated April 19, 1864. Improvement in wooden pavements.

To all whom it may concern:

Be it known that I, William H. Chappell, of the city of Saint Louis, in the county of Saint Louis, and State of Missouri, have invented and discovered a new and useful improvement in the mode of constructing wooden pavements by means of preservative materials to be used in the construction thereof, and I hereby declare the following to be a full, clear, and accurate statement of the same.

I wish the public to understand that I am not the inventor of wooden pavements constructed of blocks set endwise to the grain or the application of gas-tar to the construction thereof; that process has been effectually tried and abandoned, in consequence of the rapid decay and wear.

Wooden pavements have been constructed on the continent of Europe and the United States by laying wood blocks endwise of the grain, in parallel rows, with openings or channels between, into which
142 gravel and gas-tar were placed, but on account of the rapid decay and constant repair necessary to keep them in order, I have been induced to adopt the following method of constructing a wooden pavement, which meets my most sanguine expectations in every respect.

The nature of my improvement consists in using wooden blocks sawed about three inches thick, six inches long, and from ten to twelve inches wide, saturated with carbolic acid and cresylic acid, contained in oil distilled from coal-tar at a temperature between 350 and 450 degrees Fahrenheit, or instead of saturating the blocks as described, I saturate them with a diluted solution of sulphate of iron containing one lb anhydrous sulphate of iron to every six gallons; when the cells are filled I immerse them in a solution of soluble glass containing 4 ounces anhydrous silicate of soda to the gallon. These liquids decompose each other, and the pores of the wood are closed by a metalic silicate which effectually prevents decay. The blocks saturated with the organic acids above described, or steeped successively in the sulphate iron and solution of soluble glass, are set endwise of the grain on such boards laid on sand, which boards are first saturated with the iron solution,
143 and subsequently immersed in the solution of soluble glass as described above, and are afterwards coated with a pitch mastic, made by heating the "sludge" produced by treating the distillate of coal or well oils with concentrated sulphuric acid (to remove the highly colored and odorous constituents of the same), until the "sludge" thickens, forming an asphaltic compound, which is then separated from the acid solution and mixed while hot with gas-tar, pitch, and the heavy or dead oil distilled therefrom in the proportions as follows, viz: Two-thirds pitchy residua from oil; treatment, one-third gas-tar, pitch, and one-third dead oil.

The saturated blocks are arranged in parallel rows, set endwise of the grain on the prepared boards across the highway, said rows being one inch apart and fastened by strips of inch lumber, 2½ inches in width, prepared in a similar manner to the boards; these strips thus form a channel or groove between the blocks one inch in width and 4½ inches in depth. Into this groove the heated pitchy mastic is poured in a quantity sufficient to close the interstices between the blocks and inch strips, and leaving a channel on top of strips, into which a cement

is well rammed, prepared as follows: Coarse sand, gravel,
144 and residuum from the manufacture of sulphuric acid from bi-sulphuret of iron, are mixed with sufficient water to moisten thoroughly, then hydrate of lime about one-sixth the mass is mixed, and a sufficient quantity soluble glass is added so as to aggregate the mass in the course of a few hours into an artificial stone impervious to moisture; the surface of the pavement is then coated with the pitchy mastic above described, and while hot, fine gravel and sand is strewed thereon, thus forming a solid and durable pavement.

Therefore what I claim as my invention, and wish to secure by letters patent of the United States, is the construction of wooden pavements with lumber which has been saturated with carbolic and cresylic acids or sulphate of iron and soluble glass, coated with pitchy mastic from well-oil, residuum, heavy oil, and pitch from gas-tar, and laid with cement made from sand, gravel, lime, pyrites, residua, and soluble glass covered with pitchy mastic, substantially in the manner as described in the specification.

In testimony whereof I have hereunto set my hand this 13th day of November, 1863.

WILLIAM H. CHAPPELL.

Witnesses:
C. F. COONCE.
HUGH L. WHITE.

Ex'd.—E. A. M. E. H. R.

145 No. 7.

Edward Whitehead, of Cincinnati, Ohio. Letters patent No. 56303, dated July 10, 1866.

To all whom it may concern:

Be it known that I, Edward Whitehead, of Cincinnati, Hamilton County, Ohio, have invented a new and useful improvement in wooden pavements and I do hereby declare the following to be a full, clear and exact description thereof, references being had to the accompanying drawings, making part of this specification.

My invention relates to that class of wooden pavements comprizing a congeries of blocks having the grain of the wood presented upward, and the first part of my improvement consists in a mode of interlocking the blocks together in such a manner that any pressure is communicated from one block to its immediate neighbors, thus distributing the bearing surface and rendering the pavement more durable while preserving the integrity of its contour.

The second part of my improvement relates to a metallic frame casing or curb for receiving suitable number of blocks, which arrangement enables the pavement to be laid very rapidly and accurately. The arrangement also facilitates the taking up portions of the pavement by curbs or sections, and the transportation from place to place in the same form.

146 Fig. 1 is a perspective view of a section of pavement laid on my improved plan, a portion or the blocks being removed from the frame.

Figs. 2 and 3 are vertical sections through a frame and its contents taken, respectively, at the lines *x x* and *z z*, fig. 1.

The paving blocks are rectangular pieces of wood of any durable

species, and are composed of an upper portion, A, and a lower portion, A′, the upper face of the lower portion, A′, having a ledge, B, while the lower face of the upper portion A is provided with a shoulder, C.

The upper edges of the blocks may be chamfered as at *a*, so as to form, when the pavement is laid, a congeries of vee-shaped grooves intersecting each other at right angles, to afford a firm foothold for horse.

D is an open rectangular frame curb or casting of cast iron, upon whose upper edge or rim *d* the shoulders C of the blocks A A′ have a bearing.

The frame D is provided at bottom with a ledge or flange, D′, which serves to uphold the outer row of blocks in case the shoulders C should break off. The sides of the frame D may be flush with the outer courses of blocks, or, as represented, the face of the metallic frame may project so as to allow the shoulders of the blocks in the adjoining section to rest upon it.

147 OPERATION.—The street having been graded and properly gravelled, the frames D are laid in position and the first series of blocks 1, 2, 3, et cetera, are placed in the frames, the shoulders C resting upon the rim *d*, after which the succeeding rows of blocks are added, their shoulders resting upon the ledges of the preceding blocks until all the frames have been filled, which may be done in the most rapid and uniform manner.

Although a rectangular form has been selected as the preferred type of my invention, it is obvious that other forms, both of blocks and frames, may be employed, such as hexagonal, rhomboidal, &c.

For a superior durability and finish, the foundation may consist of a compost bed, and the frames may be curved upward in their transverse direction to correspond with the swell of the street; between the gutters and the blocks be made to taper downward.

In swampy places the corners of the frames may rest upon piles.

The frames may be filled with blocks and conveyed in this condition to their place in the street.

Where the sides of the frames are finished flush with the upper members A of the blocks, one or more entire sections may be lifted
148 bodily up so as to permit of pipes being laid, sewers dug. and so forth.

The frames may be made of wrought iron.

I claim herein as new and of my invention——

1st. The combination of wooden paving blocks, constructed as herein described, with upper members A, lower members A′, shoulders C, and ledges B. all arranged and adapted to operate as and for the purposes specified.

2d. The arrangement of congeries of wooden blocks A A′, C B, with the metallic frame, curb or casing D D′ *d*, as set forth.

In testimony of which invention I hereunto set my hand.

E. WHITEHEAD.

Witnesses:

GEO. H. KNIGHT.

JAMES H. LAYMAN.

Ex'd.—E. H. R. E. A. M.

(Here follows diagram marked page 149.)

150 No. 8.

UNITED STATES PATENT OFFICE.

Benjamin F. Miller, of New York, N. Y. Letters patent No. 64126, dated April 23, 1867. Improvement in pavements.

The schedule referred to in these letters patent and making part of the same.

To all whom it may concern:

Be it known that I, Benjamin F. Miller, of the city and State of New York, have invented and made a new and useful improvement in pavements for streets; and I do hereby declare the following to be a full, clear, and exact description of the said invention, reference being had to the annexed drawing, making part of this specification, wherein—

Figure 1 is a side view of blocks, as laid longitudinally of the street.

Figure 2 is a plan of the same.

Figure 3 is a side view of a range of blocks, with their longest measurement in the opposite direction to those; and

Figure 4 is a plan of the same.

Figure 5 is a side view of thin blocks or pieces of plank, the required length, with their ends sawed square, and laid in the same manner as fig. 1; and

Figure 6 is a side view of blocks, with a lower or foundation range receiving the surface blocks.

Similar marks of reference denote the same parts.

In the usual mode of laying paving blocks, each one is independent of the other; and where no foundation is prepared, except gravel, the blocks are often driven down into the softer spots of the bed by loads passing over them; they are also loosened by the action of the horses, feet pulling in one direction, while the wheels, as they follow, produce a concussion in the other direction.

The nature of my said invention consists in a roadway formed of blocks laid at an inclination, so that one block rests partially upon the side of the next, as well as upon the sand or other foundation. By this arrangement the weight that may rest upon one block is taken partially by two or more of the contiguous blocks, and there is no opportunity for the block to work loose in its bed, because in so doing several contiguous blocks would have to be moved, one block lying upon and against the others.

In the drawing, *a* represents the bed of sand or other foundation for the pavement. *b b* and *c c* are ranges of blocks lying at an inclination longitudinally of the roadway. The blocks *b b* are laid so that their joints come opposite to the central portions of the blocks *c c*, so as to break joints. These blocks *b b* and *c c* may be thin, as seen in fig. 5, or may be thicker, as seen in fig. 3, or they may be dressed of a diamond shape, the blocks being laid together as in fig. 4. The lower ends of the blocks may be inverted after the upper surfaces of the blocks are worn out; or, if desired, this character of block may be laid on foundation blocks *d d*, set at the opposite inclination, as seen in fig. 6.

What I claim, and desire to secure by letters patent, is—

A pavement formed of blocks laid at an inclination, so that one block lies partially upon the side of the next, substantially as set forth.

In witness whereof I have hereunto set my signature this twelfth day of March, A. D. 1867.

B. F. MILLER.

Witnesses:
CHAS. H. SMITH.
GEO. T. PINCKNEY.

(Here follows diagram marked page 151.)

152 No. 9.

UNITED STATES PATENT OFFICE.

A. Van Camp, of Washington, District of Columbia, and M. M. Hodgman, of St. Louis, Missouri. Improvement in wood pavement.

Specification forming part of letters patent No. 96,849, dated November 16, 1869.

To all whom it may concern:

Be it known that we, A. Van Camp, of Washington City, and District of Columbia, and M. M. Hodgman, of St. Louis, in the county of St. Louis and State of Missouri, have invented certain new and useful improvements in pavements; and we do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing, and to the letters of reference marked thereon, making part of this specification, in which—

Figure 1 is a plan or top view of a pavement laid in accordance with our plan. Fig. 2 is a sectional view, showing the blocks seated in cement. Fig. 3 is a sectional view, showing the blocks secured to a wooden base.

The object of our invention is to produce a combined block and concrete pavement in which the materials shall be so blended that it shall possess all the advantages, while, at the same time, it will be entirely free from the disadvantages of each. It will be nearly as cheap as wood, and as lasting as concrete, as elastic as the former, and, at the same time, as firm and durable as the latter.

The concrete demanded for such purposes must be of such impenetrable nature as to be entirely unaffected by either heat or cold, no matter how intense the same may be, and also be alike impervious to the frost and rain.

A moment's reflection will convince even the most inexperienced observer that blocks cannot be properly laid and cemented together to form a pavement if the concrete used is constantly expanding or contracting by the action either of the atmosphere or the elements.

The concrete embraced in and covered by our patent of July 27, 1869, and also that claimed in our application of even date herewith, practical experience has shown, is admirably adapted for the purpose.

The nature of our invention consists in cutting, on the opposite sides of a suitable block of wood, semi-hexagonal grooves.

The grooves are cut at such relative position on the block that when they are properly set the grooves in the adjacent block shall be directly opposite each other, having their bearing-surface in the lower half-section of the block.

The blocks thus prepared are seated in a concrete bed, sufficient space being left between the blocks, say from one to two inches, for the

admission of the cement, and to allow of its being freely rammed until the same is thoroughly packed.

To enable others skilled in the art to make and use our invention, we will now proceed to describe its construction and operation.

A A are the blocks, and may be made of any suitable wood, and either rectangular, square, or of any other desired form, their dimensions being about the same as those generally seen in wooden-block pavements. On the opposite side of these blocks are cut longitudinal semi-hexagonal grooves *a a*. The form of these grooves *a a* may, of course, be varied; but we prefer the style shown, as we desire the wedge-shaped bearing-surface it affords for the concrete to embed itself in. B is a concrete bed, and is prepared precisely in accordance with the plan stated in our patent of July 27, 18 9.

The concrete is poured down in a warm plastic state, and thoroughly rammed with hot tamps and hot rollers.

The bed B being thus prepared, the blocks are seated therein, their grain running vertically, and the warm concrete is poured in and thoroughly rammed. As will be seen by reference to Fig. 2, this concrete *b* unites firmly and permanently with the bed B, and, extending up, fills the grooves *a a*, and so on until, in a thoroughly compact state, it is on a line or flush with the upper surface of the blocks A A. The concrete *b*, that is poured in, is, as it were, moulded between the blocks into the form of a reversed cross (†), and it so rigidly secures the blocks that it is almost impossible for them to ever split, chip, or otherwise be injured.

The concrete *b* may be rammed between the blocks by any desired method. We generally use hot tamps, provided with a broad blade-shaped head, the width of the head being a little less than the distance between the blocks. This distance between the blocks may be regulated at pleasure.

153 Having thus fully described our invention, what we claim therein as new, and desire to secure by letters patent of the United States, is—

The grooved blocks A A, when they are seated and secured in a concrete bed, B, and cemented together by concrete *b*, as shown and described.

In testimony whereof we have signed our names to this specification in the presence of two subscribing witnesses.

A. VAN CAMP.
M. M. HODGMAN.

Witnesses:
EDWIN JAMES.
EDM. F. BROWN.

(Here follows diagram marked page 153.)

154 No. 10.

UNITED STATES PATENT OFFICE.

Turner Cowing, of San Francisco, California, assignor to Tallmadge E. Brown, of Memphis, Tennessee. Improvement in wood pavement.

Specification forming part of letters patent No. 101590, dated April 5, 1870.

To all whom it may concern:

Be it known that I, Turner Cowing, of the city and county of San

Francisco, in the State of California, have invented a new mode of constructing wood pavements for streets; and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawings and to the letters of reference marked thereon.

The nature of my invention consists in providing and arranging blocks of a peculiar shape, in manner to form wedge-shaped crevices for the reception of earth or gravel, and wherein such earth and gravel will be returned to act as a key to bind and confine the blocks in their place.

Figure 1 represents a section of road paved with the blocks, complete. Fig. 2 represents the straight side of a block, with the inclined side at E. Fig. 3 represents the top of a block, and also the section of the base D. Fig. 4 represents the straight side of a block, which is set next to the inclined side of the adjoining block.

In Fig. 1, letters A represent the top of the block; B, the side; and E, the crevice and gravel. The blocks should, of course, be placed so that the gravel spaces may extend lengthwise across the direction of the street or road, so that, besides wedging and holding the blocks securely, they may furnish a better foothold for animals drawing heavy loads.

In the drawing, the front edge of the pavement, as shown, represents the side next the curb, or a section parallel to the curb.

It is obvious that the wedge-shaped crevices may also be formed by setting the above-described blocks so that two vertical sides and two inclined sides come together alternately, as shown in Fig. 5; and it is equally obvious that two blocks having their vertical sides together may be replaced by a single block, having two inclined faces, as shown in Fig. 6, without any material change of plan, and with a considerable saving of labor and expense in the construction.

To construct my pavement, prepare the roadway by grading it to the proper form, and ramming solid; then set the blocks as shown in Fig. 1, confining them permanently between the curbs of walks; then fill and ram the crevices with earth and gravel.

I do not claim a wood pavement composed of wedge-shaped blocks when the blocks are laid alternately on the larger and smaller ends so as to form a continuous surface of wood; but—

What I do claim and desire to secure by letters patent of the United States, is—

A wood pavement composed of blocks, each side having a single plane surface, and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped grooves or spaces to receive concrete or other suitable filling, substantially as set forth.

TURNER COWING.

Witnesses:
W. O. ANDREWS.
J. R. BRETT.

(Here follows diagram marked page 155.)

156 No. 11.

UNITED STATES PATENT OFFICE.

Carol Gaytes, of Chicago, Illinois. Letters patent No. 108582, dated October 25, 1870. Improvement in wood pavements.

The schedule referred to in these letters patent and making part of the same.

I, Carol Gaytes, of the city of Chicago, in the county of Cook and

State of Illinois, have invented certain new and useful improvements in street pavements, of which the following is a full and exact description, reference being had to the accompanying drawing, forming part of this specification, in which—

Figure 1 is a plan;

Figure 2 is a vertical section;

Figure 3 is a perspective view, showing a single block chamfered on two sides only; and

Figure 4 is a similar view, showing a block chamfered on four sides.

This invention relates to that class of wooden pavements in which the blocks, in contact with each other, are driven, like piles, into the surface of the road-bed until they stand firmly and compactly together; and the improvement to which I lay claim consists in the construction and arrangement of said blocks, and the employment of concrete in connection with them, as hereinafter set forth.

I make the blocks by sawing from a wooden plank three or four inches thick a piece about ten or twelve inches long.

Each block is then chamfered equally on opposite sides, both at top and bottom, so as to form a short truncated wedge at its upper and a a long one at its lower end, as shown in fig. 2.

The blocks may be further chamfered, as seen at $e\,e^1$, fig. 4, or they may be left in the form shown in fig. 3.

They are placed upon the ground, in contact with each other, so as to break joints, as represented in fig. 1, and are driven down until the dirt has properly filled up the spaces between their lower ends.

The spaces between their upper ends are then filled with concrete, and the pavement is complete.

I do not limit myself to any particular dimensions of the blocks, the main feature of my invention being the chamfering upon opposite sides at each end, so that as they work into the ground they will always retain their vertical position.

Having thus described my invention,

What I claim is—

A street pavement, composed of wooden blocks chamfered on opposite sides at both their upper and lower ends, and driven into the ground in contact with each other, the spaces between their upper ends being filled with concrete, substantially as described and for the purposes specified.

CAROL GAYTES.

Witnesses:

JAS. A. COWLES.

ROBERT H. FORRESTER.

(Here follows diagram marked page 157.)

158 No. 12.

UNITED STATES PATENT OFFICE.

Richard H. Willet, of Washington, District of Columbia. Improvement in wood pavements.

Specification forming part of letters patent No. 114895, dated May 16, 1871.

To all whom it may concern:

Be it known that I, Richard H. Willet, of the city and county of Washington and District of Columbia, have invented certain new and useful im-

provements in wooden pavements, and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the annexed drawing, and to the letters of reference marked thereon, making a part of this specification, in which—

Figure 1 is a longitudinal vertical section parallel to the axis of the roadway. Fig. 2 is a perspective view of one of the blocks.

The nature of my invention consists in making the blocks wider at the middle than at the ends, so that when embedded upon a layer of sand for a foundation, and having a concrete composed of asphalt or tar and sand between them, they will form a double wedge of the filling, which will prevent the blocks either being pressed down by weight upon them or being forced upward from any power from below.

In the drawing, Fig. 1, A represents the blocks; B, the sand foundation; C, the concrete between the blocks; D, the level surface of the roadway.

CONSTRUCTION.

After the proper preparation of the road-bed a suitable thickness of sand is to be spread evenly upon the same, and, the established crowning of the cross-section completed, the blocks are to be set up as represented in Fig. 1, so that about one-half an inch may be kept between them at their widest section at *a*, but close together across the road-bed. As the courses are set up, the concrete, ready prepared, should be poured between, and thus, uniting them when cold, will form a double wedge, having the smallest part in the middle.

It will be evident, from inspection of the drawing, that there can be no possible chance for the blocks to be moved after the mass of concrete shall have become firmly compacted, and if they shall have been properly settled and prepared, no downward movement can result.

Having thus explained my invention, what I claim as new therein, and desire to secure by letters patent of the United States, is—

The blocks A, formed of a double wedge shape, with the widest part at the middle, to be embedded in a concrete composed of sand and asphalt or tar, and placed upon a foundation of sand, substantially as and for the purpose described.

RICHARD H. WILLET.

Witnesses:
C. D. IRELAN.
W. R. SINGLETON.

(Here follows diagram marked page 159.)

160 No. 13.

116217.

UNITED STATES PATENT OFFICE.

Shubeal C. Prescott, of Jersey City, New Jersey, assignor to Howard Smith and Dora E. Brown, of New York City. Improvement in combined wooden and concrete pavements.

Specification forming part of letters patent No. 116217, dated June 20, 1871.

To all whom it may concern:

Be it known that I, Shubeal C. Prescott, of Jersey City, in the State of New Jersey, have invented certain new and useful improvements in

the making and constructing of street pavement made of wood in combination with concrete or other material; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing making part thereof, and in which—

Figure 1 represents a plan view of my improvement. Fig. 2 represents a longitudinal view of my improvement. Fig. 3 represents also a plan view of my improvement. Fig. 4 represents also a longitudinal view of my improvement.

Having stated the nature and object of my invention, I proceed to describe the construction of the road or street-bed, and the manner in which the pavement is laid, by the combination of the road or street-bed with wooden blocks and concrete, and the manner of the construction of the whole so as to form a pavement, the wooden blocks resting upon the surface of the bed of the street, with break-water or water-stops formed by the concrete being placed or driven into the interstices between the blocks, and extending at about three or more inches below the surface of the road or street bed, so as to effectually prevent both the water from getting under the blocks, and also to prevent the water from accumulating and running under the pavement when laid, and carrying away the ground or sand from under the blocks, leaving them to settle down, and thus forming a pavement which can be laid at any grade or degree of inclination without the possibility of being undermined by water.

The earth comprising the bed of the street is graded in the usual manner, so as to present a convex surface declining on either side to the curb. When so graded the surface is rolled with a heavy roller, so as to form a compact and even surface, upon which the blocks are laid or arranged in rows parallel with each other at right angles, or diagonally across the street. The several blocks before being so laid may be preserved by some one of the well known processes to prevent decay if desired. After laying the blocks in the manner aforesaid, a swage is driven down between the several rows of blocks, two, three, or more inches below the surface of the road or street bed, and the entire space thus made between the blocks is filled with melted tar and gravel, concrete, or any similar suitable composite material, forming a series of break-waters or water-stops across the street, preventing the water from accumulating so as to displace the sand under the blocks, thus making a pavement equally stable upon any degree of inclination as upon the level. After the completion of the laying of the pavement the entire pavement is rolled with a heavy roller on the surface, thereby making a uniform surface, and driving each block home firmly upon the street or road-bed.

I do not intend to confine my improvement to any form of blocks to be used in the construction of the pavement, as my improvement is applicable to any conceivable form.

What I claim, and desire to secure by letters patent, is—

A pavement composed of a series of blocks having their intermediate spaces filled with concrete, the concrete being caused to extend downward below the lower line of the blocks into the road bed for the purpose of forming water-stops, as described.

SHUBEAL C. PRESCOTT.

Witnesses:

A. G. DEARING.

M. D. CONVERSE.

(Here follows diagram marked page 161.)

162 No. 14.

121544.

UNITED STATES PATENT OFFICE.

Robert C. Phillips, of Cincinnati, Ohio. Improvement in wooden pavements.

Specification forming part of letters patent No. 121544, dated December 5, 1871.

To all whom it may concern:

Be it known that I, Robert C. Phillips, of Cincinnati, in the county of Hamilton and State of Ohio, have invented a new and useful improvement in street and other highway pavements, of which the following is a specification:

My improvement consists mainly in the use of wood of any suitable kind, in its natural or undressed state—that is, in the form of round blocks or sections of small trees, or the branches of trees, from which the bark has been removed—cut as nearly at right angles to their length as may be, generally in lengths of about six inches, their diameters varying from three to twelve inches. These are placed upon end upon a bed or foundation composed of a stratum or layer of broken stone about eight inches deep, upon which a course of coarse sand or gravel of, say six inches in depth, is spread, the whole properly rolled or rammed, so as to be solid, and presenting an even or uniform surface for the blocks to rest upon. Upon this the blocks are placed upon end, as nearly together as may be, in such manner as to form an even or uniform surface. They are then rolled or rammed heavily so as to force them well down upon the bed. The spaces or openings between the blocks are then filled with good hard coarse gravel and sand, and again rolled or rammed, after which the whole is covered with gravel or sand to a depth of about one inch, when the travel may be turned on.

As stated above, these blocks may be composed of any suitable wood, but locust is preferred. White oak, white cedar, (arbor vitæ,) chestnut, yellow pine, and others afford good material.

The blocks may be used as they come from the forest, or they may be treated by any of the processes commonly applied to render woods hard and prevent decay, such as Burnetizing, creasoting, &c.

Thus the wooden portion of the pavements is composed of blocks cut from the tree, or branch of a tree, in its natural state, the bark only being removed; and, as above stated, may be of any size, from three inches upward. Blocks of large size may be split in half or other parts, where the situation may require a flat or straight side, as along a line of curb, a rail, or similar position.

Figure 1 is a plan of a portion of a street paved with my rough blocks, together with a portion of the curb. Fig. 2 is a vertical section showing a portion of a street paved with these blocks, with a rail track, and the bed of broken stone with the covering of gravel, as usually put down; and Fig. 3 is a section of a street thus paved from curb to curb with a rail track in the center.

I thus produce a pavement which can be laid as easily and with less expense than cobble-stone pavement, and which has been found in practice to be more durable than the most approved wooden pavements hitherto in use.

I do not claim broadly the use of wooden blocks in the state in which they are cut from the tree or branches, nor yet do I claim the foundation of stone or gravel, and the filling of the spaces between the block with sand or gravel, separately considered; but

What I do claim as my invention, and desire to secure by letters patent, is—

A wooden pavement composed of blocks of any desired wood, cut from the trunks or branches of trees or saplings, of any desired length, in their natural form, the bark only being removed, placed with their fibers vertical, upon a bed of broken stone and gravel, or sand, or either of them, the spaces between the blocks being filled with gravel or sand, the whole made compact by ramming, rolling, or other proper method, as herein shown and described.

ROBERT C. PHILLIPS.

Witnesses:
ALBERT E. TRIPP.
HARRY BLACKBURN.

(Here follows diagram marked page 163.)

 No. 15.

UNITED STATES PATENT OFFICE.

Gordon A. May, of Chicago, Illinois. Improvement in wood pavements.

Specification forming part of letters patent No. 112945, dated March 21, 1871.

To all whom it may concern:

Be it known that I, Gordon A. May, of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful Improvements in Wooden-Block Pavement; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawing making part of this specification, and to the letters of reference marked thereon, like letters indicating like parts wherever they occur.

To enable others skilled in the art to construct and use my invention, I will proceed to describe it.

Figure 1 is a plan of the pavement, in which part A has spaces *d* between the blocks, filled with gravel, concrete, or other composition, as in the usual way, or otherwise; part B, in which spaces *d* are filled with key-wedges; and part C, in which the said spaces are filled with pieces of wood of their size. Fig. 2 represents three sections of the above said parts A, B, and C, on the lines *x x*, *y y*, and *z z*. Fig. 3 is a section of the pavement on the line *t t*. Fig. 4, Sheet 2, is a perspective view, showing construction and arrangement of my pavement.

The nature of my invention consists in a wooden-block pavement, laid of rabbeted blocks, of the size generally used in other similar block-pavements, say of three by six (or eight), placed in rows across the roadway in a checkered manner, and so disposed that the jointing-edges of the blocks of the row and of the consecutive row rest on one and the same strip or board. It consists, also, in filling the space between the blocks with pieces of wood in place of gravel or other material generally used; also, in making the said pieces of wood in depth several inches greater than the depth of the blocks, and driving the same into

the said spaces and into the ground, thus using them as a filling and as a key-wedge.

a a are the blocks. *b b* are their rabbets, by means of which the blocks lie on and are supported by strips or boards *c c*. The blocks of each row are equally spaced, the spaces being equal to the length of the blocks, and the adjoining edges of the two consecutive rows, as the rows N N, 1, and 2, are rested on the same strips *c c*, and so on. The strips of board *c c*, on which the rabbeted blocks *a a* rest and are supported, extend crosswise of the street, as clearly shown in Fig. 4.

The blocks and strips being laid in the above manner make a sort of a net, the meshes of which are so interwoven and self-supporting that the pavement is very strong and durable without any board foundation. This superstructure can be still more strengthened by fastening by nails, or otherwise, the strips *c c* and boards *a a* together, as in no other pavement.

Strips *c c* will generally reach the middle of the height of blocks *a a*, and if the blocks are three by six (or eight) the strips can be of one by three (or four), although the size of the blocks and strips may vary, if desired.

d d are spaces between blocks *a a*, filled with gravel, or any suitable material or composition, as in the usual manner.

In place of gravel or other composition to fill the spaces *d d*, I use also pieces of wood or boards *e e* of a size of the said spaces, which boards are driven between the blocks down to the ground and even with the top of the pavement.

I also make the abovesaid boards *e e* several inches deeper than the blocks *a a*, and sharpened at the bottom, or shaped as wedges *f f*, which I use as a filling for the spaces *d d*, and at the same time as key-wedges, the same being driven into the ground several inches below the pavement, for the purpose of making the pavement firmer and more lasting.

In use these boards or key-wedges will always keep somewhat below the upper surface of the pavement, and will produce an uneven surface sufficient for safe and easy travel.

Strips *c c* are laid so as to break joints in alternate strips or boards, and may rest on their joints on boards *g g* placed lengthwise on the roadway, if desirable.

Having thus described my invention, what I claim as new, and desire to secure by letters patent, is—

A wood pavement consisting of the rabbeted blocks *a a* and strips of board *c c*, arranged as herein described, with the pieces of wood *e e* or wedges *f f* inserted between the blocks, as and for the purposes set forth.

GORDON A. MAY.

Witnesses:
J. W. CUMMINS.
JOHN W. WEBSTER.

(Here follow 2 diagrams, marked pages 165 & 166.)

167 No. 16.

UNITED STATES PATENT OFFICE.

Edward P. Morong, of Boston, Massachusetts. Improvement in laying wood pavements.

Specification forming part of letters patent No. 132682, dated October 29, 1872.

To all whom it may concern:

Be it known that I, Edward P. Morong, of Boston, in the county of Suffolk and State of Massachusetts, have invented certain new and useful Improvements in Method of Laying Pavements; and do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing making a part of this specification, in which—

Figure 1 is a perspective view of a street in which a pavement is being laid by means of and in accordance with my improved method; and Fig. 2 is a section of the pavement upon a line with the direction of the street.

Letters of like name and kind refer to like parts in each of the figures.

My invention consists in a series of manipulations constituting a method for laying pavements, whereby time, labor, and expense in laying the pavement are saved, and it is rendered more easy to take up and replace in case of repair to the substructure of the streets, and more solid and durable.

The pavement is of that class in which rectangular blocks, separated by narrow channels packed with pebbles or gravel, form the wearing part of the pavement; and the principal novelty in the whole method is the "puddling" or softening the earth foundation of the pavement after the blocks are laid and the channels partly packed with pebbles or gravel, before ramming.

No flooring of wood or other material need be prepared for this pavement, but the blocks are laid directly on the graded bed, and then partially embedded in the earth foundation while it is in a puddled or muddy condition.

The gravel or earth road-bed A is first graded to the form required, and to a proper height to allow for the depth of the blocks when rammed. Upon this graded earth foundation the blocks B are set in the usual way of setting stone blocks. Upon the upper edges of the set blocks is hung a parting strip, C, by a bracket, *c*, projecting from one side. This parting strip is shallower than the blocks, and is to be removed as the work progresses. A second row of blocks is laid against the parting strip, and on the removal of the parting strip a channel, *b*, will remain between the two rows of blocks. This channel is next filled about two-thirds full with pebbles or gravel D, poured in from a shovel or scoop or other proper tool. The nozzle of a hose, pipe, or watering-pot, E, is next introduced to the partially-filled channel, and sufficient water allowed to flow through among the pebble-packing to saturate the earth foundation or render it puddled or muddy. The pebbles are then rammed by aid of an iron blade, F, such as is used in laying the Nicholson pavement, and subsequently the blocks are rammed into the foundation while it is still puddled or muddy. The channels are now filled with pebbles or gravel, and the whole pavement covered with gravel or sand in the usual way.

I prefer at this stage to give a second ramming, but it is not absolutely essential.

In consolidating a road-bed or "form" preparatory to setting pavement it has not been unusual to sprinkle the soil with water and then roll or ram the earth so as to get a hard foundation; and, after the blocks have been set and covered with a thin final sand dressing, water has been applied to wash the sand into the interstices between the blocks.

But these uses of water differ from mine. I desire the road-bed to be in shape, but not hard, when the blocks are set. I fill the channels with pebbles, and the blocks are thus braced on all sides and hold their position. I then soften the road-bed with the use of a profusion of water conducted and directed into the channels themselves; ram the pebbles so that they wedge against the blocks and form rude ratchets or pawls to hold and brace the rows of blocks against each other as the blocks are rammed down; and I then ram the blocks well into the muddy bed, where they all set when left alone—each like a post in its post-hole—while the mud also rises among the pebbles and interstices of the blocks, forming a sort of natural conglomerate in the channels.

The described parting strip I believe to be novel, and propose to patent in another application.

Having thus fully set forth the nature and merits of my invention, what I claim as new is—

168 The method of puddling the foundation-bed of wood pavements, and of giving to the latter a firm bearing, consisting in applying water to said foundation after the blocks have been laid in position and the channels partly filled with pebbles or gravel, and afterward ramming said filling and blocks, substantially as specified.

In testimony that I claim the foregoing I have hereunto set my hand this 5th day of September, 1872.

EDWARD P. MORONG.

Witnesses:
GEO. S. PRINDLE.
JOHN R. YOUNG.

(Here follows diagram marked page 168.)

169 No. 17.

176. 1867. No. 75780. W.

Hugh McDougall, ass'or to self, Robert Stuart, and Coll McDougall of same place.

Of Chicago, county of Cook, State of Illinois.
Laying wooden pavements.
Rec'd Sept. 27, 1867.
Petition " " "
Affidavit " " "
Specification " " "
2 drawings " " "
Model " " "
Cert. dep.
1 cash $15. Sept. 27, 1867.
1 add'le fee cert. $20, M'ch 9, '68.
" " cash.

Examined, James, Feb'y 20, 1868.
2. Issue N. W. Heilborn Feb. 26, '68.
4. Patent March 24, 1868.
Recorded vol. , page .
Circular Feb'y 28, 1868.
L. L. Bond, Chicago, Ill. 1867.

1867.

Rej'c. Nov. 13th, 1867.
Ex'd—H. M. H.
C. K.
Sp. and thin d'g to att'y Nov. 23d.
Improved wooden pavement.
1867.

170 No. 18.

287. No. 108582. 1870. W. Carol Gaytes.

Of Chicago.
County of Cook.
State of Illinois.
Street pavements.

Rec'd	March	3,	1870.
Petition	"	"	"
Affidavit	"	"	"
Specification	"	"	"
1 drawing, 4 sheets	"	"	"
Model	"	"	"

1 cert. dep. $15, March 3, 1870.
Cash.
1 add'l fee cert. $20, June 10, '70.
" " cash.
Examined Oct. 13th, 1870, Spear.
2 issue Grinnell Oct. 13, 1870.
3 patented Oct. 25, 1870.
Recorded vol. , page .
Circular.
James A. Cowles, Chicago, Ill.
Asso. Howell, Ellsworth & Co. 1870.
1870.
Ex'd H. M. H.
C. K.
Rej. March 12, 1870.
L. Aug. 12, 1870.
Imp't in wood pavements.
1870.

171 No. 19.

896. No. 112945. 1870. W.

Gordon A. May.
Of Chicago.
County of Cook.

State of Illinois.
Wooden block pavement.
Rec'd Aug't 19, 1870.
Petition " " "
Affidavit " " "
Specification " " "
1 drawing " " "
Model " " "
Cert. dep.
1 cash $15, Aug't 19, 1870.
Add'l fee cert.
1 " " cash $20, March 10, 1871.
Examined Feb'y 15, 1871, Spear.
2 issue Grinnell, Feb'y 16, 71.
4 patented March 21, 1871.
Recorded vol. , page .
Circular Feb'y 17, '71.
J. B. Turchin, Chicago, Ill. Dodge & Munn, asso. pres't. 1870.
1870.
Ex'd, H. M. H.
C. K.
Rej. Sept'r 17, 1870.
Letter Nov'r 19, 1870.
L. Dec. 22d, 1870.
Imp't in wood pavements.
1870.

172 No. 20.

16249. 1865.
2358½, No. 101590.

Turner Cowing, ass'or to Tallmadge E. Brown, of Memphis, Tennessee.

Of San Francisco.
County of " "
State of California.
Constructing wood pavements.
Rec'd Nov'er 13, 1865.
Petition " " "
Affidavit " " "
Specification " " "
2 drawings " " "
Model " " "
1 cert. dep. $15, Nov'r 13, 1865.
Cash.
Add'l fee cert.
1 " " cash $20, March 23, 1870.
Examined March 22d, 1870, Spear.
2 issue Grinnell March 25, '70.
3 patented April 5, 1870.
Recorded vol. , page .
Circular.
Dewey & C., San Francisco, Cal. 1865.
J. Dennis, associate.

1865.
Rej. Dec. 27, 1865.
Letter Aug 17th, 1869.
L. Nov. 25, '69.
L. Feb. 24, 1870.
Ex'd, H. M. H.
C. K.
Improvement in wood pavement.
1865.

173 No. 21

2786. 1869. No. 96849.
1st 2d
A. Van Camp and M. N. Hodgman.
1st 2d
Of Washington, St. Louis.
County of "
District of Columbia.
State of Missouri.
Pavements.
Rec'd Sept. 11, 1869.
Petition " " "
Affidavit " " "
Specification " " "
1 drawing " " "
Model " " "
Cert. dep.
1 cash $15, Sept. 11, 1869.
Add'l fee cert.
1 " " cash $20, Oct. 30, '69.
Examined Oct 1st, 69, Spear.
2 issue H. McCormick October 2, 1869.
4 patented Nov. 16, 1869.
Recorded vol. , page .
Circular Oct. 2, 1869.
J. E. F. Holmead, present. 1869.
1869.
Rej. Sept. 17, '69.
Rej. Sept. 24, '69.
Ex'd, H. M. H.
C. K.
Improved wood pavement.
1869.

174 No. 22.

85. 110. 1871. No. 121544.

Robert C. Phillips.
Of Cincinnati.
County of Hamilton.
State of Ohio.
Street and other pavements.
Rec'd Jan'y 3, 1871.
Petition " 5, "

Affidavit " " "
Specification " " "
1 drawing " 20, "
Model " 5, "
1 cert. dep. $15, Jan'y 3, 1871.
Cash.
Add'l fee cert.
1 $20 Nov. 18, 1871.
1 " " cash $20 June 30, 1871.
Twenty dollars returned Sept. 16, 1871. H. Mc. C.
Examined Nov. 9, '71, Com'r of Patents.
2 issue Grinnell, Nov. 11, '71.
33 patented Dec. 5, 1871.
Recorded vol. , page .
Circular Nov. 13, 1871.
Marcellus Bailey, present, 1871.
1871.
Rejected February 9, 1871.
Rejected March 17, 1871.
Letter (v) May 15, 1871.
Letter July 7th, 1871.
Ex'd, H. M. H.
C. K.
Imp't in wooden pavements.
1871.

175 No. 23.

No. 116217. 483. 1871.

Shubeal C. Prescott, ass'or to Howard Smith and Dora E. Brown, of N. Y. City.

Of Jersey City,
County of ,
State of New Jersey.
Street pavement.
Rec'd April 17, 1871.
Petition, " " "
Affidavit, " 21, "
Specification, " 17, "
1 drawing, " " "
Model, " " "
Cert. dep.
Cash, $15, April 17, 1871.
Add'l fee cert.
1 " " cash, $20, June 9, 1871.
Examined May 19, '71, Geo. H. Clarke.
Issue, Grinnell, May 19, '71, ass't ex. in charge.
Patented June 20, 1871. J.
Recorded, vol. , page .
Circular, May 20, 1871.
H. W. Beadle and Co, present. 1871.
1871.
Rej. Apr. 22d, 1871.
Ex'd. H. M. H.
C. K.
Imp't in combined wooden and concrete pavements.
1871.

176 No. 24.

159. 1871. No. 114895. W.

Richard H. Willet.
Of Washington,
County of "
Dist. of Columbia.
Wood pavement.
Rec'd Feb'y 8, 1871.
Petition, " " "
Affidavit, " " "
Specification, " " "
1 drawing, " " "
Model, " " "
Cert. dep.
1 cash, $15, Feb'y 8, 1871.
Add'l fee cert.
1 " " cash, $20, April 29, 1871.
Examined April 17, 1871. Spear.
" "
2 issue, Grinnell, April 20, 1871.
4 patented May 16, 1871. J.
Recorded, vol. , page .
Circular, April 21, 1871.
P. O. box 139. 1871.
1871.
Rejected March 21st, 1871.
Ex'd. H. M. H.
C. K.
Imp't in wood pavements.
1871.

77 No. 25.

17-467. 1872. No. 132682. W.

Edward P. Morong.
Of Boston,
County of Suffolk,
State of Mass.
Method of laying pavements.
Rec'd Sept. 5, 1872.
Petition, " " "
Affidavit, " " "
Specification, " " "
1 drawing, " " "
Model.
Cert. dep.
1 cash, $15, Sept. 5, 1872.
Add'l fee cert.
1 " " cash, $20, Oct. 26, 1872.
Examined Oct. 23d, 1872. Bates.
Issue, Knight, Oct. 24, 1872.
4 patented Oct. 29, 1872. J.
Recorded, vol. , page .
Circular, Oct. 24, 1872.
T. W. Clarke, Boston, Mass.

1872.
Letter. Oct. 10, 1872.
Ex'd. H. M. H.
C. K.
Improvement in laying wood pavements.

178 No. 26.

59131. 1867. No. 64126. W.

Benjamin F. Miller.
Of New York,
County of " "
State of " "
Pavements.
Rec'd M'ch 18, 1877.
Petition, " " "
Affidavit, " " "
Specification, " " "
2 drawings, " " "
Model, " " "
1 cert. dep., $15, M'ch 18, 1867.
Cash.
1 add'l fee cert., $20, April 12, 1867.
" " cash.
Examined, James, Mar. 30, 1867.
2 issue, A. M. Stout, April 5, 1867.
3 patented April 23, 1867. J.
Recorded, vol. , page .
Circular, April 6, 1867.
L. W. Serrell, New York, N. Y. 1867.
Ex'd. H. M. H.
C. K.
1867.
Improvement in pavements.
1867.

179 Form 2.—Special assessment voucher. Original.

Warrant 1493.

CHICAGO, *July 26th*, 1872.

City of Chicago, for the board of public works, to Wm. H. Stow, Dr.

For patent fees in pavement on Warren ave., 2,255 yards, @ 10c 225 50

Approved by the board.

W. H. CARTER,
President.
A. H. BURLEY,
Comptroller.

Ex. 28.
(Across the face:)
Good for taxes of 1872.

A. H. BURLEY,
Comptroller.

180 Form 2.—Special assessment voucher. Original.

Warrant .

CHICAGO, *March* 25, 1872.

City of Chicago for the board of public works to Wm. H. Stow, Dr.

On a/c patent fees for pavement on Warren ave., 6,450 yards @ 10c..... $645 00

Receive' from Wm. H. Stow on a/c of his own taxes.

A. H. BURLEY,
Comptroller.

Approved by the board.

W. H. CARTER,
President.

Ex. 28.

181 Form 2.—Special assessment voucher. Original.

Warrant 1486.

CHICAGO, *July* 8, 1872.

City of Chicago for the board of public works to W. H. Stow, Dr.

Patent fees on pavement on W. Randolph st., 12,523 yards @ 10..... $1,252 30

A. H. BURLEY,
Comptroller.

Approved by the board.

WM. MCARTHUR,
President.

Ex. 28.

182 Form 2.—Special assessment voucher. Original.

Warrant 1493.

CHICAGO, *July* 26, 1872.

City of Chicago for the board of public works to Wm. H. Stow, Dr.

For patent fees on pavement on Warren ave., 2,225 yards @ 10c..... 225 50

A. H. BURLEY,
Comptroller.

Approved by the board.

W. H. CARTER,
President.

Ex. 28.

183 Form 2.—Special assessment voucher. Original.

Warrant 1413.

CHICAGO, *March* 25, 1872.

City of Chicago for the board of public works to Wm. H. Stow, Dr.

On a/c patent fees for pavement on Warren ave., 6,450 yards @ 10c. 645 00

A. H. BURLEY,
Comptroller.

Approved by the board.

W. H. CARTER,
President.

Ex. 28.

184 In the circuit court of the United States for the northern district of Illinois. In chancery.

HENRY M. STOW
against
THE CITY OF CHICAGO.

Deposition of WILLIAM H. STOW, taken on behalf of the complainant, before Charles L. Driesslein, United States Commissioner, at the office of Messrs Carter, Becker & Dale, in the city of Chicago, on April 17, 1875.

Present, Mr. Becker, counsel for complainant, and Mr. L. L. Bond, counsel for defendant.

Said witness, being first duly sworn, testified as follows:

Examined by Mr. BECKER:

Question. Give your name, age, residence, and occupation.

Answer. My name is William H. Stow; age, sixty; residence, Chicago; occupation, real estate.

Counsel for complainant introduced patent of the United States to Henry M. Stow, dated December 10, 1867, No. 72110, which is marked Exhibit A.

Next, patent from the United States to Henry M. Stow, dated February 25, 1868, No. 74862, marked Exhibit B.

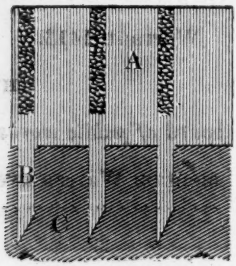
Next, patent of the United States to Henry M. Stow, dated January 19, 1869 (reissue), No. 3274, marked Exhibit C.

Next, letters patent of the United States to David L. DeGolyer, dated April 6, 1869, No. 88765, marked Exhibit D.

Next, a certified copy of an agreement, from the records of the Patent Office, dated the 30th day of March, 1869, signed D. L. DeGolyer, and made with Henry M. Stow, marked Exhibit E.

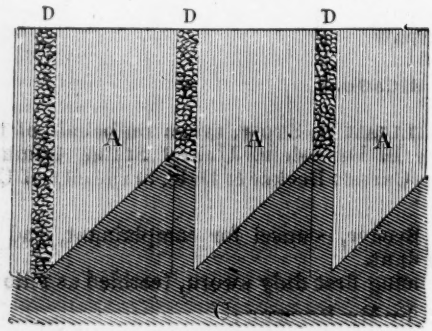
185 Next, letters patent of the United States to Henry M. Stow, dated December 31, 1872, No. 134404, marked Exhibit F.

Q. Look at the model marked Exhibit G, and state what it is.



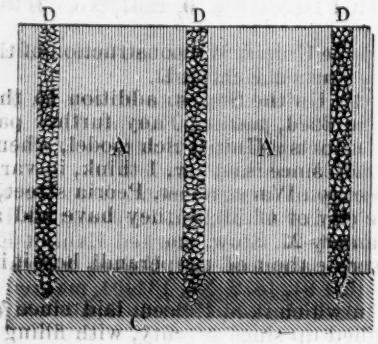
A. The model was made to represent the making of the Stow Foundation Pavement, as in his original or reissued patent. That model is made to represent patents Exhibit A and C.

Q. Look at the model now introduced and marked Exhibit H, and state what it is.



A. This model represents patent B, when the pavement is completed

Q. Look at the model marked Exhibit 1–1 and state what that is.



A. It is meant to represent the pavement in D. L. De Golyer's patent, Exhibit D, so much of it as is covered by the agreement, Exhibit E, with

Henry M. Stow, where the blocks lay directly on the sand, loam, or earth, or gravel foundation.

186 Q. Now look at the model marked Exhibit 1–2 and state what that represents.

A. That represents the patent Exhibit F when the pavement is finished in the streets.

Q. Do you know Henry M. Stow?

A. I do.

Q. Where does he reside?

A. His home is in San Francisco, California.

Q. How long has he been a citizen of this country?

A. All his lifetime.

Q. Do you know whether the city of Chicago has been laying any pavements similar to any of the pavements represented by the models introduced?

A. I do.

Q. State what kind of pavement the city of Chicago has been laying, when it was laid, and where, so far as you know, which you regard as similar to any of the models introduced.

A. The city has laid the pavement marked Exhibit G on Market street, between Randolph and Lake; on West Randolph street, between Halsted and Union Park; on Washington street, between Ashland avenue and Leavitt street; on Warren avenue, between Ashland avenue and Leavitt street; this was laid in seventy-one and seventy-two in those streets. There was a block laid on Clark street in seventy-three, between Madison and Monroe, and a block on Twenty-third street, between State and Wabash, in seventy-two. That is all, except a sample laid at the intersection of State and Lake streets.

Q. That is all you know of?

A. That is all that has been laid of that patent. One part of the model represents it in its commencement, and the other as finished, except gravel, after the wedges are driven down, where it is left open and the gravel filled in.

Q. The model Exhibit G, showing the interstices, is not, then, a complete pavement, is it?

A. The model don't show it completed.

Q. Explain what the interstices are.

A. They are to be filled and rammed with gravel when completed.

Q. What does the end where the interstices are filled up represent; the end of Exhibit G?

A. It represents the wedges in the construction of the pavement before they are driven down into the ground.

187 Q. State whether the city, in addition to the pavement which you have described, has laid any further pavement similar to any of these models; if so, which model, when and where.

A. They have laid, since 'seventy, I think, in various streets of the city; on Clark street, on Water street, Peoria street, Fifth avenue, and other streets in the city of Chicago, they have laid a pavement similar to the models 1–1 and 1–2.

Q. Well, sir, describe the modus operandi, how it is made, and everything.

A. The manner in which it has been laid since 'seventy, on streets where they have filled up since seventy, with filling the same three or four inches of sand for the road-bed, the blocks then having been laid across the street, or diagonally across, with spaces about an inch wide between the rows, and filled with gravel and rammed down thoroughly

in the finishing. It is covered then with a top-dressing of an inch of fine gravel, and the foundation is prepared by putting about three or four inches of sand on and shaping the surface of the street by crowning from ten to fourteen inches, according to the width of the street.

Q. You stated that this was rammed, I believe.

A. Thoroughly rammed with gravel between the blocks, with a paving rammer.

Q. Was this that you saw thoroughly rammed, all of it, or some of it just thrown in?

A. There is none of it but what is rammed, but some was not thoroughly rammed, the contractors slighting the work, the way they can do.

Q. Describe how this rammer is used.

A. The ramming is done by a pavor's rammer on to an iron blade which fits the spaces between the rows of blocks. The new rammer is an iron rod with a blade attached to it. The same power used in this way will ram it ten times as much as the original way of ramming, where a hammer struck a wedge. The old process was with a swedge and rammer.

Cross-examination by Mr. L. L. BOND:

Q. You have described the model Exhibit G as being a representation of the Stow foundation pavement; what do you mean by Stow foundation?

A. I mean to represent the name that it is called generally.

Q. Do you understand that there is anything peculiar in the Stow foundation?

A. Yes, sir.

Q. What is it?

A. It is in driving the wedges down a number of inches below the blocks, which makes the foundation under the blocks solid, and holds the sand, when a loaded team passes over, from pressing under its neighboring block and settling, or, in other words, it keeps the pavement smooth on the surface.

Q. Then you consider the wedges shown in that model G to be a part of that foundation, do you?

A. No, sir; except for the gravel between the spaces.

188 Q. In what respect does the pavement shown by the model Exhibit H differ from that shown in G?

A. It has no wedges between the rows of blocks. Next, the lower end of the blocks are wedge-shaped.

Q. What is the difference between the end 1–1 and the end 1–2 of the exhibit having both of these letters?

A. Exhibit 1–1 shows the gravel does not go below the bottom of the blocks, in the space between the rows of blocks, and in 1–2 the gravel between the rows goes below the blocks.

Q. Do you consider the end 1–1 a correct representation of a pavement laid on sand or earth under the De Golyer patent Exhibit D?

A. It does where the gravel is not thoroughly rammed.

Q. Do you know of any one pavement which has been laid which embraced in its construction the peculiarities of the pavements described and claimed in the patents Exhibits B, C, D, and F, or the pavements which you think included in their construction these patented improvements—separate and different pavements?

A. No; I do not know of any one pavement. They were separate and different pavements.

Q. Do you find in any of these patent exhibits of complainant, B, C, D, or F, any description or indication of the rammer and swedge, or tamping iron, that is to be used in putting down the gravel?

(Objected to as calling for secondary evidence.)

A. In Exhibit F it says: "Then drive all gravel and sand in said spaces into the sand foundation below by means of a swedge, maul, or other suitable instrument, until the foundation under the blocks is sufficiently compressed." In Exhibit B it says: "The space' between the tiers of blocks are to be filled with clean gravel or pebbles, averaging, as near as may be, from one-fourth of an inch to an inch in diameter, said gravel to be well packed, by a rammer and swedge, but instead of filling the said spaces with all gravel, they may be filled within about an inch of the top of the block with sand, well packed with rammer and swedge, and the residue of the spaces filled with gravel, as aforesaid." In Exhibit D it says: "For filling, and then pack or ram the filling by means of an iron blade conforming with the width of the channel, driven down by a rammer."

Q. Isn't the swedge and maul there spoken of a system of ramming described by you as being the old process?

A. Yes, sir.

WILLIAM H. STOW.

189 UNITED STATES OF AMERICA,
Northern District of Illinois:

I, Chas. L. Driesslein, a United States commissioner in and for said district, residing in Chicago, do hereby certify that William H. Stow, the witness whose name is subscribed to the foregoing deposition, appeared before me and gave his testimony in the case of Henry M. Stow against the city of Chicago, now pending in the circuit court of the United States for the northern district of Illinois, on the seventeenth day of April, A. D. 1875, at the office of Messrs. Carter, Becker & Dale, in said city of Chicago; that previous to the examination of said William H. Stow as a witness in said cause he was duly sworn by me as such commissioner, to testify the truth in relation to the matters in controversy in said cause; that said deposition was taken upon oral interrogatories; that I reduced to writing the interrogatories propounded to the said witness and his answers to the same in the order in which they were proposed and answered; and that after the said deposition was so taken by me and reduced to writing, as aforesaid, the interrogatories and answers thereto were respectively read over by said witness, William H. Stow, who thereupon signed and swore to the same, the oath being administered by me as such commissioner.

Witness my hand at Chicago this 26th day of April, A. D. one thousand eight hudnred and seventy-five.

CHAS. L. DRIESSLEIN,
U. S. Commissioner, Northern Dist. of Illinois.

190 In the circuit court of the United States for the northern district of Illinois.

HENRY M. STOW
against
THE CITY OF CHICAGO.

Depositions taken on behalf of the complainant, before Charles L. Driesslein, United States commissioner for said district, at the office of Messrs. Carter, Becker & Dale, in the city of Chicago, of the following persons, to wit: J. D. C. Whitney and J. McArthur, on November 30; Eugene Robinson, on December 2d; Henry M. Stow, on December 1st and 4th; George T. Pitkin, Sylvester W. Fallis and Frederick Barnard, on December 4th; William Cox, William H. Carter and C. L. Woodman, on December 7th; John Hanson, on December 11th and 30th; George Stirling and John C. Rue, on December 21st; W. H. Stow, on December 30th; and James A. Cowles, on December 30th and 31st, 1875. Present, Mr. Becker, of the firm of Carter, Becker & Dale, and Mr. Jewett, counsel for complainant, and Mr. West or Mr. Bond, of the firm of West & Bond, counsel on behalf of the defendant.

EUGENE ROBINSON, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows, on December 2, 1875:

Examined by Mr. BECKER:

898. Q. What is your name, age, occupation, and place of residence?

A. My name is Eugene Robinson; occupation, engineer; at present it is contracting; age thirty-seven; place of residence, Detroit.

899. Q. How long have you resided in Detroit?

A. Twenty-five years.

900. Q. How long have you pursued the occupation of engineer?

A. About twenty years.

901. Q. Were you at any time in an official position in Detroit; if so, what?

A. Twelve years; city engineer there.

902. Q. During what period?

A. From 'sixty-one to 'seventy-three or 'seventy-four.

903. Q. Do you know Mr. H. M. Stow?

A. I do, sir.

904. Q. How long have you known him?

A. Six or eight years.

905. Q. Have you had any experience, if so what, in what is termed "Stow" pavements?

A. Have had considerable—large quantities of it laid under my directions. I have laid large quantities myself, as contractor.

906. Q. Look at model G, and also at model I^2, and state which of these pavements, if either, you have laid.

A. Both; they have been laid under my directions, as city engineer.

907. Q. Where and when did you lay the pavement G?

A. Pavement G was laid on Woodbridge street, in the city of Detroit, and on several streets there.

908. Q. During what time?

A. 'Seventy-three and 'seventy-four. G was laid in 'seventy-two, I believe.

909. Q. Where and when has the pavement represented in
191 model I^2 been laid?

A. In Detroit, on Twelfth street, in one instance, and on two or three other streets there.

910. Q. When?

A. 'Seventy-three, I think; that was laid on Twelfth street.

911. Q. Were these two kinds of pavements laid under a license from Mr. Stow?

A. I believe they were. This Exhibit G was. This other is what is called the Chicago free pavement, under our specifications.

912. Q. By this other, you mean I^2?

A. I^2.

913. Q. Will you state in what way you prepared the foundation for pavement I^2?

A. The road-bed was excavated to correspond with the cross-section, and the filling of sand, I think, was six inches, placed on that, and tamped down with rammers. The blocks were then placed on it, and the spaces filled in with gravel and rammed.

914. Q. Have you in connection with the pavement represented by I^2 made any experiment as to whether the gravel would go below the blocks or not; if so, when was that experiment made, and where, and what was the result of it?

A. I made that experiment in the city of Detroit; prepared a space of pavement about six square yards, as we usually do on a street filled in with six inches of sand; tamped thoroughly with rammers, placed the blocks on it, filled the spaces with gravel, and tamped that down with a bar, with a part half way up, and the remainder all the way up before we tamped it. I found I could drive the gravel in either case about three-quarters of an inch into the sand or ballast, in either case, whether half full or filled.

915. Q. Did you prepare this pavement, in your experiment, in the same way in which the other pavement, represented by I^2 and laid in Detroit, was prepared?

A. Precisely the same.

916. Q. Was the foundation in the experiment pavement made as firm as the foundation in the ordinary I^2 pavement?

A. I think it was. Probably a little firmer than is ordinary; more pains taken with it.

917. Q. When was the experiment made?

A. In October of this year.

918. Q. What was the effect of driving the gravel below the bottom of the block?

A. I looked at the blocks and gravel afterwards, and found it hardened the sand, about equally displacing it on either side of the gravel.

919. Q. Beneath the block?

A. Beneath, and in a circle, about equal to the driving, all around, adjacent to it, wherever it went in.

920. Q. Have you ever studied mechanics?

A. Somewhat.

921. Q. Do you know of any principle in mechanics which is opposed to the driving of a column of sand, by packing it between two blocks, arranged as the blocks are arranged in model I^2?

A. I do not. Merely the resistance of the substrata, whatever it is.

922. Q. Please look at Exhibit Mundy 1, representing blocks on both sides, and gravel between, and sand foundation beneath, and state whether the position of the gravel, as there indicated, is necessarily the position which a column of gravel, under all circumstances, or under the majority of circumstances, would take, in being driven down? (Coun-

sel here read from Mr. Mundy's deposition in this case, as follows): "I imagine the reason why it is impossible to drive a mass of gravel
192 through between blocks, and cause it to penetrate a sand foundation, is, because the gravel will wedge out against the sides of the blocks, and form an arch or series of arches, which I will illustrate by the following diagram, and introduce as Exhibit Mundy 1. The question is, whether that column will take that position as indicated in Mundy 1.

A. I should think that was placed rather regular for any gravel; it shows an inverted arch there. It is just as liable to be the other way as that. Those lines indicating the arch could be drawn inverted the other way, as well as the manner in which they are drawn. Gravel is very irregular, and of different sizes.

923. Q. In constructing this pavement, I², either in your experiment, or for general use, in the city of Detroit, have you found any difficulty in driving the gravel into the foundation beneath the block?

A. Not any.

924. Q. Do you know of a principle of mechanics, or of any practical experiment, which would militate against the theory of driving the column of gravel below the block?

A. I know of nothing in practice.

925. Q. Do you know of anything in science or theory?

A. No, sir.

926. Q. What is your experience as to the settling of the blocks into the foundation, by travel or use?

A. Always settle more or less.

927. Q. How much will the blocks settle?

A. On fresh laid pavement, after travel, I should think it would settle about half an inch to three-quarters. Half an inch.

928. Q. How long a time does it generally require for the settling after the pavement is laid?

A. Varies according to the season of the year and whether it is wet or dry, summer or fall.

929. Q. Would a pavement laid one year be apt to settle half an inch?

A. I should think it would by that time, or before.

930. Q. In case the street is filled with newly made earth, for two feet below the sand foundation, how much would you say the settling would be of the blocks?

A. That would depend on the nature of the sub-soil or filling. If it is loose clay it might settle several inches—two or three inches probably; sand, it would not be so much.

931. Q. I will modify that question by saying, suppose the earth filling is only a foot beneath the block, what would the settlement be in such a case?

A. It would not be as much as though it were two, or more.

932. Q If it were two feet below the block, what, in that case, would it be?

A. Would be proportionably greater, I think.

933. Q. About what amount?

A. Depends on the nature of the soil.

934. Q. On Chicago soil, if you know what that is?

A. I scarcely know what it is. I should think, on sand, would be about two inches, or an inch and a half—probably two inches.

Cross-examination by L. L. BOND, esq.:

935. C. Q. When settling occurs from earth-filling, isn't that a settle-

ment of the entire pavement, instead of a settling of the blocks without the filling?

A. The blocks must follow the filling and foundation. If the foundation settles, the blocks must settle.

936. C. Q. Would not the filling also go with the blocks?

A. Certainly. I suppose you mean the earth-filling—the two or three feet below. I refer by filling to the sub-strata.

937. C. Q. When a street is filled, by being raised to grade, or
193 for other reasons—when the foundation settles on this sub'tratum, does not the filling between the blocks settle with the blocks; and is not a settlement from that cause a settling of the entire pavement?

A. It settles with the blocks; probably not quite as much as the blocks.

938. C. Q. If blocks on a six-inch tamped foundation of sand will settle from one-half to three-quarters of an inch, how much good does the tamping do?

A. You mean the tamping of the gravel?

939. C. Q. And sand foundation?

A. It does answer for this purpose. We try to make it as hard as possible before placing the blocks on it, to get it as firm as possible; cannot always succeed. In actual practice, we go over it and tamp the blocks and all down, with very heavy rammers, again, and drive the blocks into the sand or ballast.

940. C. Q. Have you ever read or examined the plaintiff's patent, Exhibit E, in this case; said exhibit being the patent of December 31, 1872?

A. I have.

941. C. Q. When the filling is rammed down, as shown in said exhibit, and spread under the bottom of the blocks, how can the blocks settle without an equal settlement of the filling?

A. In settling, they will settle with the filling. In driving, they will be drove into the filling or ramming.

942. C. Q. Have you any interest in any of the Stow patents, or in a license under any of them?

A. No interest. Have a license to lay it in the city of Detroit; not in this patent, however—the other.

943. C. Q. Which one?

A. Cedar round blocks.

944. C. Q. Do you not know, as a matter of fact, that neither sand nor gravel can be driven through a tube, or through a narrow space enclosed by firm walls?

A. It depends on the length of it.

945. C. Q. Isn't dry sand, used in blasting, the best tamping material that can be obtained?

A. I think it is.

946. C. Q. And for this reason, that it cannot be forced through the opening?

A. That would depend on the length of it. If it is a short opening, it would; if long, it would not.

947. C. Q. But would it not hold in an opening the depth of paving blocks?

A. I think not, in regard to this. I have seen it used in cupolas, less depth than that.

948. C. Q. Where there is a check or base left for the filling, as there formed by the sand foundation in a pavement, would not the sand or

gravel arches form, as shown by Mr. Mundy, except a very small part of it, in the center line at the bottom?

A. Form as Mr. Mundy has them; also inverted arches form, invert them right over.

949. C. Q. Have you not, in taking up the pavements, seen the gravel imbedded in the sides of the blocks half their depth?

A. Never.

950 C. Q. Or a considerable dent formed in the block, caused by the tamping of the gravel?

A. Nothing, except in the Nicholson pavement, taking that up in a strip. I have not seen it in any other. Very often, in the Nicholson pavement, the strip and gravel also works up to the surface.

194 951. C. Q. Have you ever had anything to do with amalgamators?

A. Never, sir.

952. C. Q. You do not know, then, whether a column of material as fine as it is pulverized by a stamp mill can be forced through a tube, or not?

A. Know nothing about it.

953. C. Q. Then there might be some theory or facts militating against driving the gravel and sand through a confined space that you don't know; but might there not?

A. Certainly.

954. C. Q. Have you ever taken up any portions of the street laid for use in Detroit, to ascertain whether or not the filling was driven below the blocks?

A. Never have taken any up, but I have seen it taken up in making connections for water, and so forth.

955. C. Q. Did you examine it carefully in that particular?

A. Not carefully, but I have seen it and examined it.

956. C. Q. How did you find it in those Detroit pavements?

A. I always found the gravel or filling penetrated to the bottom of the blocks, or to the ballast on the bottom of the blocks.

957. C. Q. Did you find it below?

A. I never examined it in regard to that. It might have been below.

Redirect examination by Mr. BECKER:

958. Q. How long had the pavement just spoken of been down; the last pavement which you examined in reference to whether the gravel extended below the blocks, of which you have just testified—how long is that pavement down?

A. Been down one, two, three, four years.

959. Q. You don't understand me. I am not speaking generally of this pavement I[2]; but how long was this pavement which you examined in answer to Mr. Bond's question?

A. One year, I should think. There were some repairs made on it a year after it was laid, and I had occasion to examine it at that time.

960. Q. Had it been down long enough for the blocks to settle more or less?

A. Thoroughly, I should think.

Recross-examination by Mr. BOND.

961. C. Q. In the experimental test of pavement, which you made to ascertain whether the gravel could be driven below the blocks, what grade of gravel did you use, in reference to its being free from sand, and in reference to its size?

A. Same gravel that we use constantly in our paving—Detroit pavement—for this same filling.

962. C. Q. Will you state what it is?

A. From the size of a pea up to three-quarters of an inch, I guess, the largest of it.

963. C. Q. Is it clean, or is there sand in it or dirt?

A. It is clean gravel from the gravel bank—bank gravel, screened.

By Mr. H. M. STOW:

Perfectly free from sand?

A. No; some trifle of sand in it; not entirely free.

195 JAMES D. C. WHITNEY, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows, on November 30, 1875:

Examined by Mr. BECKER:

964. Q. What is your name, age, residence, and occupation?

A. James D. C. Whitney; thirty-seven, nearer to thirty-eight years of age; reside at 463 Belden avenue, Chicago; in the business of sign-painting.

965. Q. Have you ever been connected in any way with any public office in the city of Chicago; if yea, when, and with what office?

A. Been employed by the board of public works. I was appointed to the position of assistant bookkeeper May 26, 1866, to the board of public works. April 20, 1867, I was appointed assistant secretary, which position I held until the 6th of June, 1875.

966. Q. Do you know the complainant, Mr. H. M. Stow?

A. I have seen the gentleman.

967. Q. Do you know Mr. William H. Stow?

A. Yes, sir.

968. Q. Do you know James K. Thompson, commissioner of the board of public works, in the city of Chicago?

A. I do.

969. Q. Do you remember at any time being present at any interview between Mr. William H. Stow and Mr. James K. Thompson, in which any conversation concerning the Thompson pavement of sixty-four was discussed or mentioned; if so, when and where was the conversation, and what was said?

(Objected to as immaterial and incompetent, for the reason that neither Mr. Thompson or said Stow are parties to this suit.)

A. I was present at an interview between Mr. Stow and Mr. Thompson, when a model was shown, and which Mr. Stow claimed was the same that Mr. Thompson laid at the approach to State street bridge.

970. Q. State when and where this conversation occurred.

(Objected to for same reason as before stated.)

A. It was in the secretary's room. I should say in April or May of 'seventy-four.

971. Q. Look at the model, Complainant's Exhibit Thompson 4, and state whether that is the model to which you referred in your previous answer (handing the same to the witness).

A. I can't say that this is the identical model; it was one that looked like that. There are no marks by which I distinguish it.

972. Q. In what respect, if any, did the model then introduced differ from Complainant's Exhibit Thompson 4, now in your hands?

A. No difference. I should judge this was the same.

973. Q. Please state what was said, either by Mr. Stow or by Mr. Thompson, at that interview, in reference to that model.

A. Mr. Thompson claimed that he had seen that pavement, meaning the Russia pavement, laid in New Orleans, in 'thirty-six.

974. Q. You refer to the hexagonal blocks?

A. Yes, sir; that part (referring to the hexagonal blocks), and the other he laid at State street bridge.

975. Q. You mean the square block part?

A. The square part; this part, marked Complainant's Exhibit Thompson 4.

976. Q. Did he refer to the pavement laid at the State street bridge, as his pavement of 'sixty-four?

(Objected to as leading.)

Question withdrawn.

196 977. Q. How did he refer to or designate the square block pavement?

A. As the same that he laid at the approach to State street bridge.

978. Q. Did he state any year in which he laid it?

A. I do not remember.

979. Q. Do you know what, if any, efforts complainant in this case has made to introduce his pavement in use in the city of Chicago previous to the year 'seventy?

A. Mr. Henry M. Stow I merely know by sight. Mr. William H. Stow, I have seen him about the offices for several years, agitating the pavement question, and endeavoring to get the authorities to use some particular style of pavement in which he was interested.

980. Q. Do you know what, if any, objections were made by any of the officers of the city to any of the Stow pavements?

A. I recollect hearing Mr. Burley at one time——

981. Q. Who is Mr. Burley?

A. Commissioner of the board of public works, at one time president, say the pavement would sink. That pavement laid on the ground, without any boards. The exact year I cannot give; but it was during the time the board of public works occupied the building 15 and 17 Wells street, now Fifth avenue.

982. Q. Was Mr. James K. Thompson, at that time superintendent of the board of public works, superintendent of streets?

A. He was.

983. Q. Who was present at the time Mr. Burley made that remark, if you remember?

A. Mr. Tinkham, the then secretary.

984. Q. Secretary of the board?

A. Yes, sir; but I do not remember who else.

985. Q. Had you occasion to pass over the approach to State street bridge often, near Kenzie street, since 'sixty-four?

A. I was over there quite a number of times; not as often as Clark street. I went Clark street on my way home.

986. Q. You went across frequently?

A. Yes, sir.

987. Q. Did you, during the year 'sixty-four, or subsequently, observe the kind of pavement that was laid there?

A. No, sir; did not take particular pains to notice.

Cross-examination by Mr. L. L. BOND:

988. C. Q. Which one of the Stows was it that was active in introducing new pavement in the city?

A. I saw Mr. William H. Stow about there.

989. C. Q. Was he at the office of the board frequently?

A. Quite so.

990. C. Q. Are not the full square blocks in the model Thompson 4 cubes?

A. They look to be.

991. C. Q. Was it not the form of the blocks, rather than the particular way of laying them, that Mr. Thompson referred to in the conversation had, when that or a similar model was present?

(Objected to, as calling for a conclusion of the witness, and not for the conversation.)

A. My recollection was that Mr. Thompson says, that the hexagonal is the kind of pavement that was laid in New Orleans in 'thirty-six; that I saw laid in 'thirty-six, and that (referring to it) the same that was laid at the approach to State street bridge. Did not say whether it was the form of the block or the method of laying, best of my recollection.

992. C. Q. Are there not two forms of blocks shown in that model?

A. There are.

993. C. Q. Was it not in reference to one form that he spoke of
197 the New Orleans pavement, and in reference to another form as being laid at the State street bridge approach?

A. He stated that was the kind he saw, pointing to the two kinds; one was the kind he saw (the hexagonal), and the other the kind he laid (the square).

994. C. Q. Was there, at that conversation, anything said as to whether or not there was a space between the cubical blocks in the State street pavement?

A. I do not remember anything of that kind being said.

Adjourned to the following Wednesday morning, at 10 o'clock.

Parties met at 10 o'clock, December 1, 1875, pursuant to adjournment; then an adjournment was had to 2 o'clock of the same day.

Parties met pursuant to adjournment, at 2 o'clock, on December 1, 1875.

HENRY M. STOW, the complainant, being first duly sworn, testified as follows, in his own behalf, on December 1, 1875:

Examined by Mr. JEWETT:

995. Q. Are you the complainant in this case, and the same Henry M. Stow to whom letters patent of the United States offered in evidence in this cause were issued?

A. I am.

996. Q. Where were you residing at the time your attention was first turned to the construction of street pavements?

A. I was residing at San Francisco, and I was temporarily at Sacramento, in 'sixty-five. Had a contract of putting down cobble pavement there.

997. Q. State the circumstances under which your attention was first called to that matter.

A. We were putting down a cobble pavement, and Jonathan Taylor came there, and put down a block of—one or two bolcks—one block, I think, of the Nicholson pavement; and the man that I was concerned with, or at least had the contract with, had control of all the cobble in the State of California that could be delivered at San Francisco at a

price that they could use. He had control of all the different quarries. They called him there, and he was my partner in this contract of paving cobble. He says to me: "Can you get up anything that will beat the Nicholson pavement—a wood pavement?" I first got up a machine for cutting off cobble, and tried that, to make an even surface of the upper end. Looked like Belgian blocks, almost. Experimented with using cobble and asphalt. Afterwards, got up the patent punch. I got a patent on (and laid it) 10th December, 1867, and 25th day of February, 1868.

998. Q. When did you first invent the two forms of pavement that are shown in the patent of December 10th, 1867, and February 25, 1868?

A. I made several samples, without making models, in the fall of '65. I think it was January, '66—either January or February, '66; I put down a sample of the pavement, that of the patent dated the 25th of February, 1868. Also made a model in March—think it was—I made a model, a model of the other pavement of the patent dated December 10, 1867; and in June and July I laid two samples of that in San Francisco. I think it was June or July; might have been July and August, 1867.

999. Q. When did you invent, or reduce to tangible shape, in the form of models or otherwise, the pavement described in your patent December 31, 1872?

A. I made a model in the winter of '69 and '70—I think it was in January, either January or February, that I made the model.

1000. Q. Where were you living, or where were you staying, at
198 the time of making that model?

A. I was stopping in New York, and I had the model in the second story of No. 48 Broad street, John Bryan's office.

1001. Q. Did you exhibit it to any one at that time?

A. Yes, sir. All the clerks, and different ones, saw it. It was a small model that I made myself.

1002. Q. Have you that model now, or do you know what has become of it?

A. I do not. All of our papers and everything we left there in the office—pamphlets, two or three hundred, and I dont know but thousands; and they took the different models of other inventions that I had. They moved to 39 Broad street, and put them up stairs, in the cockloft, and I cannot find anything. It has been years since. I cannot find anything of any of them—either our papers or anything else.

1003. Q. Have you made search for them?

A. Yes, sir; and I sent before I went there.

1004. Q. Have you ever put down, personally, the form of pavement described in that patent?

A. Never, only in putting down the Stow foundation pavement. Have left out the wedges in some places in putting it down, and driven the sand. Never laid down a regular sample of it. The patent of 'sixty-eight I put down two years before I got the patent.

1005. Q. Has any of the pavement described in your patent of December 31, 1872, been put down by any other person, either with or without your consent, to your knowledge?

A. I believe a great deal has been put down that I have not given a permit to put it down; but I don't know that I ever objected to anybody's putting it down, provided they paid royalty.

1006. Q. Where has it been put down?

A. I saw them put down in this city, on Clark street. I think it was 'seventy-two.

1007. Q. Has it been put down in any other city that you know of?

A. I was told it was put down in Detroit, but I have not seen it. And I claim there has been four hundred thousand yards of it put down in Washington. Of course I saw but very little put down—might have seen ten yards of it. They put down some in St. Paul, and paid me part of the royalty on it—at least so they write to me. They put it down, and paid part of the royalty. I was informed there was a pretty large amount of it put down in Indianapolis, and I sent a notice there, notifying them.

1008. Q. When was any of that pavement first put down in the city of Chicago, to your knowledge, or any of the pavements described in any of your several patents that are evidence in this case?

A. I think it was in 'sixty-nine we put down the first piece.

1009. Q. Where was that?

A. Intersection of Lake and State streets. I believe it was 'sixty-nine—I won't be sure—I think 'sixty-nine. Also a piece on Clark street.

1010. Q. Did you personally superintend the putting down that piece of pavement?

A. I did.

1011. Q. Can you fix, definitely, about the year that was done?

A. I cannot, because I took no memorandum at the time. Put down a small piece at the same time on the corner of—I think it was—Monroe, up here on Clark. It was a pavement of the patent issued December 10, 1867—the pavement that was put down there.

1012. Q. The large blocks, with wedge blocks between them?

A. Yes.

1013. Q. When did you first have interviews with the board of
199 public works in the city of Chicago in relation to putting down your pavement, about?

A. I came here several times in 1868 and 1869, trying to get the board of public works to allow me to put down a sample. I had a great many conversations with the board—different members of it, mostly with Mr. Burley. Mr. Burley objected to it strongly, stating that the blocks, setting directly on a sand foundation—their foundations here—with the fillings they were filling here, they would settle uneven, and could not answer at all. I produced certificates from San Francisco, and from Washington, of the quality of the pavement, and his answer was that "We know more about wood pavements than any and everybody else; we have put down more pavement, had more experience in wood pavements, than all the world besides." He afterwards agreed that I could put down a sample—that is, I could put down an intersection—I think it was—on Van Buren and Canal streets, upon giving a bond that any time they deemed it best we would take it up, and replace it with other pavement, with a board on the bottom. I told him to select the worst place in the city—the worst place he could find—the poorest foundation; and he thought that was the worst place he could find in the city, and he selected that. The contract was let, I believe, but the contractors were not going to pave it for two ar three weeks. And he said to telegraph would not cost them anything, and they would telegraph me—give me time to come from Washington here, to put it down, at that intersection, but did not telegraph me, and they paved it with pavement with a board on the bottom.

1014. Q. So the first pavement that was put down, to your knowledge, was put down at the intersection of Lake street and State, by you?

A. Yes, sir. Had several convesations with Mr. Thompson on the same thing, and his answer was the same as Burley's; that I could not

put it down on their foundation here, their sand foundation, and make it stand; that the only manner I could put wood pavement down on sand without a board foundation was to place the blocks close together—cover the whole surface.

1015. Q. Are you able to now recollect whether it was 1869 or 1870 that the pavement was put down by you at the intersection of Lake and State streets?

A. I now know it was not in 'sixty-nine, because I put a sample down in New York in 1869, in December, and I had not put down any here previous to putting down one there, so I know it could not have been in 1869.

1016. Q. When, according to your best recollection, was that pavement put down by you?

A. Put down in the summer of 'seventy, but I cannot give you the date.

1017. Q. Did you have any talk with Mr. Thompson, the superintendent of the streets of the city of Chicago, at those times or that time?

A. Almost every time I came to see the board, I went and saw him, and I had a lot of blocks sawed, and put in the city office buildings there on Wells street, I think—I think it was there, a year before that pavement was put down—anyhow they were put there before the pavement was put down, some time. When I came to put down the pavement they were all gone, I know.

1018. Q. Did you ever, at any time, know of the piece of pavement spoken of by some of the witnesses examined in this cause, put down at the north end of State street bridge, in the city of Chicago?

A. Never heard of a piece being put down until after I had a patent—of my patent of '72. I did not know where it was then at all. I never heard of the location until I heard it in the evidence.

200 1019. Q. Did you have frequent conversations with Mr. Thompson, who says he put down that piece of pavement at or about the time that you were here?

A. Almost every time that I went to see the board, I would go in to see Mr. Thompson and talk about pavement. I showed him a model I had, and left one or two of my circulars with him, pamphlets, and also with the board, and I went and talked with him, supposing he would have an influence with the board, to convince him that the pavement would stand, and be as firm or better than with a board. Once at least—I think twice, he told me that I could not make a pavement to sustain the blocks even, unless I covered the whole surface with my blocks, by putting the blocks close together; that I could not put blocks with my wedge between even, but that the blocks would settle uneven. I told him of the Broadway pavement of New York, of stone placed on sand similarly, and he stated that the stone being rough and placed together there was a friction on the stone that kept the stone surface even, by the friction of the sets of blocks against each other; that of wood pavement blocks was different; that they had not the ragged edge to hold on to keep them tight.

1020. Q. Did he, at any of those interviews, tell you anything about the piece of pavement put down by him at the north end of State street bridge?

A. As I stated before, I never heard of it at all.

1021. Q. After your patent of '72 was issued?

A. I would not say until after any patent. I never heard of it until after I made an application. I applied for my patent nearly two years

before a patent was issued. I might have heard of it in '72. The application was filed on the 10th day of January, '71.

(Question and answer objected to as not being the best evidence.)

1022. Q. What do you know, if anything, as to the issue of patent No. 88755, which, I suppose, is the De Golyer patent, isn't it?

(Objected to.)

A. This is dated April 6th, 1869. Patent issued to David L. De Golyer. I had been out of the city of Washington, and on my return I went to my patent lawyer, and Mr. De Golyer was there, and they told me they had just got a patent for a pavement, and described it to me. My patent lawyer being employed by Mr. De Golyer, I of course could not apply to him, but I went to A. B. Stoughton, to employ him, and give notice of an interference claim. It was a direct interference with my patent issued the 25th day of February, 1869.

1023. Q. Well, you may state what occurred.

A. To do that I must relate that the board of public works promised to make a specification—that was during the winter of '69—make the specifications in such a manner that I could put on the Stow foundation pavement. I came on here to find—we received that on the 27th of March—some time in March at any rate—that all the specifications mentioned that the blocks should be nailed to a board foundation. I applied to them—asked them if I could change that in my bid, and they said that I could not. They could only receive bids according to the specifications. I met Mr. De Golyer, and he asked me—he had been trying for some months to get a compromise—to allow him to get his patent. I told him, when I came, I would not take less than ten thousand dollars, but since I came here and was not allowed to bid on my patent, that I would withdraw my interference, and he was to have a patent before the 15th of April, upon his assigning to me the exclusive right to lay it on a sand or earth foundation and pay me five
201 thousand dollars. Under that consideration, I withdrew my interference. He obtained a patent on the 6th day of April, 1869.

(So much of the answer as refers to the interference objected to, for the reason that it is not the best evidence, there being a record of all interference matters in the Patent Office.)

1024. Q. Have you ever given a permit to the city of Chicago to put down any of the several kinds of pavement described in the several patents issued, which are in this examination referred to, and has the city paid you royalty therefor; if so, when, and under what circumstances?

A. I think it was in '71 the contract was, one of them. Either McBean or Steele told me that the board would not accept bids to lay the Stow foundation pavement without knowing what the city would be holden for its royalty. Upon that I wrote a communication and delivered it to them, addressed to the board of public works, I believe—either the mayor, or common council, or board of public works—I think the board of public works—that for all pavement put down that year in the city of Chicago I would only hold the city for ten cents per yard royalty. Most of the pavement laid that year, or most that I am aware of—at any rate I qualify that by saying the pavement laid on West Randolph, West Washington and Warren avenue, I think, were the three streets—was paid for by certificates, I think, from the city.

1025. Q. At that rate? At the rate of ten cents per yard?

A. At the rate of ten cents a yard on two of them, but Randolph street, I think, is paid in the contract. Messrs. McBean Brothers included the royalty in their bid, but I am not sure. That is my impres-

sion. No, I don't know as that is the case either. I don't know anything about it. I never collected any money from the city, but I think they paid that on those three streets.

1026. Q. In the testimony of some one or more of the witnesses it appears that this royalty, at ten cents a square yard, was paid one-half of it to you or your brother, and one-half to the contractor; will you state how that was?

A. I agreed with Mr. McMahon that for all the pavement he laid that year, I would repay to him one-half of his ten cents—that is, the city pay ten, and I repaid it to him five. At least he had half the royalty.

1027. Q. What was the inducement to do that?

A. To introduce the pavement. Afterwards Mr. McMahon came to me to say the other contractors must have the same terms. That is, the others were obtaining these contracts for the Stow foundation pavement, and I submitted to it, or consented. I offered licenses to McBean of the pavement covered by the patent of 1872, for twenty-five cents a yard, with a rebate of twenty cents, to introduce that. He did not accept a license, but De Golyer and Hubbard did—Hubbard or Hubbell. All of my licenses on that pavement invariably have been twenty-five cents per yard. In some cities I make a rebate, some more and some less, to get them to introduce the pavement; that is, to a contractor.

1028. Q. Are these licenses for a specific time?

A. Not for the life of the patent. They are none of them exclusive, and all of them, except one, has been for a specified time.

1029. Q. Less than the lifetime of the patent?

A. Yes, sir; that is, that I ever made of that patent; but none of them are exclusive. I merely license that particular person or company to lay the pavement on contracts that they obtain.

202 Cross-examination:

1030. C. Q. What was the highest rebate which you allowed under any of the licenses just mentioned?

A. Twenty cents of the twenty-five, and that was only in cases where the men were putting down either the pavement with the board on the bottom, to induce them to put down mine. In one case they were putting down mine. In the other case, they were putting down—I think it was on this street here, Washington street—and I am sure in all those streets they were putting down with a board on the bottom, and I reasoned with them that the royalty of five cents would be less than the cost of the board, and held that out as an inducement for the introduction of the pavement. I am not sure whether that was in '72 or '73.

1031. C. Q. What patent or patents were covered with that license?

A. If it was in '73, it was on the patent that was issued in '72. If it was in '72, it was on the patent of the 25th day of February, 1868.

1032. C. Q. Are you not able to tell what patents were licensed, and which are not?

A. I never have given a license to any person to my knowledge, that is, to my memory now, on the patent of 1868. I know this was in '73, because I had a copy of the patent when I talked with these men.

1033. C. Q. It included, then, did it, your patent of December 31st, 1873, Exhibit F, in this case?

A. That was the license I proposed.

1034. C. Q. You have frequently spoken of the Stow foundation pavement. When you use that term, to which of your patents do you refer, if any?

A. Well, I gave the name to the patent that I obtained of Dec. 10, 1867, but I claim that all of my patents that I ever obtained, I think, are on the Stow foundation; that is, of forming a foundation of sand in a manner that it will not settle uneven, and place my blocks upon it, and whatever forms of blocks that I have patents on. I believe I am the first man on record in the Patent Office, and I do not know of any other, that had laid a foundation of wood pavement upon that foundation, with spaces between the blocks, either filled by a wedge of wood, of stone, of brick, of gravel, or sand, or paper, or coal-tar paper. The patent covered all; at least. I have patents for different ones. I never saw any foundation made for a pavement previously to my making it in the manner that I made it, either by ramming it or rolling it. I have been told more than a thousand times that they never saw or used, in any manner, to make any kind of foundation for a pavement, to make that a foundation, rather, since I put the sample down in the city of Chicago, at the intersection of State and Lake streets. I have been told that in all the pavements the city requires them to make a foundation in the manner that I make it; that is, by ramming it all over, and find the soft places, ram it to make them as hard as the hard places.

1035. C. Q. Will you please define what you consider to be the distinguishing feature, or the distinguishing characteristic of the Stow foundation pavement, which you say enters into all your patents?

A. It is of ramming that foundation of sand, to make the whole foundation of equal solidity, or rolling it. I prefer rolling it to make it a perfect foundation. I have taken it where it has been dug up seventeen feet, filled it, and rammed it, and paved over it, without settling any more than the ground on either side of it that had not been disturbed for years.

1036. C. Q. You consider then, yourself, do you, the first in-
203 ventor, or discoverer, for a rammed foundation for a pavement?

A. I do, sir; for a wood pavement. I do not know whether there was any before for any other.

1037. C. Q. In what respect does that foundation differ from the foundation of an ordinary cobblestone pavement?

A. A cobblestone pavement, they grade the street, put their loose sand, and commence laying their cobble. When they get long, large cobble they dig out the sand and lay the cobble down. Small cobble they pull in the sand and raise that cobble above the large cobble; then when the rammer rams each he rams the small cobble down, and makes it an even surface. It is all of loose soil. The foundation of a cobble pavement is loose from four, in some instances, ten and twelve inches not rammed at all until they put on their cobbles and ram it. My first idea that I got of making my wood foundation, was from laying cobble pavement, that every cobble laid down is a wedge.

1038. C. Q. Have you not carried the wedge principle of your '67 patent into this patent, Exhibit F, being the patent of Dec. 31st, 1872?

A. The specifications and claim will inform you what I carried into it, and what I am claiming.

1039. C. Q. That is true; still I would like your idea what you carried into it.

(Objected to on the ground that Mr. Stow did not pretend to be an expert in these matters.)

1040. C. Q. Do you not know what you have invented, except as you read the specifications drawn by your attorney?

A. I know that I invented a pavement, and that is a description of the pavement, and the specifications of it, and the manner of laying it.

1041. C. Q. Do you understand the pavement described in this patent, Exhibit F; has in it the principle of wedging the foundation or not?

(Objected to.)

A. Under the blocks or between the blocks?

1042. C. Q. Under them.

A. I understand the principal of that pavement. If it is made properly, and as it should be laid down, that it will solidify the sand under the space, and at the edge of the blocks, if is properly rammed, as it should be rammed, in accordance with the specifications with the patent.

1043. C. Q. Do you understand that pavement laid with the filling not extending below the bottom of the blocks would be such a pavement as is described in your patent, Exhibit F?

(Objected to.)

A. I understand that you cannot lay a pavement, in accordance with that patent, on an ordinary foundation made in accordance with the patent, but that the filling between the blocks will go down on and into the foundation.

1044. C. Q. But would it be if it was not laid in accordance with this specification, with the blocks laid upon the sand foundation?

(Objected to.)

A. It would be. You could not evade the patent by improperly laying it, or a defective construction. I will state, you can construct pavement in the manner that you speak of; that all wood pavements that are placed on a sand foundation, the blocks settle from a half an inch to an inch and a half, according to the imperfect foundation, by the settling of this blocks and filling; that is, the filling between the
204 blocks remains; but the blocks pass down below that filling, because the travel of the teams is like the blow of the hammer. It is the continual rap that settles the blocks, and by that rap raises the filling; at least, it settles below the filling, and in some cases, if the filling was not rammed perfectly hard, would raise the filling between the blocks. In the Nicholson pavement—the idea was first told to me by Mr. Burley—the cause of the strips raising between the blocks, and forcing the gravel out of the Nicholson, was by the travel of the horses, and roll of the wheels from one block to another, which was like the tap of the hammer, and it would continually keep raising until the strips rose to the surface, as the blocks could not settle because of the board foundation; but on a sand foundation, as long as the filling is not perfectly hard, it allows mud to ooze up between the blocks, and the blocks have to settle by the wear of travel, and the longer the blocks of a pavement have been laid the further down the blocks will go, and the more the filling, if it is not perfectly hard, will rise; but, even if the filling does not rise at all, the blocks settle below the wedge formed by driving gravel between them. Even if it is very hard, it does it; so that a pavement constructed exactly in the manner described in that patent, upon a new filled street, may, in two or three years after, be found that the bottom of the block is lower than the gravel between the blocks. It has been proved by taking a level of the street when paved, and afterwards, after it is used. We find it in every place where you find a paved street, even with the board foundation, the pavement settles.

1045. C. Q. Does it on a rammed foundation?

A. It settles on the Stow foundation pavement, where the wedges are driven almost as far as you can drive them. You let it be wet, and dry, freeze and thaw, and the surface of the pavement will settle without wearing; even allowing for the wear from a half an inch to an inch, and

I often find more than a half an inch. The one way that I can account for that, and one way I cannot account for it, is when the pavement is perfectly made, when finished new, there are air places of rot in the blocks, and by covering them with sand, the water carries this fine sand down into the crevices, and the water passing down below, passing off in the drainage, in time the pavement becomes partially if not perfectly air tight. When it does that, and the water soaks out below, we have a pressure of fifteen pounds to the square inch, directly on the pavement, aside from all the teams passing. I do not say that it becomes perfectly air tight, but it becomes nearly so, by the fine sand and loam, and everything that is on top, being carried down by the water, until it fills up perfectly tight. Then the drainage of the water below keeps a weight on top of the ordinary pressure of fifteen pounds to one inch.

1046. C. Q. Does not that pressure hold the water and prevent it from escaping?

A. No; because by this drainage below the water passes out. I do not claim that it is fifteen pounds to the square inch, because I do not claim it would be a perfect vacuum below.

1047. C. Q. Did you surrender your patent of 1868 in order to get into an interference with DeGolyer?

A. No, sir; not to my knowledge.

1048. C. Q. How could you get into an interference between a patent already issued and the later application?

A. That is either a legal or a Patent Office question that I cannot answer. The notice was given and Stoughton served a notice; I don't know what it was; and on that, I suppose it was on that. General Spear served a notice on Mr. DeGolyer's attorney, appointing a time to take testimony. There was no testimony taken on either side; never
205 came to any trial; lay that way until I withdrew my interference; I never surrendered a patent to my knowledge; what was done was done by my attorney, and the proceeding is one that I am not familiar with.

1049. C. Q. How long before you applied for your patent, which was issued December 31st, 1872, did you make the model that you spoke of?

A. Nearly a year before I made that, with one or two other models, one of wood and Portland cement filling between. I was then much engaged in putting down and introducing pavement in New York. Putting this sample down here and in New York, and going to Elizabeth, Newark, Baltimore, and Philadelphia, and Buffalo, and Detroit, to get it introduced, was the cause of my taking the delay until the fall or winter, when I was not engaged in that line.

1050. C. Q. In all of your samples, there were none of them laid in the manner described in this patent, were there?

A. All pavement that I laid previous to this year, I think all the pavement that I ever laid previous to this year, the samples were of the first patent issued, except the sample laid under the patent of February 25th, 1868, which is the first piece I laid in San Francisco, in 1866, except in laying the Stow foundation pavement, in several instances, left the wedges out in the spaces and drove gravel, but to no great extent; merely an experiment to see whether it settled more than where the wedges were in.

1051. C. Q. How much of the pavement described in your '68 patent did you lay in '66?

A. I laid a strip on the corner of Battery and Broadway, in the city of San Francisco. I think it is about thirty feet long, and the width of the railroad track, between the tracks. That was laid with strips be-

tween; part of them left in, and part of them taken out, that was. I did not use the movable strips in that case. I had not gotten it up.

1052. C. Q. How much did you lay of your '67 patent in San Francisco and Sacramento?

A. I laid in San Francisco, I think, about—I think it was forty feet front, out on the centre of the street, on the corner of Front and Clay streets, and a strip twenty or twenty-five feet—anyhow, between twenty and thirty feet—on Market street, from the curve to the railroad track. That is all that I have ever laid in San Francisco myself. There has been more laid there, but that is all I laid.

1053. C. Q. When was that?

A. That was in 1867, previous to October the twentieth. That was the patent of 1867.

Redirect examination by Mr. JEWETT:

1054. Q. How much pavement, constructed according to your patents, or either of them, is now laid in San Francisco?

A. I cannot tell you.

1055. Q. Well, as near as may be?

(Objected to as immaterial.)

A. A number of thousand yards, but I do not know anything about it. I have been there, but I have never examined any of it. It is laid by the City Paving Company there.

1056. Q. Laid under a license from you?

A. I have a partner in the pavement in San Francisco, and the agreement was I was to have a certain royalty, which was, I think, a cent and a half a foot, but he is a first-rate man, and he says that the paving company did not make any money, and I never have forced any royalty.

1057. Q. Acting under a license from you; laying the pavement under an agreement with you?

A. Yes, sir; not any violation of patent.

206 1058. Q. What kind?

A. The pavement that I believe they laid was the patent of 1867. I do not think they laid any other of my patents; not to my knowledge.

Adjourned to nine o'clock next Thursday morning.

Parties met pursuant to adjournment, on December 2d, 1875.

GEORGE T. PITKIN, a witness introduced on behalf of the complainant, being first duly sworn, testifies as follows, on December 4th, 1875:

Examined by Mr. JEWETT:

1059. Q. What is your name, residence, and occupation?

A. George T. Pitkin; residence, 176 Warren Avenue; connected with C. L. Woodman in the baking business.

1060. Q. Do you know Mr. J. K. Thompson, who was for some years the superintendent and officer in the employ of the board of public works in the city of Chicago?

A. I do, sir.

1061. Q. Have you ever, at any time, had any interviews with him, with respect to the pavement of streets or use of wooden blocks for the purpose of paving streets?

A. I have had one interview only.

1062. Q. Will you state the occasion of that interview and about the time when it occurred?

A. Early in February of 'seventy-four, I received a letter from a Mr. Armstrong, in Michigan, making inquiries regarding pavements in general, and wishing me to call upon Mr. Thompson, or upon the board of public works, see some member, and make some inquiries regarding a pavement that is laid here, which he said was called the "Free pavement," and I called upon Mr. Thompson.

1063. Q. Did you show him the letter which you had received?

A. I did.

1064. Q. That was about the first of February, 1874?

A. That was about the middle of February, 'seventy-four, on the sixteenth, I think, that I called upon Mr. Thompson.

1065. Q. And this interview was where?

A. At the office of the board of public works.

1066. Q. What reply, if any, did Mr. Thompson make to your inquiry?

A. I first showed him the letter and then asked him about this Free pavement, and what it was, and he said he did not know anything about the Free pavement. He did not know as it was called that. Hadn't heard it. And then I asked him particularly in regard to the pavement that he had laid, and he said that he had laid some pavement in '64, I think, composed of square blocks laid on the ground, and he said that was virtually the same thing that Mr. Stow was laying, and I made the remark to him that it was not the same thing. If I remember correctly, the pavement that Mr. Stow laid, it had gravel beneath and between the blocks. While he said that he laid that last close together, the blocks were, and he said that makes no difference. That was in reply to a question of Armstrong's whether it would be safe for him to go on and lay the pavement without paying royalty to Mr. Stow, and when I asked him whether he advised Mr. Armstrong to go on and lay the pavement, about securing himself against the royalty, and he said he would not advise him to do that. He would advise him to wait until Mr.
207 Stow's suit was decided. He had either commenced a suit, or he had understood was about to commence a suit against the city for damages.

(Mr. Bond objected to the answer for the reason that the conversation between the parties, persons not parties to the suit, is irrelevant and improper.)

1067. Q. Did you make, at the time, any note or memorandum of the conversation as it occurred between yourself and Mr. Thompson?

A. I did, sir.

1068. Q. Have you that in your possession?

A. I haven't it with me; I have it in my office.

1069. Q. Can you and will you produce it before the examiner, to be attached to your deposition, marked Exhibit Pitkin 1?

A. I will.

1070. Q. Did you read, or exhibit to Mr. Thompson for him to read, and, if so, did he read the letter which you have received from Mr. Armstrong?

A. Yes, sir; I first read it to him and then he wished to read it himself, and I handed it to him and he read it.

1071. Q. Is the memorandum of the conversation with Mr. Thompson made upon that letter?

A. It is.

1072. Q. You will produce the letter and memorandum together. Is anything said by Mr. Thompson in that conversation in relation to pavement laid at the entrance of the LaSalle street tunnel?

A. Yes; he said that there was some laid at the entrance shortly after the fire.

1073. Q. Where were you residing, Mr. Pitkin, prior to the Chicago fire of 1871?

A. 251 Indiana street.

1074. Q. Did you have frequent occasion to cross State street bridge for four or five years prior to that time?

A. I did, sir; from two to six times a day.

1075. Q. What is your recollection as to the kind of pavement laid between the bridge and Kinzie street?

A. Well, I had always supposed it was an ordinary plank pavement; never paid particular attention to it, but never noticed anything about it tending to show it was different from other planking.

1076. Q. Between '64 and '71, how frequently did you cross or travel over that?

A. I cannot say that I travelled over the pavement, although I passed beside it.

1077. Q. Passed over that portion of the street, then?

A. Two to six times a day. Never less than two, excepting, perhaps, Sundays sometimes.

1078. Q. Were you with Mr. Woodman during those years?

A. I was with Mr. Woodman from the 27th of January, '71, then located at 230 and 232 Kinzie street, just by the approach to State street bridge.

1079. Q. How near was that? Did you remain there in connection with Mr Woodman in the business of the firm of C. L. Woodman & Co. from the time you mentioned up to the time of the fire?

A. Yes, sir.

1080. Q. How near was that to State street?

A. Within about 100 feet I should judge; 80 to 100. It is the depth of that block there, and the width of an alley.

1081. Q. Did you frequently pass over that portion of State street which lay between Wright's livery stable building on the east and the Turner block on the west of State street and just south of Kinzie?

A. Yes, sir.

1082. Have you at any time observed the laying of a wooden block pavement upon a sand or gravel foundation in the city of Chicago?

A. Yes, sir.

208 1083. Q. About when and in what place?

A. I have seen the pavement laid at the intersection of Lake and State streets, and various other places in the city; on Clark street, Dearborn——

1084. Q. Did you notice the laying of the pavement on Dearborn street, between Randolph and Madison?

A. Yes, sir.

1085. Q. When was that?

A. I could not say positively when the pavement was laid.

1086. Q. Did you pay attention to that pavement upon that street and between the streets named at the time it was cut up for the purpose of laying water pipes in Dearborn street?

A. I did, sir.

1087. Q. About when was that?

A. That was in, I think, May, '75.

1088. Q. Did you notice particularly enough to observe whether or not the gravel between the blocks went down to the sand foundation and into it?

A. Yes, sir; I noticed it did. My attention was first called to the fact by hearing considerable talk in relation to that matter, and I saw them taking up the street there for the purpose of laying water-pipes, and I paid particular attention to the fact, and I noticed that all along for the distance of half a block there I could distinctly see gravel driven down below the sand, kind of in the formation of a wedge.

1089. Q. What distance below the bottom of the blocks did the gravel extend, according to your recollection?

A. I should think, as near as I can remember, from three-fourths of an inch to an inch. I did not take particular pains.

1090. Q. But this seemed to be tolerably uniform?

A. It did.

Cross-examination by Mr. BOND:

1091. C. Q. Have you any interest in any of the Stow patents?

A. Not in the least, sir.

1092. C. Q. Who called your attention to the point as to whether the gravel went below the blocks or did not go below them?

A. Well, my attention was first called to it by the matter being discussed in our office, and one day the matter was being discussed, and Mr. Stow says, "If you want to see some of it, you can see it by going up on Dearborn street," and that day, during the day, some hours afterwards, I came up Dearborn street and examined it.

1093. C. Q. How long had the opening for the water-pipe been made before you had examined it?

A. Well, a very short time; perhaps in some places a day or so, and in others perhaps not an hour. The men were at work then taking up the street.

1094. C. Q. Did you go down to examine it to see whether the gravel which appeared to be below the blocks was gravel which had simply fallen over or which had been driven down?

A. Yes, sir; I did; stooped over and felt the side of the gravel with my finger.

1095. C. Q. It had dirt and sand below the blocks for the distance named by you, had it?

A. Yes, sir.

1096. C. Q. Do you know who laid the pavement?

A. I don't.

1097. C. Q. Know when it was laid?

A. I am not positive; I think it was laid in '73.

1098. C. Q. Were there any wooden wedges in the pavement?

A. I did not see any.

1099. C. Q. So far as the pavement of North State street was concerned, did you notice any difference in the pavements except that
209 which you supposed to be plank?

A. Well, I saw some laid on Indiana street and some on Illinois street that were laid with a board foundation.

1100. C. Q. The question was North State street.

A. North State street, I did not.

1101. C. Q. Was the pavement which you supposed to be plank of uniform appearance so far as you noticed?

A. Seemed to be; yes, sir.

1102. C. Q. Was not there a very large portion of that approach actually plank?

A. I think it was.

Redirect examination by Mr. JEWETT:

1103. Q. Was it easy to tell the difference between the plank pavement and the ordinary wood pavement that is put down in our streets here?

A. Yes, sir.

1104. Q. According to your recollection, was it or not the ordinary wooden block pavement between Kinzie street and the approach?

A. According to my recollection it was not.

SYLVANUS W. FALLIS, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows, on December 4th, 1875.

Examined by Mr. JEWETT:

1105. Q. What is your name, residence, and business?

A. My name is Sylvanus W. Fallis; my residence is 587 West Ohio street; and my business a wood-engraver.

1106. Q. State what your firm was, or with what firm you was connected in 1870.

A. I was foreman for Mr. William D. Baker.

1107. Q. What was Mr. Baker's business?

A. Wood-engraver.

1108. Q. Did you or Mr. Baker execute any order in wood engraving for Mr. Stow, relating to what was termed Stow's improved pavement, some time in the year 1870?

A. We did.

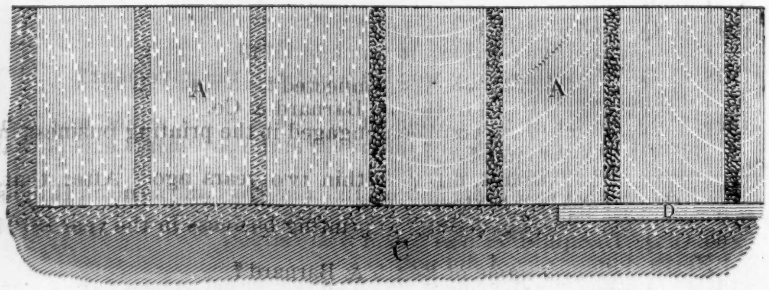
1109. Q. Or at any other time?

A. 1870 we did, and have done since.

1110. Q. Look at this paper which is now shown you, and which has printed in large letters the words, "Stow's improved pavement," and state whether or not you engraved the wood from which that impression was made, or like it?

A. I did engrave the wood from which this impression was made.

Stow's Improved Pavement.



A—Gravel. C—Sand foundation.. D—Board foundation.

1111. Q. About when did you do it?

A. It was in the summer of 1870. I do not remember exactly what month, but I know it was in the summer.

1112. Q. At whose instance did you do it?

A. At the instance of Mr. Baker—at the instance of Mr. Stow for Mr. Baker. I took the order from Mr. Stow, personally, myself.

1113. Q. Was the impression from the wood engraving which you made also made in Mr. Baker's office?

A. Yes, sir.

1114. Q. That one of the impressions? (Handing it to witness.)

A. That is not one of the impressions made in Mr. Baker's office. This is printed by the printer. We print a proof always before a cut is taken away from the office.

1115. Q. Who engraved that?

A. I did, myself.

1116. Q. Do you know what has become of the cut, or engraved block?

A. I do not.

1117. Q. Don't know where it went to?

A. No, sir; delivered it to Mr. Stow. It was in Mr. Stow's possession. We delivered it to Mr. Stow before the fire.

210 1118. Q. Do you know how much was paid for that engraving?

A. My memory is, we charged him four dollars for it.

1119. Q. You certain about the date?

A. Well, not to a day; but I am positive about the date being in summer of 1870. It was before the fire. It was done in the old office, corner Clark and Randolph streets, opposite the Sherman House; the northeast corner, it was. We removed from there in the spring of '71—May, '71. I remember of doing it in the old office.

(Paper above referred to introduced as Exhibit Fallis 1.)

Cross examination by Mr. BOND:

1120. C. Q. From which one of the Stows did you obtain the order?

A. This gentleman here, Wm. H. Stow.

FREDERICK BARNARD, a witness introduced on behalf of the complainant, first duly sworn, testified as follows on Dec. 4th, 1875.

Examined by Mr. JEWETT:

1121. Q. What is your name, residence, and occupation?

A. Frederick Barnard; residence, Du Page County.

1122. Q. What is your business?

A. Printer.

1123. Q. With what firm are you connected?

A. A member of the firm of Beach, Barnard & Co.

1124. Q. How long have you been engaged in the printing business in Chicago, in that firm name?

A. As Beach & Barnard, up to within two years ago. After that, Beach, Barnard & Co. Sixteen years.

1125. Q. Were you engaged in the printing business in the year 1870?

A. Yes.

1126. Q. Same firm name of Beach & Barnard?

A. Beach & Barnard.

1127. Q. Did your firm print the paper now shown you, and which is marked as Exhibit Fallis 1, purporting to be a cut of Stow's improved pavement?

A. Yes; I printed this myself, for Mr. Stow.

1128. Q. When did you print it?

A. Well, I printed this before I printed another one which we have

a record of. Seems to me it was in the heated time of summer. It was before the fire.

1129. Q. Do you know definitely when you printed the cut—the second cut to which you have referred?

A. I only know by reference to our books.

1130. Q. By reference to your books, when does that seem to have been printed?

A. That seems to have been printed in December.

1131. Q. December of what year?

A. In 1870.

1132. Q. Have you in your hands one of the impressions printed last, to which you have referred?

A. It seems to me not. Seems to me there is another cut. Seems to me that is the impression. Yes, it is so stated here, "the improved roadway." Now there is another cut, isn't there?

By Mr. STOW. There is a number of other cuts.

By the WITNESS. Of course I cannot tell the date unless I refer to the books, and I did not bring along the item in these matters. Mr. Stow got the items. I don't know how in the world this ever came to be omitted from our job-book. It is not our custom to take work, no matter how little a job, but what we put it down on our books.

211 1133. Q. The paper which you now hold in your hand is a memorandum taken from your books?

A. Yes, sir.

1134. Q. What does that show, if anything, in respect to the time when these cuts were printed by you?

A. This shows the impressions of the roadway in '70, Dec. 29th, one dollar. That must have been that. I think there is another cut. That means another cut.

1135. Q. Another one than this you hold in your hand now?

A. Yes; spiked roadway, it seems to me.

1136. Q. Were the cuts which you hold in your hand printed before or after the date stated in the memorandum made from your books at the date of the printing?

A. This was printed after; this was printed before. This is the first cut I ever saw.

1137. Q. What is the date, as appears by your book, in which the cut referred to by you is charged?

A. Dated Dec. 29th, 1870.

1138. Q. Now which one of the other cuts, which you hold in your hand, was printed before that time, according to your recollection, and which afterward?

A. The one marked Fallis 1.

1139. Q. Was printed before, was it?

A. That was printed before.

1140. Q. According to your recollection, was it or not the first impression made by you for Mr. Stow, of that kind of pavement?

A. According to my recollection, that is the first impression.

1141. Q. Now state, as nearly as you may be able to from recollection, the time when that was printed.

A. Well, it seems to me it was in the summer time.

1142. Q. If it was in the summer time, and before Dec. 1870, what year was it probably printed in?

A. Must be in '70. I remember doing this job, and altering it over or Mr. Stow myself. Such little tinkering matters as this I never put n the hands of journeymen, because they have not got the patience for

such work as this as it requires. So I remember this work. I remember setting up the type; my anxiety to brush it up.

1143. Q. Do you remember whether Mr. Stow waited there while setting it up?

A. Yes, he waited.

1144. Q. Did you strike off any considerable number at that time?

A. No; I think not.

1145. Q. How many?

A. Half a dozen, and he put them away in his pocket book.

1146. Q. Which Mr. Stow was it that did the business with you?

A. Wm. H. Stow.

Cross-examination by Mr. BOND:

1147. C. Q. Was there anything in the form of the circular or other matter, attached to the brown cut, Exhibit Fallis 1, except what is shown on the exhibit?

A. Nothing at that time.

1148. C. Q. You think there were about six of them?

A. Well, I think there was no circular attached. That is the whole of the first impression. That is my recollection. That is to say, Mr. Stow visited us to get a proof of it in that shape.

1149. C. Q. That printed in December, '70, had something besides the cut, had it?

A. I think it had what is something similar, two lines. Something similar to the one in Fallis 1.

212 1150. C. Q. That you think was a different style pavement, as shown in Fallis 1?

A. Yes; it seems to me that was a different one. It was a deeper cut wedge.

The complainant offers in evidence a contractor's bond, and contract and specifications for paving, in the city of Chicago, which is marked Complainant's Exhibit L. The parties whose names appear are signed to the contract, being the proper officers in the city of Chicago for executing street contracts—Prindiville and Thompson, whose names are attached, who were at that time commissioners of the board of public works in the city of Chicago.

(Counsel for defendant objects to the exhibit being used in evidence, for the reasons that it is not a contract referring to any of the streets named thus far in the proceedings in this suit, nor signed by any of the parties who had let or done work on the streets concerning which complaint is made; but that is a contract for paving bridge approaches, and not for paving street pavements.)

H. M. Stow, on December 4th, 1875, desires to add to his deposition in reference to the license granted by him under his patents, as follows:

I granted license to John Bryan, of the city of New York, for the State of New York, States of New Jersey, Georgia, Kansas, and some other States, and I think in the State of Missouri, city of St. Louis; at any rate, Memphis, Boston, Baltimore, and Philadelphia, in the years 1869 and '70, which licenses have since been canceled. These were licenses, I think, during the life of the patent. In the license made to Robinson & Co., of Detroit, I licensed them to lay down a certain pavement, covered by any and all of my patents issued previous to the first day of July, 1875, during the life of the patents, at twenty-five cents per yard, with a rebate of eighteen cents. The price of licenses to John Bryan were, I think, all of them thirty cents per yard, without

any rebate; the most, and I think all of them, were that price. New York and New Jersey were thirty-five cents.

Adjourned to Tuesday, Dec. 7th, 1875, at 2 p. m.

Parties met on Tuesday, Dec. 7th, 1875, pursuant to adjournment.

JOHN MCARTHUR, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows on Dec. 7th, 1875:

Examined by Mr. JEWETT:

1151. Q. What is your name?

A. John McArthur.

1152. Q. Were you a member of the board of public works of the city of Chicago in the years 1869 and '70?

A. Yes, sir.

1153. Q. For how long prior thereto had you been connected with the board as a member?

A. From the first of April, 1866.

1154. Q. Did the board of public works have charge of streets and street improvements of the city while you were connected with it?

A. Yes, sir.

1155. Q. During that time what had been the form of wooden pavement that had been employed in the city, as far as you know?

A. During the time I was in the board the pavement laid down was laid on flooring, square blocks 3x6, laid on flooring, with an inch space between, filled with gravel and tar.

1156. Q. Any strip between the blocks?

A. Not after I came into the board. We discontinued the use of the strip.

1157. Q. When did you first know of any pavements being laid
213 in the streets of the city of Chicago upon sand and sand-gravel foundation without the introduction of any board flooring?

A. I think in the fall of 1868 we laid the intersection, corner State and Lake.

1158. Q. For the purpose of being certain about the date, General, I will ask you whether you are positive as to its being 1868 or 1869?

A. I am not positive.

1159. Q. From the paper shown you, are you able to state when the ordinance authorizing the laying of that pavement was passed?

A. This says November 15, 1869, if I looked right.

1160. Q. Then, when probably was the pavement itself laid?

A. Oh, I should think within thirty days thereafter.

1161. Q. The latter part of 1869 or first part of '70?

A. Yes, sir; it would depend somewhat on the weather. I do not remember now exactly.

1162. Q. At whose instance was that pavement laid in the way it was, and without any board flooring underneath the blocks?

A. At the instance of Mr. Stow.

1163. Q. Do you know the first name?

A. Well, I don't remember the initials; I used to call him the "California Stow."

1164. Henry M. Stow?

A. Yes.

1165. Q. Who first called the attention of the board of public works of the city of Chicago to the probability of laying the wooden block pavement upon a sand or gravel foundation, so far as you know?

A. I think William H. Stow was the first that spoke of it to the

board. Whether it had been talked of previous to my going into the board, I have no knowledge.

1166. Q. Do you remember that the board of public works, some time in the year 1869, was waited upon by Henry M. Stow and one J. H. Moore, who was then the superintendent, in Chicago, of the Pittsburg and Chicago Railroad Company?

A. I do.

1167. Q. What was the subject which they brought to the attention of the board at that time?

A. It was to the method of laying the wooden block pavement without flooring, using wedges between the blocks.

1168. Q. Was that method of laying the pavement adopted at that time by the board; and, if not, why was it not, if you remember?

A. It was the opinion of the board at that time that in the newly filled streets we required a wooden flooring to keep the blocks from settling into the mud.

1169. Q. And was the proposition then accepted or rejected by the board?

A. Rejected, I think, at first.

1170. Q. Was the opinion of the board during your connection with it, changed in that respect?

A. Yes, sir.

1171. Q. And how did they subsequently come to lay the majority of the pavement that was laid, the wooden block pavement?

A. We laid at the intersection, as I said before, at the corner of Lake and State, as an experiment, and it proved satisfactory.

1172. Q. And after that experiment, how was the pavement of the city generally laid, with or without a board flooring?

A. A portion of it was laid on this method. I do not remember what portion. Generally determined by the opinion of the property owners to some extent, what kind of a pavement they wanted.

1173. Q. Was this form of wooden block pavement, to wit,
214 the blocks laid upon a sand and gravel foundation, without the interposition of any board, petitioned for by any property owners in any part of the city, as you remember?

A. Yes.

1174. Q. Can you designate any streets upon which it was laid in pursuance of such petition?

A. Market street, Warren avenue, and Washington, and I was thinking a portion of Milwaukee avenue, but I am not certain about that.

1175. Q. Prior to the laying of the pavement at the intersection of Lake and State streets, had you ever known of any pavement—any wooden block pavement—laid in the city without a board and plank flooring underneath the blocks?

A. Yes; I was told by the superintendent there was an intersection laid without flooring, but I cannot now recall where it was.

1176. Q. Was it, or not, at the entrance of the LaSalle street tunnel, at or near Michigan street?

A. Oh, it is previous to the building of the LaSalle street tunnel.

1177. Q. Was it claimed to have been laid at the north end of State street bridge, at the time the approach was first constructed?

A. I cannot recall. It was at the approach of some bridge, I think.

1178. Q. I will confine the question now to your own actual knowledge of the laying of the pavement, and did you know personally of any pavement of that character, prior to the laying of the pavement at the intersection of State and Lake streets?

A. No, sir.

1179. Q. Who was the superintendent from whom you received this information?

A. J. K. Thompson.

1180. Q. Are you able to state, and, if so, state about the time when he made that communication to you?

A. About the time of the discussion of this laying of this Stow pavement.

Cross-examination by Mr. BOND:

1181. C. Q. About the time of the first discussion?

A. First discussion, yes.

1182. C. Q. Did not Mr. Thompson always contend that Nicholson and others who attempted to exclude the water from the blocks, were on a false theory—how their theory was to keep the water in?

A. I know that he claimed that the blocks laid on the solid ground made as good a pavement without a flooring as with it, but he agreed with the board that the newly filled streets required flooring. That is my recollection of the information we got from him when I went into the board.

1183. C. Q. For what reason was the board of the opinion that the flooring was better for the newly filled streets?

A. It was distributing the weight of the gravel more evenly over the soft filling, and not settle so much as if it was laid without flooring.

1184. C. Q. Were not the newly filled streets liable to settle further and to settle more uneven than an older street which is simply dressed?

A. Yes, oh, yes.

1185. C. Q. Did not Mr. Thompson also contend that if rounded cobblestones would stand on sand, angular blocks would?

A. Yes.

Redirect examination by Mr. JEWETT:

1186. Q. In laying the pavement upon North Clark street, was not a double board foundation used under the blocks, in '68?

A. Yes, sir.

215 1187. Q. At whose instance or suggestion was that double flooring laid?

A. I cannot say now; I cannot remember who urged it first. It was agreed upon by the board.

1188. Q. Did Mr. Thompson have anything to do with the suggestion?

A. I cannot remember.

1189. Q. Was there or not, in the years '70 and '71, in the office of the board of public works, a section of pavement represented by the model marked H, and which is now shown you?

A. I have seen a model of that kind of pavement in the office of the board of public works. I do not remember what time.

1190. Q. Do you know who brought it there?

A. I think it was Mr. Stow.

1191. Q. Was it in the office, according to your recollection, at the time of the fire in '71?

A. I believe it was.

WILLIAM COX, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows on December 7, 1875:

Examined by Mr. JEWETT:

1192. Q. What is your full name?

A. William Cox.

1193. Q. Residence and business?

A. 15 Harmon court; contractor at present.

1194. Q. Did you have occasion to notice the wooden block pavement on Dearborn street, in the city of Chicago, between Randolph and Washington, when it was broken up for the purpose of laying water-pipes in it, in the spring of '74 or '75—last spring?

(Objected to for the reason it is new matter, and not rebuttal.)

A. Yes, sir; I took particular notice of that.

1195. Q. Do you know who laid that pavement?

A. It was called the Stow pavement.

1196. Q. I mean do you know who laid it down—what contractor?

A. No, sir; I do not.

1197. Q. Did you have occasion to notice, when the pavement was broken into for the purpose of laying the water pipe, the distance under which the gravel between the blocks extended down?

A. Yes, sir; I believe it was almost solid; the blocks were thus reversed and the gravel made underneath it.

1198. Q. Did the gravel or not, in the pavement you saw broken open, extend below the wooden blocks?

A. It did.

1199. Q. How far was this, as you made an examination below?

A. About as far below, I should think, as the distance between the blocks.

1200. Q. What was the extent of your examination?

A. Well, I hitched my horse on the street, and walked along to examine it for my own curiosity, nothing else; I had no object in it at all at the time, feeling interested in the Chicago pavement.

1201. Q. Was it a single space between the blocks or a good many?

A. No, sir; a number of feet; in fact nearly the whole block. Although I was little acquainted with the pavement previous to that, I was never so familiar as I was afterwards.

1202. Q. There was no board flooring under the blocks in that pavement?

A. No, sir.

216 Cross-examination by Mr. BOND:

1203. C. Q. When was the pavement on Dearborn street laid?

A. I should think it was laid in the spring of '75.

1204. C. Q. When was it opened?

A. In the spring of '75.

1205. C. Q. When was it opened for the water pipe?

A. It appeared to be immediately after, probably a month or six weeks; something of that kind. I regretted to see the street torn up. It must have been a very short time.

1206. C. Q. What part of Dearborn street was this?

A. Between Washington and Madison.

1207. C. Q. How came you to notice the pavement in reference to this particular point, as to whether or not the gravel extended below the bottom of the blocks?

A. I got out of my buggy and examined it.

1208. C. Q. How did you come to do that?

A. Well, I felt an interest in Chicago pavements. I always have.

1209. C. Q. Isn't it quite a common, frequent occurrence to open pavements for water-pipes and sewers?

A. Yes, sir.

1210. C. Q. Have you been in the habit of getting out and examining the pavements whenever they were cut open that way?

A. Yes, sir; in an official capacity. I have taken up, I suppose, one hundred feet in my life.

1211. C. Q. Did you ever find any other pavement where the filling went below the blocks?

A. No; I did not know of any that was driven down below the sides and appeared again at the bottom, although I examined many pavements.

Redirect examination by Mr. JEWETT:

1212. Q. You have no interest in any wooden pavement of any kind?

A. No, sir; only in common with the citizens of Chicago.

1213. Q. In this pavement which you say you have taken up, to a considerable extent, was there or not, generally, a board flooring under the pavement?

A. Yes, sir.

WILLIAM H. CARTER, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows on December 7th, 1875:

Examined by Mr. JEWETT:

1214. Q. Your full name, Mr. Carter, and residence, and business?

A. William H. Carter; residence now, at 69 Twenty-second street. My regular profession is a builder. I have not worked at that much the last seven or eight years.

1215. Q. Were you at any time, and, if so, at what time, a member of the board of public works of the city of Chicago?

A. I was a member from February, '68, to February, '74, I think, sir. I was in there six years.

1216. Q. During that time did the board of public works have charge of the streets and pavement of the city?

A. Yes, sir.

1217. Q. Do you know Henry M. Stow?

A. Yes, sir. Yes, sir; I know him.

1218. Q. How did you first become acquainted with him—in what connection?

A. He used to come around to the office at the time I was in the board, in connection with street pavements.

1219. Q. What was the feature of the pavement which he rep-
217 resented and in relation to which he conferred with the board?

A. It consisted of blocks—ordinary blocks—laid upon the ground, with a wedge between them, drove down about half way, and the remainder filled in with gravel.

1220. Q. State as near as you can, Mr. Carter, the first time when this method of laying wooden pavement came to your knowledge, as a member of the board?

A. Do you mean when it was laid?

1221. Q. No; when this method of laying came to your knowledge?

A. I could not remember the exact time; so many of these things brought to our notice when I was on the board. Continually something of that kind coming. I have no correct knowledge of the dates.

1222. Q. Do you remember about the time when the pavement was

laid, on a sand, or sand and gravel foundation, at the intersection of Lake and State streets?

A. I do, sir.

1223. Q. About when was that laid?

A. Well, I should judge that was about not far from seventy; somewhere along there; might have been a little later.

1224. Q. Under what circumstances was that piece of pavement laid; I don't mean the particulars, but in a general way; in a few words?

A. If I understand it, Mr. Stow was anxious to put down a sample of his pavement, and he had conferred with the board of public works, I think, several times in regard to it. Hadn't anything occurred to give him an opportunity, and finally there was some action taken by the common council ordering the board to give him an opportunity to put it down in some place. That happened to be the place designated, so far as I recollect.

1225. Q. Was that, so far as you know, the first wooden pavement laid in the city of Chicago without a board flooring or planking?

A. So far as I recollect, it was, sir. There might have been others that I don't know anything about.

1226. Q. In laying the wooden block pavement, in 1868, on North Clark street, do you remember whether one or two boards were used between the blocks?

A. I think there was two boards used in some part of the way; I could not say to what extent.

1227. Q. Do you know to what extent?

A. No, sir; I could not tell exactly, unless it was because property holders wanted it. The board used to confer with property-holders on the streets as to the kind of pavement and manner of being laid, that was not going to detract from its substantial practicability, and so forth.

1228. Q. When the matter of laying the wooden block pavement upon the streets without any board foundation under the blocks was first brought to the attention of the board of public works, how was it received?

A. Not very favorably, sir.

1229. Q. For what reason?

A. Well, main reason, especially with me—I gave my own reasons—was, that in improving our streets we had a large amount of filling to put in usually; some instances five, six, or seven feet; it was thought that a block would not stand well on newly filled ground as most our streets were at the time.

1230. Q. Do you remember that Mr. Henry M. Stow, and J. H. Moore, the agent of the Pittsburgh and Fort Wayne Road at Chicago, at the time, called at the office of the board of public works, to confer
218 with them upon that subject?

A. I had not thought of it from that time to this, but my memory is somewhat refreshed about it; I think they did.

1231. Q. Did the opinion of the board subsequently change in respect to the practicability to lay wooden payment upon a gravel, or a sand and gravel foundation directly?

A. I don't know that it did, sir, until the experiment was made.

1232. Q. I mean after that at any time?

A. Yes; I think they modified their views concerning it considerably, after they had samples of it put down.

1233. Q. After the laying of the pavement at the intersection of State and Lake streets, were other streets in the city laid in the same manner without the interposition of any board foundation?

A. Yes, sir; do not think there are any laid quite as well as that was.

1234. Q. Since that time, and so long as you remained in the board of public works, how, in that respect, was the majority of the pavement laid in the city put down, with or without the board foundation?

A. I could not tell as to the majority, sir; at first, the first two or three years that I was in the board, they were laying it down considerably with a board foundation, altogether, entirely, but after a while, after two years or so, we began to change, and laid different styles of pavement, some with foundation, and some without.

1235. Q. Can you remember, now, any streets that were paved?

A. I should think the majority, as long as I was in the board, was laid with the wooden pavement.

1236. Q. After the experiment on the corner of State and Lake, from that time, afterwards, how was it laid generally?

A. It was laid both ways. I could not state how the majority was.

1237. Q. I will ask you if you can remember, and, if so, state what streets subsequently to the intersection of State and Lake were laid with the blocks resting directly upon the gravel, or sand and gravel foundation?

A. What streets?

1238. Q. Yes, name some of them, if you can?

A. There was Warren avenue, I think; West Washington; two or three streets out beyond Union Park; I am quite sure Market street was one.

1239. Q. How was it with Randolph, do you remember?

A. Randolph, a portion of it, I think, was; yes, sir; I think it was laid both ways on Randolph, if I recollect. I know there was a good deal of discussion and ill feeling about it at the time.

1240. Q. Part of it laid one way and part another?

A. I think so; that is my impression.

1241. Q. Did you ever know of any wooden pavement laid on North State street, between Kinzie and State street bridge, previous to 1871, before the fire?

A. I do not recollect how it was, or when it was first laid, sir.

1242. Q. You frequently traveled over that portion?

A. I used to go over there often; yes sir. There is a long approach there. I should think there would not be very much paving between Kinzie and the bridge.

1243. Q. How was the space under the bridge occupied?

A. A portion of it was occupied by Wright Brothers at the time they had a stable there.

1244. Q. For what purpose?

A. I never was under there, sir, to see. I have looked down there and seen them occupy it. They kept a livery stable. Whether they kept any horses there, or simply their matters connected with the stable.

219 1245. Q. Didn't they have the cleaning of the streets?

A. Yes, sir; one of the Wrights did.

1246. Q. Wasn't their utensils, carts, and so forth——

A. My impression was, their utensils, to a certain extent, were kept under there; I don't know what amount.

1247. Q. How near down to their stable did that extend?

A. That approach?

1247. Q. Yes?

A. I should think it went past the stable north.

1248. Q. How near to Kinzie street would that bring it?

A. I think that stable was right on Kinzie street; I think the approach would go beyond Kinzie street.

1249. Q. Was there, about that time, and prior to the time of the fire, in the office of the board of public works, a section or model of wood street pavement, similar to the model F that is before you there?

A. I could not tell, sir; I should think I had seen that model in the board—office of the board; I could not tell what time.

1250. Q. That, or one like it?

A. Yes; something like that. I don't know whether that is it or not.

Cross examination by Mr. BOND:

1251. C. Q. Was the pavement laid at the intersection of Lake and State streets, upon the sand, laid with wedges, like those shown in the complainant's model, Exhibit G?

A. I think that was the style of it.

1252. C. Q. Were Warren avenue, West Washington street, and other streets west of the park, and so much of West Randolph street as was laid without a board foundation, laid with similar wedges between the blocks?

A. I recollect more particularly about this intersection on Lake street than any other. I was there a great deal. Being the first experiment, it was impressed on my mind. But the other Stow pavement, I suppose, was laid about the same style—might have been some variation. I don't know. Don't remember that thing.

1253. C. Q. You understood that there were wedges in all of it?

A. Yes, sir; that is what I understood, and I had an impression there was.

1254. C. Q. Was that the kind of pavement known and understood as the Stow foundation?

A. This kind here.

1255. C. Q. This like Exhibit G?

A. That is the kind when it first came around.

1256. C. Q. Was there anything to be paid by the city, as a royalty, or as a license fee, for the intersection of Lake and State streets?

A. I think not, sir. My impression is they wanted to put it down to demonstrate it was a good thing. It was done, however, at the expense of the city.

1257. C. Q. Who superintended the laying of it?

A. I think Mr. Thompson did, sir. I think he was superintendent at the time—city superintendent. Might have been some other man under him.

1258. C. Q. Wasn't it Mr. H. M. Stow?

A. Yes, sir; I think he was there, most of the time.

1259. C. Q. Was North Clark street heavily filled where the double plank and double boards were used.

A. I do not remember, sir, where the double planks were laid.

1260. C. Q. Was that street intersection heavily filled?

A. There was considerable filling on North Clark street when it was first put down.

220 1261. C. Q. Wasn't the city somewhat anxious to get a pavement that would avoid the payment of royalties or license fees under the Nicholson patent?

A. Yes, sir; the city were. The officers of the city, so long as I was in the board, were anxious to get the best pavement they could for the cheapest money—lowest money; and it would be just as well by leaving out any portion. We were anxious to do it.

1262. C. Q. In passing over a street where the only difference in a pavement was the difference between blocks four inches and blocks six inches wide, would you be very apt to notice it?

A. High, you mean?

1263. C. Q. Wide, in a finished street.

A. No, sir; I don't think we would.

CHARLES L. WOODMAN, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows, on December 7, 1875:

Examined by Mr. JEWETT:

1264. Q. Your full name, Mr. Woodman?

A. Charles L. Woodman.

1265. Q. Your business and residence?

A. Place of business is 196 South Clark street, and residence 170 Sangamon.

1266. Q. Where was your place of business prior to the fire of 'seventy-one?

A. I had a place on the north side, on the corner—near the corner of Kinzie and State, and also, by the post-office close on this side, on Dearborn street.

1267. Q. How long did you have a place of business on the north side at the location mentioned?

A. About three years, previous to the fire.

1268. Q. Did you, between the years '64 and 1871, have occasion frequently to pass over that portion of North State street between the bridge and Kinzie street?

A. Yes, sir; probably passed it two or three times a day for two or three years previous to that.

1269. Q. What is your recollection in respect to the kind of pavement was upon that street, between Kinzie street and the approach to the bridge?

A. I recollect of their putting down a block pavement from the approach to the bridge to Kinzie street. The approach rise takes place at Kinzie street. But I do not know anything different from the block pavement and that pavement. I recollect distinctly when the pavement was laid, but I could not give the date of the time. It was something new to pave these approaches with block pavement; they used to plank them; and I recollect of their putting down a block pavement there—wooden pavement. I do not know of any difference in the block pavements in the city.

1270. Q. Was there but one pavement in the city at the time that was put down in the city?

A. They were using what was caused the Nicholson, by some of them.

1271. Q. Had any kind of wooden pavement been laid in the city without a board foundation at that time, to your knowledge?

A. Never, to my knowledge. The first that I ever noticed of being laid without a foundation was out here on Clark street, a few years ago, on Clark street since the fire, being laid on the sand. I recollect of passing along at the time that pavement was being laid, because we could not pass with teams.

1272. Q. Do you remember the size of the blocks?

A. I have an impression the block was more than a square block. Won't swear to that. It was a long block and narrow—more of

221 a square block; that is my impression. I do not know whether I am right or not. There was something odd in the block.

1273. Q. The shape was not the usual shape?

A. That is my impression. More than square.

1274. Q. Was there any difference upon the surface between that pavement and any other?

A. Not that I have a recollection.

Cross-examination by Mr. BOND:

None.

Adjourned to Saturday, December 11, 1875.

JOHN HANSON, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows, on December 11, 1875:

Examined by Mr. BECKER:

1275. Q. What is your name?

A. John Hanson.

1276. Q. Your age?

A. Thirty-two.

1277. Q. Your occupation?

A. Working for the city as paver.

1278. Q. Where do your reside?

A. 207 Thirteenth Place.

1279. Q. How long have you been in the employ of the city?

A. Since the fire—big fire of 'seventy-one.

1280. Q. In what capacity?

A. As paver.

1281. Q. Are you experienced in laying pavements?

A. No, sir, only by working on the street.

1282. Q. You have worked on the street pavements since the fire, haven't you?

A. Yes, sir.

1283. Q. Done a good deal of work, haven't you?

A. Yes, sir.

1284. Q. Have you lately tried any experiment in laying wooden block pavements?

A. Yes, sir; yesterday, and day before yesterday, we was trying.

1285. Q. Where did you try that experiment?

A. Down corner Jefferson and Adams.

1286. Q. Who was present?

A. I don't know the names of the gentlemen. Mr. William H. Stow; there was two others. I don't know their names, though; I could not tell who they was. That man that left here, Mr. Rue, he was there.

1287. Q. How did you prepare the pavement in this experiment?

A. We fixed a frame there. First we dug the ground up and tamped it fast again, and laid a frame around, so it would hold the blocks, and filled it up with sand, and tamped that sand, four to five inches thick. Then we tamped that with a big oak stick we had—tamped it fast, as solid as any street, and scraped it off level, and put the blocks in, and gravel, and then rammed it.

1288. Q. How large a piece of pavement did you put down?

A. About six by five, I think, or six by four. I could not say exactly. I did not measure it.

1289. Q. Six feet by four to five feet; when you say four to five, you mean feet?

A. Yes, sir.

1290. Q. Was the pavement that you there put down as an experiment made in the same way as the city pavements which you have before built?

A. Yes, sir.

1291. Q. What did you observe, whether or not the gravel extended below the blocks into the sand foundation?

A. Yes, sir; it's below the blocks.

1292. Q. How far below the blocks did the gravel go?

A. From three quarters of an inch to an inch and a half.

222 1293. Q. Had you any difficulty in ramming the gravel down below the form of the block?

A. No, sir.

1294. Q. Have you at any time, and, if so, when, taken any blocks on West Randolph street?

A. Yes, sir; yesterday.

1295. Q. Where on West Randolph?

A. West Randolph street near Ogden avenue; this side of Union Park.

1296. Q. Was it between Ada street and Union Park?

A. Yes, it was between Ada and Union Park.

1297. Q. On Randolph?

A. Yes, sir.

1298. Q. What kind of a pavement is laid on West Randolph street, between Ada and Union Park?

A. Same pavement as we made an experiment with. Blocks between, gravel between. That's all.

1299. Q. Is there any board foundation under that pavement?

A. No, sir.

1300. Q. Are any wedges between the blocks?

A. No; there are none there.

1301. Q. Is the pavement on West Randolph street between Ada steet and Union Park substantially like model 1 and 2, which I now show you?

A. Yes, sir; that is the same; gravel between the blocks. There was no wedges in.

(Defendant's counsel objects to all the testimony in reference to the character of that pavement as not being in rebuttal.)

1302. Q. In repairing the pavement now used by the city, with gravel between the blocks, on a sand foundation, state whether or not more gravel is used in the repairs than in repairing a pavement which has a board foundation.

A. Yes, sir; more gravel used. Ramming the gravel in there goes into the ground; goes in further than if it had boards under, which is more solid.

1303. Q. What do you know about the settling in a pavement laid directly on a sand foundation with the gravel between the blocks?

A. I could not tell much about that. We repair, that is all, according to how the whole had been settled—how long it has been drove over it. That is different from the pavement of a new street.

1304. Q. As a matter of fact, does it or does it not settle?

A. Yes, sir; it settles.

1305. Q. How much does it settle—about how much?

A. That is a thing I could not say, how much it will settle.

1306. Q. Settle a foot or an inch?

A. No, sir; in a new street it would not settle a foot, but it will settle

some. See it on the streets underneath the aprons. It always stands high underneath the apron. We often have to lower it underneath the aprons.

1307. Q. Did you aid in constructing a model of pavement, with the blocks resting directly on a sand foundation, with gravel between the blocks, which said model is hereafter to be introduced, marked Complainant's Exhibit H?

(Objected to as also the introduction of the model, for the reason that the model is not produced so as to be identified, either by the examiner or witness.)

A. No, sir; I did not make it.

1308. Q. Didn't you do anything about the model?

A. Yes, sir; I tamped the gravel in.

223 1309. Q. That is my question, whether you assisted in making it?

A. I misunderstood what you meant—making the frame itself?

1310. Q. You did not understand my first question?

A. No, sir.

1311. Q. What did you do in that model?

A. I put it full of sand, and tamped the sand, and put the block frame on top, and filled it with gravel, and tamped it.

1312. Q. Who was present when that model was made?

A. Mr. William H. Stow and Mr. Rue.

1313. Q. Where was the model made?

A. I could not tell you, sir.

1314. Q. Where did you do the work?

A. In the same place, corner Jefferson and Adams.

Cross examination by Mr. BOND:

1315. C. Q. Was there any one present representing the city while you was working this model, or while you were up on West Randolph street?

A. No, sir; not that I know of.

1316. C. Q. In making the model, did you fill the spaces between the blocks full of gravel before you tamped them, or did you fill them partly full and tamp, and then fill them more and tamp?

A. We filled it partly full and tamped.

1317. C. Q. About how many rows of blocks are there in that model?

A. There are four, I think. There is three rows of gravel.

1318. C. Q. Were the blocks of the usual length as laid by the city?

A. No, sir; they are pieces as long as the model. In one piece only nailed in. They were not regular blocks.

1319. C. Q. How deep were the cells that the gravel went into?

A. I think it was six inches, by the looks.

1320. C. Q. Are you foreman of any set of men in the street paving?

A. No, sir.

1321. C. Q. Who is foreman of your set?

A. We do not have any foreman.

1322. C. Q. You work under contractors, as you get jobs, or for the city?

A. For the city, sir.

1323. C. Q. Most of your work is repairing, isn't it?

A. Yes, sir.

1324. C. Q. Have you laid, or helped lay for the city, any regular pavement right along—full, new pavement?

A. No, sir; not full; only small pieces.

1325. C. Q. Where you have repaired pavements, did you ever notice whether the gravel went below the blocks or not?
A. No, sir; I never noticed.

Redirect examination by Mr. BECKER:

1326. C. Q. How far, at any one time, have you paved a street, in repairing?
A. Some places have blocks along, for instance, where pipes have been laid in; we are paving right along, sometimes whole blocks.
1327. C. Q. Was the pavement there put down the same as when paving a new street whole?
A. No, sir.
1328. C. Q. How did it differ?
A. I did not use any lake sand. We only set them on top of the board.
1329. C. Q. Well, in any other respect does it differ, or is that the only respect?
A. All I know, the block is set the same way, and tamped the same way, and all.
(Signature waived.)

224 Adjourned to Friday afternoon, December 17, 1875, at which time another adjournment was had to December 21, 1875.

GEORGE STIRLING, a witness introduced on behalf of the complainant, being first duly sworn, upon his oath testified as follows, on December 21, 1875.

Examined by Mr. JEWETT:

1330. Q. Please state your full name, residence, and occupation.
A. Name is George Stirling; residence, 72 West Lake street; connected with the water department—foreman.
1331. Q. Did you have charge of the laying of water pipe on Dearborn street, between Randolph and Madison, in the spring of 1875?
A. Yes, sir.
1331-2. Q. Was the pavement, for the purpose of laying that pipe, taken up?
A. Yes, sir.
1332. Q. When was the pavement laid on Dearborn street, between the streets named?
A. I think it was laid in 'seventy three. I do not recollect exactly.
1333. Q. Your best recollection about it?
A. 'Seventy-three or four. I do not recollect it.
1334. Q. How wide a space in the street was the pavement removed from in laying that water pipe?
A. About four feet.
1335. Q. Was there any board flooring under the paving blocks in that street?
A. No; not in them blocks.
1336. Q. Not between those two streets?
A. Not between those two streets. That is the best of my recollection.
1337. Q. Did you notice the condition of the pavement whilst it was being removed for the purpose of laying these water pipes?
A. What way do you mean?
1338. Q. Did you observe it for any purpose?
A. Yes; I was there all the time. I see the whole thing taken up.

1339. Q. Did you observe whether or not the gravel filling between the blocks extended below the bottom of the blocks themselves?

A. Yes; I did in some places.

1340. Q. Did it or not extend below the bottom of the blocks?

A. It did, yes; that is, I would not say all of it—in some places. I did not watch every block taken up—what I saw.

1341. Q. As far as you observed, did it or not go below the blocks?

A. Yes, what I seen.

1342. Q. In how many places is it your impression that you observed the fact?

A. Yes; I saw it in different places.

1343. Q. How frequently; in how many places?

A. I could not tell that. My mind was not placed on such a thing as that—to mark how many it was.

1344. Q. How far below the paving blocks did the filling extend?

A. That I could not tell you.

1345. Q. Was it perceptibly below?

A. Oh, yes; I saw it in below the blocks, in some places; not all of them.

1346. Q. Was that pavement laid on what is called a sand or earth foundation?

A. Laid on sand.

Cross-examination by Mr. WEST:

1347. C. Q. How much below the lower surface of the blocks
225 did the filling extend that you noticed?

A. That I did not measure. Extended some—an inch probably.

1348. C. Q. Were there not many places where the filling did not extend below the blocks at all?

A. Well, that I could not say. My attention was drawn to those where the gravel went through.

1349. C. Q. Did the filling, as a rule, extend below the blocks, or was that an exception?

A. How do I understand you—all the way along?

1350. C. Q. Yes, all the way along.

A. That I could not say.

1351. C. Q. Didn't you observe many places where the filling did not extend?

A. Yes; I saw places where the filling did not go through. I saw places where it did go through.

1352. C. Q. How came you to observe this so carefully at that time?

A. Well, my attention was called to it by parties there.

1353. C. Q. After your attention was called to it, did you observe pretty carefully?

A. First I did not. I had other business to attend to except watching the pavement.

1354. C. Q. Did not pay much attention to the pavement either way?

A. Not a great deal.

Redirect examination by Mr. JEWETT:

1355. Q. Who called your attention to the fact that the filling did go below the blocks?

A. Mr. Stow did.

1356. Q. William H. Stow?

A. Yes, sir.

1357. Q. In those places where the filling did not go below, was there anything that you observed to prevent?

A. That I did not take notice of.

1358. Q. Notice whether there was any stone or brick?

A. I did not take notice.

JOHN C. RUE, a witness called on behalf of the complainant, being first duly sworn, testified as follows, on December 21, 1875:

Examined by Mr. JEWETT:

1359. Q. State your full name, Mr. Rue, and residence and occupation.

A. John C. Rue; age, between sixty and seventy; residence, Chicago; occupation, I have been a carpenter and joiner; that is my occupation; worked at a great many things in the course of my life.

1360. Q. Do you remember about the time Dearborn street, between Randolph and Madison, was taken up, or a portion of it taken up, for the purpose of laying water pipe, some time in the spring of 'seventy-five?

A. Yes, sir.

1361. Q. Were you along in the neighborhood of the excavation made for that purpose, while the work was going on?

A. Yes, sir.

1362. Q. Did you have your attention called to the condition of the pavement at the time?

A. Yes, sir.

1363. Q. Who called your attention to it?

A. Mr. Stow—William Stow.

1364. Q. Did you notice whether or not the gravel filling, between the paving blocks, extended below the base of the blocks?

A. Yes, sir.

1365. Q. Did it or not, so far as your observation went, extend below the blocks?

A. It did, almost in every instance that I examined. It was down from one inch to an inch and a half; might have been two. Showed very plain.

1366. Q. Was there, in those places where it did not go below
226 the base of the block, anything to prevent, that you noticed?

A. I did not notice anything of the kind.

1367. Q. Whereabouts and to what extent was your examination?

A. It was from Madison street north; a little north of the alley coming out between Madison and Washington streets.

1368. Q. About half a block?

A. Yes.

1369. Q. Was your examination particular enough to state whether, in that distance, the gravel between the blocks, as a general rule, extended below the base of the blocks?

A. Yes, sir.

1370. Q. If so, how was the fact?

A. It did, as far as I examined, and I looked along—came along the excavation some ways. It was open then quite a distance. I guess it was open north to Washington street at the time. I did not come the whole entire length of the space.

1371. Q. Your examination then extended over a couple of hundred feet?

A. Yes, sir.

1372. Q. Or about that?

A. About that.

1373. Q. Were you present at an experiment made for the purpose of determining whether or not in the laying of the wood pavement upon a sand foundation the gravel would, by ramming, be projected below the base of the blocks?

A. Yes, sir; I was.

1373½. Q. Where and when was that experiment made?

A. I could not tell you whether it was made then. It was a week last—could not tell the exact day. It was done on the west side of the river, on Jefferson street, near the corner of Adams; on a place that I own; live there.

1374. Q. What were the preparations made for the making of that experiment, and how was it conducted? Just state it in your own way, Mr. Rue.

A. There was a small space excavated, and timber put round the space, and then it was filled up with sand four inches and a half deep, usual for laying street blocks, and that sand was hammered down, rammed they called it, made solid, and then the blocks were set on top of it, inside of the frame work, and then the gravel was put on the blocks as usual, and then a man there, who professed to be a street paver—he told me that was his business—he rammed the gravel in between those blocks, and when we made an examination, after he was through ramming, we found that the sand had driven down—the gravel had driven down below the ends of the blocks.

1375. Q. How did you get at the bottom, for the purpose of ascertaining that fact?

A. We had a side so that we could take it off. After the ramming was done, we could take off a piece, and that left the blocks, and the sand below the blocks, opened to our view, and no trouble to ascertain that the gravel, in most every instance, had gone down in the sand an inch or thereabouts.

1376. Q. Have you seen before the box and a specimen of the pavement now before you, the whole exhibit together being designated as Complainant's Exhibit M, and now produced before you, and introduced in evidence?

A. Yes, sir.

1377. Q. Were you present when the work, resulting in this exhibit, was performed?

A. Yes, sir; I was.

1378. Q. Where did it take place?

A. On Jefferson street, near the corner of Adams, at my place, at the same place and same time that this other work was done, that I spoke of—the blocks.

227 1379. Q. Will you please state, in your own way, just exactly what took place in the production of that exhibit?

A. Mr. Stow brought the box there at my place himself; came with them at the time they were brought there, and in the course of the experiment, some three or four days more before we got all through with it, and the last part of it was this box here. This frame M was filled with clear sand, laid down flat, leveled off the earth, and put sand on, and put this down on the sand, and then filled this full of sand, and it was tamped with a timber in here, and packed thoroughly full; then this frame was, the other side up, set up upon this, and then the gravel. It is one solid block in the frame, to represent the blocks as though laying in the street, same depth; and after that the gravel was put on top, just as you put it on the street pavement, and this paving man was

there, and he rammed the gravel in these joints, standing on these blocks just as it was; and after that was done, Mr. Stow put a little shellac on top, under on this side (indicating), and it stood that way two or three days. I guess it was done Saturday, and Monday, I think it was, might not have been until Tuesday, Mr. Stow came to my house. It was then in my place, locked up; yes, I am right. After this ramming was done on the top, then shellac was poured on the top, and then after it stood out in my yard until the next day, then Mr. Stow came with a piece of iron, and we slipped the iron under the lower frame, and then turned it over, and then we carried this into my place, and the sand all remained on here, and the shellac did not dry at all, and Mr. Stow and myself took and cleaned this sand off, as you see it there, and then he poured some more shellac onto it. We disturbed nothing, excepting taking the sand off. This remained there until today, in my place, just as you see it.

1380. Q. Does this exhibit show the condition of the gravel as rammed down when you exposed it by turning over the entire work, box and frame together?

A. Yes, sir; just the same.

1381. Q. What was the condition of the sand between the gravel below the pieces of the blocks, as to hardness?

A. The sand was quite hard. It was packed, you understand, before that gravel was driven into it, and then we drove that gravel down into it. That packed it still harder, and the sand was quite firm. Took the fingers and stick to work the sand off, as you see it.

1382. Q. Did you disturb the gravel?

A. Did not disturb the gravel.

1383. Q. So that this now represents the condition of the gravel after the experiment was performed?

A. Yes, sir; shows just what gravel was down below the blocks after being driven down.

1384. Q. Were you present on last Saturday when an opening was made on West Randolph street between Ada street and Union Park, to notice what pavement was laid?

A. Not this last Saturday. It was a week ago last Saturday.

1385. Q. Upon the opening of the pavement, what did you find to be the kind of pavement laid?

A. Found the blocks had been laid on the sand, and gravel all between the blocks, as usual; nothing different.

1386. Q. Was it or not such pavement as is represented by model 1–2, now shown you?

A. Yes, sir; I think it was the same thing.

1387. Q. Did you open the pavement between the streets mentioned in more than one place?

A. Yes, sir; we opened it in two places.

228 1388. Q. How far were those places apart?

A. Well, I should think it was one hundred and fifty, or perhaps it might have been two hundred feet. I did not notice very particularly. We opened it just at the edge of Ogden avenue, at one place. We then came east some distance, and took up another block; might have been one hundred and fifty or two hundred feet apart.

Cross-examination by Mr. WEST:

1389. C. Q. When you examined the Dearborn street pavement near Madison, did you find places where the gravel did not extend below the blocks?

A. I might have noticed two or three places. There were some, as it had been filled in with brickbats; some of the filling had been done before the paving had been put on, and if there had been any obstruction of brickbats below the gravel, or such a matter as that, and sometimes a block gets in—small block or chip—but it was uniform for the gravel to go below the blocks.

1390. C. Q. You say you might have noticed. The question is, did you notice such places?

A. I don't know. It does appear to me that I noticed a brickbat that had been driven down. Gravel did not go below.

1391. C. Q. Then, with this exception of where this single brickbat was observed, you noticed, did you, that the gravel extended below the blocks for that whole distance of two hundred feet?

A. Yes, sir.

1392. C. Q. At every place?

Yes, sir.

1393. C. Q. How far below?

A. From an inch to an inch and a half, so that it showed plain by persons walking along looking on it, because the blocks were cut right down smooth, and the gravel showed, without any exertion, that the gravel had gone down—driven below.

1394. C. Q. When did you say you made this examination?

A. I could not tell whether it was in April or May. It was when they put the pipe in the street here.

1395. C. Q. You mean this year?

A. Last spring—yes, sir. I was not particular about the date.

Adjourned to 2 o'clock on December 22d, when another adjournment was had to 10 o'clock on Dec. 23d.

JOHN HANSON, a witness on behalf of the complainant, on being recalled on December 30, 1875, testified as follows:

Examined by Mr. JEWETT:

1396. Q. Were you present on Monday last at some openings made in the wood pavements on Wabash avenue?

A. Yes, sir.

1397. Q. Made on River street and Wabash avenue, in the city of Chicago?

A. Yes, sir.

1398. Q. Who were present?

A. Mr. William H. Stow; he was present on River street.

1399. Q. Anybody else there?

A. No, sir.

1400. Q. Near Rush street bridge, wasn't it?

A. Yes.

1401. Q. Who were present at the opening made on Wabash avenue?

A. Mr. Coles and Mr. William H. Stow.

1402. Q. How much of the pavement was taken up on River street

A. I think seven or eight blocks.

229 1403. Q. Of the wooden blocks?

A. Yes, sir.

1404. Q. Did you notice how far the gravel between the blocks extended down, during that experiment?

A. Some places about half an inch, and other places less.

1405. Q. Half an inch below what?

A. Below the blocks.

1406. Q. Did the gravel in all cases appear to have gone down below the bottom of the blocks, so far as you observed?

A. Yes, sir.

1407. Q. How was it at the opening made on Wabash avenue? Was it the same?

Yes; there was the same as on River street.

1408. Q. Whereabouts on Wabash avenue was the opening in the pavement made?

A. Same was about Hubbard court; it was south of Harrison street.

1409. Q. How many wooden blocks were taken out of the pavement at that place?

A. I think we had five out.

1410. Q. Did you notice particularly whether the gravel between the blocks extended down below the blocks themselves?

A. Yes, sir.

1411. Q. How far below did it extend in that place?

A. About half an inch.

Cross-examination by Mr. BOND:

None.

(Counsel for defendant objected to all the matters embraced in the foregoing deposition, for the reason that it is not rebuttal and all of entirely new matter.)

Signature waived.

WILLIAM H. STOW, a witness on behalf of the complainant, being recalled on December 30, 1875, testified as follows:

Examined by Mr. JEWETT:

1412. Q. Mr. Stow, are you a brother of the complainant in this cause?

A. I am.

1413. Q. Have you at any time acted as his agent or representative in reference to his several patents relating to wooden street-pavements?

A. I have.

1414. Q. Were you acting as such agent or representative at the time the wooden pavement upon the Stow plan or foundation was laid at the intersection of Lake and State streets, in the city of Chicago?

A. I was.

1415. Q. About when was that intersection paved in the manner indicated?

A. It was paved in the latter part of May, 'seventy, I think; at that time or first of June—along about that time.

1416. Q. Who superintended, on the part of the city, the laying of that pavement?

A. A man named Warner—William Warner.

1417. Q. Who at that time was the superintendent of streets and bridges for the city?

A. J. K. Thompson.

1418. Q. Did you have any conversation with said Warner whilst that pavement was being laid, with reference to the character and stipulation of the pavement? if so, what did he say?

230 (Objected to for the reason that Warner nor the witness are not the parties to this suit, and conversation with him is incompetent.)

A. I understood by parties that he had intimated he meant to kill

the pavement, and I went to him. He said the damn stuff would not stand on the ground; it would go down.

1419. Q. Did he give any reasons for that opinion; if so, what were they?

A. The blocks would not stand on the ground; they would go down.

1420. Q. What, if anything, did you observe in reference to the manner of laying that pavement, at the time it was being laid, having a tendency to strengthen your suspicions they were not treating it fairly?

A. They would not drive the wedges down—the men that worked under him—they would drive them down aboutan inch, a sharp wedge, and then fill it with gravel.

1421. Q. Where did you reside prior to the fire of October 8 and 9, 1871?

A. I resided a part of the time on Indiana street, near State, and part of the time on Dearborn, near Indiana street.

1422. Q. Were you during two or three years prior to the fire in the habit of frequently passing over State street bridge and the portion of North State street immediately north of the bridge; and if so, how frequently?

A. I passed over that street for four years, I should think, on an average of twice a day, sometimes four times; an average of twice a day for four years up to the spring of 'seventy-one; from 'seventy-one back four years.

1423. Q. What, if anything, did you observe in reference to the character of the pavement on State street, immediately south of Kinzie, and between Kinzie street and the approach to State street bridge?

A. I never saw anything that looked like a pavement there, from Kinzie street to the bridge, during any of this time.

1424. Q. What, according to your recollection, was the condition of the surface of the street?

A. The street was a level street; it started from Kinzie street, and it went up flat clear to the viaduct bridge. There was an approach from the abutment, say about one hundred and eighty or two hundred feet, to Kinzie street. Mr. Turner's building and also the North Western Railway Company had a warehouse adjoining on the west and on the east. A little way from the bridge was the Northwestern oil building, where they kept their oil; then there was a large space between that and Wright's livery stable.

1425. Q. How was that place under the street, or in the street, occupied?

A. Under the street?

1426. Q. Yes.

A. Under this street this viaduct over this street-way was occupied by Levi P. Wright, street sweeper, a great part of the time, keeping his carts and wagons under. About, I should think, twenty-five or thirty feet was piles across there; under that, from Kinzie street up, and it was about twenty feet wide, I should think, perfectly square grade all the way up to the bridge.

1427. Q. Regular ascent?

A. Yes, sir, to the water. When it got to Kinzie street, then it would run down to the gutters each way. The cobble stone was on an arch, and it was very slippery there. When the load was on the cobble stone, and also on the filling, teams would get stuck.

1428. Q. How far was it from the intersection of the cobble stone pavement on Kinzie street to where the viaduct commenced, or about where?

1406. Q. Did the gravel in all cases appear to have gone down below the bottom of the blocks, so far as you observed?

A. Yes, sir.

1407. Q. How was it at the opening made on Wabash avenue? Was it the same?

Yes; there was the same as on River street.

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Cross-examination by Mr. BOND:

None.

(Counsel for defendant objected to all the matters embraced in the foregoing deposition, for the reason that it is not rebuttal and all of entirely new matter.)

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1428. Q. How far was it from the intersection of the cobble stone pavement on Kinzie street to where the viaduct commenced, or about where?

A. I should think it was from one hundred and eighty to two
231 hundred feet from Kinzie street; I should think it was somewhere in that neighborhood. It was not so far as it is now.

1429. Q. Did you ever observe anything resembling either the Stow or the Nicholson pavement, according to your recollection, on that portion of North State street?

A. Never observed any pavement there.

1430. Q. What is your best recollection, then, as to the manner in which North State street was made passable?

A. My best recollection was that it was plank there. There was a wash on the street that washed down the dirt and dust from there to the lower part.

1431. Q. Did you ever make any examination for the purpose of determing in what manner that portion of North State street was paved?

A. Yes, sir.

1432. Q. When, and under what circumstances?

A. It was in the summer of 'seventy-four. I applied to J. K. Thompson for the privilege of examining that part, and he told me they could furnish a couple of men to do it. Said he wanted to know what kind of pavement was laid there himself. He referred me to a man there in the office, and he said he would furnish men there on such a morning, second morning after this conversation, and I went there. In the mean time Mr. Thompson told me about where to dig for it. I set the men to work on the west side, about six feet from the line of Kinzie street, and about five or six feet from the west curb, and we dug about ten or twelve feet, I should think, in length south, and about the center we went in two or three feet further into the street; dug down, I should think, about six or seven feet there. We found nothing but dirt and brick bats and so forth there. And then went on to the east side, commenced about six feet from Kinzie street south, and dug about ten or twelve feet from that south. We then drifted in west.

1433. Q. Towards the center of the street?

A. Yes, sir; towards the center of the street, about three or four feet. We struck some boards there, about the level of the old street, about three to four feet deep. We took out one, and I took it off. That is the board we took out (producing it), and we split off some more of another. The board lays lengthwise with the street.

(The piece of board referred to by the witness is here shown and marked Exhibit G, W. H. Stow.)

1434. Q. What kind of pavement is indicated by the appearance of that piece of board?

A. Well, it indicates the appearance of Nicholson pavement.

1435. Q. How do you infer that from the appearance?

A. By where the blocks would stand on the board in one place, and the spaces about an inch where the composition or tar touched it going through the gravel.

1436. Q. Did you make an examination down to where the original pavement of State street should have been found?

A. We went some two feet or three feet below the original street surface.

1437. Q. Did you find there in either of the openings made any indication of a pavement laid upon a sand foundation in square or otherwise shaped blocks of wood?

A. Found no blocks at all.

1438. Q. (Question repeated.)

A. I did not.

1439. Q. Did you, as the representative and agent of your brother, the complainant in this case, have any other interviews and conversations with J. K. Thompson, superintendent of streets and bridges of the city of Chicago, in reference to the laying of wooden block pave-
232 ments in the streets of the city, and exhibit to him any pictures or cuts or drawings representing any forms of such pavement; and if so, when, and state what occurred between you?

A. In July, I think it was, 'seventy, I presented to Mr. Thompson some two or three cuts representing a pavement of three different kinds, which the cuts represented. It was from a cut of Ferris. He engraved it for me, Mr. Ferris did. Got Beach & Barnard to print them; they printed some two hundred. Paid them a dollar and a half.

1440. Q. About when were those cuts printed?

A. They were printed in July, 1870. The cut was engraved and printed in July, 1870.

1441. Q. Are they the same that have been presented as exhibits in the testimony of the complainant in this case? If so, state what exhibits they are.

A. The Exhibit Ferris 1 is one of them.

1442. Q. Describe what those drawings of cuts represented, as near as you can.

A. They represented on the left hand side or end a cut of the gravel going down to the sand; the other next adjoining were coarser gravel and composition, and going down below the blocks, representing probably an inch or an inch and a half. The other end represented a board under it, with gravel going down to the board and blocks standing on the board.

1443. Q. Now, state what conversation, if any, you had with Mr. Thompson with reference to this form of pavement.

A. He did not say much about that. The conversation went on this intersection down here on Lake and State streets. I gave Mr. Thompson one of the cuts, and laid two or three on his desk. I think I distributed them in other parts in the board of public works at the same time.

1444. Q. Did you, at about the same time, or at any time, have any conversation with the members of the board of public works with respect to the introduction of what is called the Stow foundation pavement?

A. I had before that. I got it introduced when it was first put down by a petition to the council. We applied to the board of public works a good many times. I took with me Mr. Moore there once or twice to have them put it down.

1445. Q. What objections, if any, were made to the Stow foundation pavement?

A. Mr. Burley was the head man of the board of public works and Mr. Carter was a member. Mr. Burley objected to this plan, on the ground it would not stand. And in answer to us, he says, "we have last year put down on North Clark street pavement with two boards under it to sustain it in the street, and this would not stand at all—won't do at all." After that I got a petition to the council, and the council ordered it put down here by superintending it, and giving bonds to take it up, and laying a Nicholson pavement if they were not suited with it.

1446. Q. Did you ever have to take up any pavement under those bonds?

A. Not at all.

1447. Q. Do you know, and if so, state whether the kind of pavement generally known as the Stow foundation pavement has since then been introduced and is in general use in the city in laying street pavements. (Objected to, as the city has been sued upon four different patents.)

A. They were introducing it at the time of the fire. The city ordered about three miles of it laid, I think, at the time of the fire. Before the fire it was being laid; some of it was laid after.

233 1448. Q. Now what is the form of wooden block pavement now in general use in this city?

A. Complainants' model 1^2 represents the pavement.

1449. Q. Was the form of pavement represented by the model last referred to represented in the cut or cuts exhibited by you to Mr. Thompson, city superintendent of streets, in the interview with him referred to by you, as having occurred in or about July, 1870?

A. Yes, sir.

1450. Q. Did you afterwards have any further interviews with Mr. Thompson, and whilst he was still superintendent of streets in the city of Chicago, and exhibit to him any models or representations of other forms of pavements, and have any conversation with him respecting the kind of pavement laid in 1864, at the north end of State street bridge?

A. No, sir; he was one of the board of public works at that time.

1451. Q. Did you have any conversation with him in reference to other forms of pavement at any time subsequently to July, 1870, and whilst he was a member of the board of public works, in the city of Chicago; and if so, state when, and what occurred?

A. In May, 'seventy-four; I was sitting at Mr. Whitney's desk, the assistant secretary of the board of public works, and held the model, complainant's exhibit Thompson 4 in my hand, and Mr. Thompson came by where we were sitting; I was sitting at the desk, at the side of Mr. Whitney, and he took it from my hand, and he said this is the kind I saw laid in New Orleans in 'thirty-six, referring to the six-sided blocks, and there is the kind I laid at State street bridge in 'sixty-four, referring to the square blocks represented by the model.

1452. Q. Was this conversation with Mr. Thompson or with Mr. Whitney?

A. Mr. Thompson. Mr. Whitney said nothing during the conversation.

1453. Q. Was that about the substance of the conversation which occurred at that time?

A. Well, that is all, except he reiterated, I think, in saying what he saw in New Orleans.

1454. Q. Were you present at any time when any experiment or experiments were made with the view of determining whether, in the ordinary way of laying wooden block pavement upon a sand foundation, and driving gravel between the blocks, the gravel went below the base of the blocks?

A. I was.

1455. Q. If so, state when the experiment or experiments were made, who were present, and what was the result.

A. Experiments were made on the ninth and tenth of December, 1875, at 131 South Jefferson street, in Chicago; Henry M. Stow, Mr. James A. Coles, J. C. Rue and John Hanson were present; there was a large number on the sidewalk, some ten or fifteen persons. The ground was dug up, afterwards rammed down with a rammer, then there was

about four inches of sand placed on this earth, and a frame around it staked up, of about six or seven by four, I should think, about that size. The sand was rammed down, and then it was struck off to a gauge, leaving about four or five inches of sand. The paving blocks were then placed on that, in rows, across this four feet way, clear across, and six or seven feet in length. Then the spaces between the blocks were filled about two-thirds full, say four to five inches. The blocks were about six inches in depth, and this paver, John Hanson, rammed the gravel between the blocks, and then the spaces were filled again with gravel, and rammed again. We then took the side piece
234 off, showing the ends of the blocks, and could see the sand down right below the blocks as they stood in position, which showed the gravel below the blocks all the way through, driven down into the sand.

1456. Q. How far below the blocks did the gravel extend?

A. Some of them went an inch and a half, some of it an inch; from three-quarters, I should think, to an inch and a half, was the distance.

1457. Q. How wide were the places left between the blocks?

A. One-inch places. An inch board was placed between each row when they were first laid.

1458. Q. How did this man Hanson happen to be present?

A. One of the city superintendents furnished me a man, on an order from the city superintendent's office to furnish a man.

1459. Q. Have you been in the habit of watching the laying of pavements in the streets of Chicago the last few years?

A. I have.

1460. Q. Were these experiments conducted in the usual way of laying such pavements?

A. Yes, sir.

1461. Q. Was any other experiment, resulting in an exhibit introduced in this case, made at about the same?

A. On the tenth day of December there was a model made there by placing the bottom frame on the ground and filling it with sand, when it was rammed with an iron sledge that rammed it solid down, and then a frame was constructed that you see there, part of the model put on top, the spaces being an inch apart between the blocks, and filled with gravel about four inches in depth, perhaps a little more or less, and that was driven down. Then it was filled up again; that was driven down. In the first place, when we first drove it down, I poured in shellac varnish to hold it, and after that we then filled it up and drove it again, and then I poured in the shellac varnish, and then it was covered up with some boards until Monday following; on Monday I took a piece of galvanized iron, about the right size, and slipped it under, then turned the whole frame the other side up; then we took and scraped out the sand between this, and it was so hard I had to take a piece of wood and scrape it out, and then got it open a little on top so as to dry, and then poured the shellac on the gravel to hold the gravel just as it there stood, because it had to be dried before it would harden, and then put it into Mr. Rue's house and kept it.

1462. Q. Has the result of that experiment been produced as an exhibit in this case, on the part of the complainant?

A. Yes, sir; I think it was introduced in Mr. Hanson's deposition, and it was referred to in Mr. Rue's deposition. It was produced at the time Mr. Rue was examined.

1463. Q. In the making of that deposition exhibit was the manipula-

tions, so far as you could judge, such as were usual and customary in laying street pavements?

A. The same, except being confined in a frame.

1464. Q. Were you present; and, if so, when, at any openings made in pavements on River street and Wabash avenue, in the city of Chicago, with the view of determining whether the gravel between the paving blocks on those streets projected below the base of the blocks?

(Objected to as new matter, not in rebuttal.)

A. It was, on the twenty-seventh of December; it was on River street, where Mr. Hanson dug up several paving blocks, and under those that we found loosened we found that the gravel went down on one
235 side about half to three quarters of an inch, but on the other side it did not go down so much, probably not over a quarter of an inch, below the bottom of the block. On Wabash avenue, near Hubbard court, we took up, I guess, five blocks, so that we could work under the ends and sides of several blocks. The gravel there went down uniformly to a half an inch; might have been some more; at least half an inch below the bottom of the blocks.

1465. Q. Who were present at the time the openings were made?

A. Mr. Hanson down at River street, and Mr. Hanson and Mr. Coles up at Hubbard court and Wabash avenue.

1466. Q. When was that pavement on Wabash avenue, along in the vicinity of Hubbard court, laid down?

A. I should think about two months ago.

1467. Q. Was it laid with square ended blocks on sand, without any boards underneath?

A. Yes, sir; without any board on the sand. This at River street was laid about two years and a half ago.

1468. Q. Was there at any time, to your knowledge, any model or representation of a pavement laid in pursuance of the patent of H. M. Stow, No. 74862, in the office of the board of public works, in the city of Chicago; and, if so, when, who took it there, and for what purpose?

A. There was a model put into the board of public works of that, of full sized blocks, four inch blocks in thickness. They were made six or seven inches in length. My brother brought it from the shop where he had it made; had it sent to Market street at the time Steele and McMahon were laying that street in 'seventy-one. I took it from there to the board of public works.

1469. Q. When did you take it there, or about when, and how long did it remain there, to your knowledge?

A. I took it there, I think, in the spring of 'seventy-one, and it was in the office there at the fire. It was in Mr. McArthur's window.

1470. Q. Did you call the attention of the board of public works to that form of pavement?

A. Yes, sir.

1471. Q. Was the representation of it substantially like the model which you have now before you, marked H?

A. It represented everything, except the gravel and sand below it. There was, I think, a piece in here, to keep the blocks apart about an inch. Otherwise the shape of the blocks is the same. There was no gravel or sand representation in it.

1472. Q. Did you explain to them what was intended by the filling between the blocks and the filling of it under the blocks?

A. I talked with Mr. Carter about it, and he said one pavement was enough to try at once. That was the Stow pavement he was trying then. He said one pavement was enough to try at once.

1473. Q. What pavement were they trying then?

A. They were putting down the Stow pavement on Market street at that time.

1474. Q. What form of the Stow pavement?

A. That was the form, the form represented by the model W. H. S. 1, which I now produce.

1475. Q. Did you explain to the members of the board of public works, or any of them, the construction of that pavement?

A. I do not think I did, for Mr. Carter stopped me from going any further in the question.

1476. Q. Did they know then, or about that time, that your
236 brother had, or claimed to have, a patent upon pavement of that kind?

A. They knew then, because I took it there, that it was my brother's patent at that time—at the time I brought the model there.

1477. Q. Look at exhibit marked Exhibit G, C. L. D., and state what it represents.

A. It represents the pavement as laid at State and Lake street intersection.

1478. Q. How did it happen that the wedges in that case, between the blocks, were beveled on both sides, instead of one?

A. The city done the work and furnished the material, and they cut the wedges six inches in length, and then sharpened them with the hatchets of the laborers on both sides, they not having any machine to cut them. Cut generally an inch board diagonally into wedges; that will make a wedge six inches long, with a bevel.

1479. Q. Were you present, Mr. Stow, at the experiment or examination of the pavement laid on West Randolph street, with the view of determining the character and kind of pavement?

A. Yes, sir.

1480. Q. State when and what was done—what was discovered.

A. I do not know as I recollect the date now. I think it was about the fifteenth of this month. Know it was between the tenth and fifteenth. I and Mr. Rue and Mr. Hanson went there. We took up a block on the east side of Ogden avenue, and then we took up another some 100 or 150 feet east of that. There was no board under the pavement.

1481. Q. What was the form of the blocks?

A. The blocks were in the form of I^2.

1482. Q. Square-ended or beveled?

A. Square-ended. I think they laid that pavement from Ada street to Union Park. I made an examination in two places.

1483. Q. How far apart?

A. About a couple of hundred feet.

1484. Q. Do you know when that pavement was laid?

A. That was laid in the fall of 'seventy-one; laid in the fall or winter. I saw them laying part of it, without any board or wedge.

1485. Q. Did you witness any opening of the pavement on Dearborn street at any time, with a view of ascertaining the character of the pavement and the manner in which it had been laid?

A. I think about the seventeenth or twentieth—somewhere along there—of May, 'seventy-five. The street was cut up from Randolph to Madison; cut up further, clear through here, to Monroe, I guess, and those two blocks were laid on the ground in 'seventy-three. The blocks were square-edged blocks, laid on the ground; gravel driven down between these, as a general thing. Shoved the gravel down from

half an inch to an inch and a half between the blocks and below the blocks, down into the sand.

1486. Q. How carefully did you make that examination?

A. I made an examination several times. I brought it to the attention of Mr. George Stirling, and we went along for a block at that time near Randolph street.

1487. Q. Did you call the attention of anybody else to it?

A. Yes, sir; I called the attention of Mr. Pitkin and Mr. J. S. Rue. I came several times with each one of those. I afterwards met Mr. Cox, ex-alderman, who examined it. He had a buggy there, and he was out examining the pavement. It was cut square down, so you could go along and see. It went down mostly, except where there was a board under, and some bricks or something driven down between. Where there was sand, the gravel went down below the blocks.

237 (The foregoing testimony in regard to West Randolph street and Dearborn street objected to as new matter, and not made in rebuttal.)

1488. Q. In your former examination in this case you say, in substance, that there had been laid in various streets in this city, since 'seventy, pavements similar to models I^1 and I^2. Can you, and if so, state when that form of pavement was laid in this city, more definitely?

A. That form of pavement, the first that I knew of being laid, was laid in the fall of 1871, at West Randolph street, from Ada to the Park, by Ray & Whitney. It was laid in the spring of 'seventy-two. It was laid on Twenty-third street.

1489. Q. What is the effect of the general use of the streets in the ordinary way upon any form of wooden block pavement laid upon the sand, without the interposition of any board underneath?

A. The effect of it is it settles more or less, according to how much filling the street has had. Now, filling and ramming Clark street, it settled so that the water lay in the gutters all through, on most all of Clark street, except one block, and that is where the wedges were used, between Madison and Monroe.

1490. Q. Do you know whether this would be true also of streets laid with Nicholson pavement, to a greater or less extent?

A. They settle similarly, only they throw the blocks loose by the spring of the board. Where the blocks lay on the gravel they follow the settling generally; but the Nicholson springs, and throws the blocks loose.

1492. Q. Would it be the same with reference to pavement shown by model I^2?

A. The same in both.

1493. Q. What is the comparative cost and expense of laying wooden block pavement, with and without board foundation; or, in other words, on which side is there a saving of expense, and for what reason?

A. The expense is less where there is no board laid under it; the expense of the board and cutting it, and wastage also.

1494. Q. From your observation, what is, in your judgment, the comparative durability of the two forms of pavement?

A. The durability of the pavement laid on the sand, keeps the block wet all the way up through. A green block laid on a board sets the sap down, and it dry-rots.

1495. Q. The question is, which, in your opinion, and from your observation, is the most durable form of pavement?

A. Those three forms, I^1, I^2, and Stow.

1496. Q. With or without a board foundation?

A. Without a board.

1497. Q. For the reason you have stated?

A. Yes, sir. The expense and non-durability has thrown the Nicholson out of use, compared with the expense and durability of the pavement laid on the ground.

4498. Q. The diminished cost and greater durability of the sand foundation has caused this pavement to supersede the Nicholson. Is that the idea?

A. Exactly; because the city requires the same sand under the board—same depth of sand that they had under the block alone.

Cross-examination by Mr. BOND:

1499. C. Q. Has not the fact of the Nicholson pavement being patented and patent sustained by the courts, set everybody to circumvent it, if possible?

A. I don't know.

238 1500. C. Q. Don't you know that this has been the main cause of its being out of use?

A. I understand this patent has expired.

1501. C. Q. In August of this year, have you not heard almost everyone say, that now that the patent was out, they were going back to the old Nicholson?

A. I understand that in Cleveland they have abandoned it altogether now, although they have owned the exclusive right of using it.

1502. C. Q. Have you not understood from contractors in Chicago, and from others in this city, that they propose, now that the Nicholson patent has expired, to go to laying that kind of pavement again?

A. I understand Nelson De Golyer uses it to get clear of paying royalty on any other pavement. I also understand from the city that they would not go back to the Nicholson on any consideration. The board of public works, Mr. Thompson says, they were making an assessment for La Salle and other streets.

1503. C. Q. Mr. Thompson claims, does he not, that the city has got the right to use whichever they choose?

A. I understood that the city claimed that in the first place, and never paid any royalty on it until a few years ago—on the Nicholson—some fifteen years.

1504. C. Q. Has not the city paid royalty on the Nicholson ever since the Nicholson patent was sustained in the suit in this circuit court?

A. I understood it was not paid for or settled until Mr. Burley settled it with the heirs and interested parties of Mr. Nicholson.

1505. C. Q. In the settlement, did they not pay for all the Nicholson pavement laid in the city?

A. I understood Mr. Burley got a good share of the money coming to the heirs of Nicholson or heirs and other interested parties.

1506. C. Q. You do not personally know about it, either one way or the other?

A. Not at all, sir; only from hearsay.

1507. C. Q. When a street settles, by reason of being newly filled, does not the filling between the blocks settle, as well as the blocks themselves?

A. No, sir.

1508. C. Q. Why not?

A. The reason is, it is not held together by the composition. The horses dig out the space between the blocks. The settling of the blocks is by heavy loaded teams passing over it. They pass over the blocks, and do not touch the filling between.

1509. C. Q. Then, if the streets should not be used and the foundation should generally settle, you think that the filling would stick up, do you, above the blocks?

A. That would depend on how hard they rammed the gravel between the blocks.

1510. C. Q. Do you think it possible, if the filling should be rammed and spread under the blocks like your Exhibit Hanson, that in the settling of the street all of that gravel would be found between the blocks?

A. No, sir; I do not.

1511. C. Q. Then, why does not the filling settle with the blocks?

A. Because in this it is wider than the space. In this exhibit it is wider than the space; therefore it would settle to the gravel under it, if it settled at all.

1512. C. Q. Then, there is too much in the Exhibit Hanson, is there?

A. Too much?

1513. C. Q. Too much filling.

A. No, sir; but it would be undeveloped if it was driven down below like that.

239 1514. C. Q. Is that done, then, as they generally make it?

A. I have not seen how they generally make it.

1515. C. Q. Then you don't know whether the city lays it like that exhibit or not?

A. They lay the blocks in the same way, and put the gravel in in the same way, but whether they drive it I cannot tell. This man Hanson says that is the way the city drove and done the work.

1516. C. Q. That is, he used the same ramming iron that they use in laying the city pavement?

A. Same kind? Not exactly the same kind.

1517. C. Q. But whether they strike as many blows or not, you don't know?

A. He didn't say; he does the work for the city, he says.

1518. C. Q. But you don't know whether he gave more blows on the filling in the Exhibit Hanson, than he gave the filling of the regular street pavements, you do not know?

A. I have not seen him work on the street. I saw him on the other experiment, and he rammed it about the same, and it showed a good deal like this.

1519. C. Q. What other experiment do you refer to?

A. I refer to the same time, where there was a piece of four by six feet on the ground there, in the frame.

1520. C. Q. Where was that?

A. Same place this was; 131 South Jefferson street.

1521. C. Q. Was that a regular pavement?

A. It's a regular pavement laid on the ground. Ground dug up.

1522. C. Q. Is it there yet?

A. No, sir; taken the blocks back, borrowed them from the railroad company.

1523. C. Q. Then it was not a regular city pavement?

A. It was on the same principle. It was on a lot belonging to Mr. Rue. It was done in the same way. The ground was broken up.

1524. C. Q. It was not laid in the street?

A. No, sir; not in the street. We had no authority to lay in the street.

1525. C. Q. The street was already paved, was it not?

A. In front of that, yes, sir; in Nicholson pavement. In holes though, pretty much of it.

1526. C. Q. In your previous examination on the prima facie case, didn't you state the pavement laid on West Randolph street was a pavement like the complainant's Exhibit G?

A. I would not be certain whether I did or not. I said it was represented as the Stow foundation pavement that was laid there.

1527. C. Q. Did not you say that a pavement like Exhibit G had been laid by the city on West Randolph street and other streets, and named them?

A. Could not tell.

1528. C. Q. Did you then say anything about pavements like Exhibit I and I^1, being laid on West Randolph street?

A. No, sir; I did not.

1529. C. Q. Now sir, as a matter of fact, was not the pavement laid on West Randolph street like Exhibit G?

A. No, sir; not from Ada street to Union Park, it was not. No wedges used between the blocks in those two blocks.

1530. C. Q. It was laid by the same contractors, was it not?

A. Yes, sir.

1531. C. Q. How came the change to be made?

A. I think he said he could not drive the wedges.

240 1532. C. Q. It was laid from Ada street east, was it not, with wedges?

A. Yes, sir.

1533. C. Q. Was there any different sand laid on West Randolph street, from Ada street east?

A. Same kind of sand.

1534. C. Q. Why couldn't he drive wedges in one as well as the other?

A. Frost interposed in the ground below it; below the sand.

1535. C. Q. The street was paved up to Ada street, was it not, and then left for a long time?

A. It was paved a little beyond Elizabeth street, about along to the livery stable there.

1536. C. Q. At the time you went around taking up blocks in different streets, as named by you and other witnesses who have named you as being present, did you notify any of the council or experts for the defendant, or ask any of them to be present?

A. I did not.

1537. C. Q. Did you notify or ask any of the city officers to be present?

A. I did not.

1538. C. Q. Was the pavement laid on Market street, constructed in accordance with the plan shown in Exhibit H, or according to that shown in Exhibit G?

A. No, sir; neither one.

1539. C. Q. Did you not state in your previous deposition, that it was like the Exhibit G, or the patent which that illustrates?

A. I might have said it was like the patent that it illustrated. I think it was like the patent.

1540. C. Q. Did you not put in model Exhibit G, as illustrating the patent?

A. I would not be certain.

1541. C. Q. Well, the only difference between G and model H. M. S. 1, is simply in the fact that in one the wedges are beveled on both sides, and in the other on one side only, is it not?

A. Yes, sir; that is all the difference.

1542. C. Q. Then was the Market street pavement like the Exhibit W. H. Stow 1?

A. Yes, sir; that is like the Market street pavement.

1543. C. Q. During the years 1870 and '71, was not that pavement the one shown in Exhibits G. and W. H. Stow 1 the pavement known as the Stow foundation?

A. That is the one that was called the Stow foundation pavement—was this; referring to Exhibit G.

1544. C. Q. Why did you give it that name?

A. I didn't give it that name.

1545. C. Q. Why did it get that name?

A. It got that name in California.

1546. C. Q. Do you know why it got that name?

A. I don't know, sir; the pamphlets that were sent me from there represented it as the Stow foundation pavement.

1547. C. Q. In looking at the cut through Dearborn street for the water-pipe, did you do more than walk along and observe the cuts in the rows as you found them cut by the city?

A. We got down into the trench, that is, below; you could stand; the place was a few inches, probably; five or six inches, probably, each side from the blocks. It was cut back, so as not to cave down, and we stepped down and you could put your finger on the gravel. Mr. Cox was in there when I came across him, examining it.

1448. C. Q. Would not sufficient gravel fall down to give it the appearance of being below, even when it was not actually below, when cut in that manner?

A. No, sir.

241 1549. C. Q. When water-pipes were rolled over it?

A. They had not rolled the water-pipes over it then; they were below the track; they followed up from Lake street.

1550. C. Q. The cut had not been made with any special care in reference to the tearing of the filling?

A. The blocks were cut back from the main trench, leaving a shoulder and earth some six or eight inches on either side; I don't know but more, and then a space about two feet, I should think, where the trench went down.

1551. C. Q. Where the joints came properly, the blocks were taken out, and where they did not they were split off, were they not?

A. It was cut right down.

1552. C. Q. Would not the splitting of the blocks disturb the filling?

A. Could not say; did not appear to there.

1553. C. Q. How far was the north approach of State street bridge filled with earth south from Kenzie street?

A. I should think probably twenty-five feet; might have been that.

1554. C. Q. Then there was piling, and then there was wood work over the railway?

A. Yes, sir; and then they planked—oak plank.

1555. C. Q. And the piling and the bridge work had plank?

A. Yes, sir; oak plank on top. Slippery for horses to draw up any weight.

1556. C. Q. In your digging, why did you dig down six feet, more or less?

A. I didn't know but there might be something down below; I don't know how far we dug down; I set the men to digging; and then they came to board, and took out one, and struck on to another; we found two boards.

1557. C. Q. One below the other?

A. No; on a level.

1558. C. Q. There were but two?

A. We did not go over into the street; we dug down as far as we dared to go into the street; we were told to leave a roadway there for teams to come past.

1559. C. Q. Hadn't that approach been raised when the present bridge was built in place of the burnt bridge?

A. Yes, sir; Mr. Thompson told me it was raised up about three feet there, but it was more than that; it was near four. I went and measured where the wall was added on the west side there—Mr. Turner's block—I went and measured that; that showed they added on about four feet about where we were digging, west of the wall.

1560. C. Q. And raising the grade was the reason of your digging?

A. We had to dig lower; they said the filling was from three to three and a half feet; three feet, Mr. Thompson said.

1561. C. Q. You found in there bricks and board and all sorts of filling, didn't you?

A. We found brick, that is, before we got down; there was not a great deal of brick filled in. I don't know where they got their filling, but it was filled clear up to the approach. There is no passage under there now. Walls are built on each side of the abutment across up there, and all filled.

1562. C. Q. There was a horse railway track or tracks on the old approach, was there not?

A. Yes; there was a horse railway track, but it was taken up years ago; I don't know what year; 'sixty-eight or 'sixty-nine, I guess; I recollect when they took it up.

1563. C. Q. It was before the bridge was burnt?

A. Oh, yes, a long time before; two years, I think. They took it up from Clark clear around on to State street, or up to Water street, along there over on the south side.

242 JAMES A. COWLES, a witness called on behalf of the complainant, being first duly sworn, testified as follows, on December 30, 1875:

Examined by Mr. JEWETT:

1564. Q. Please state your name, residence and occupation.

A. My name is James A. Cowles; I reside in Chicago; occupation is lawyer, specialty, patent business.

1565. Q. For how long and to what extent, have you given your attention to the investigation of patents and patented inventions?

A. For the past ten or twelve years I have given my attention mostly to it.

1566. Q. What opportunities have you had of becoming familiar with the principles of patents and patent law?

A. I have given most of my time almost exclusively to patent litigation, in various forms, such as soliciting patents, litigating patents, and have been called time and again as expert in patent cases.

1567. Q. What connection, if any, have you had with, and what opportunities for becoming familiar with the various forms of wooden pavement for streets, as illustrated in patents issued in foreign countries and the United States?

A. When I was a student at law in the office of Goodwin, Larned & Goodwin, the original litigation on the Nicholson patent pavement was then being carried on, and I assisted them in that litigation during the time

that I was there. Since then I have been employed by the city of Springfield, in this State, in defending the city against a suit brought by the owners of the Nicholson patent, and during these times I had occasion to examine the history of the art, as represented both in America and foreign inventions.

1568. Q. Have you examined and are you familiar with the patent and specifications issued to Henry M. Stow, and involved in this litigation?

A. I have read the patents, and am familiar with them and understand them.

1569. Q. Have you examined and do you understand the several letters patent offered in evidence in this case, on the part of the defendants, and numbered as their exhibits from one to sixteen inclusive?

A. I have examined them, or copies of them, and am familiar with them.

1570. Q. Do you find in any or either of those patents the same or substantially the same inventions described in the patents of Henry M. Stow?

A. I do not.

1571. Q. Have you read the deposition of J. W. Mundy, taken on behalf of the defendants in this cause?

A. I have.

1572. Q. Please answer this question more especially with reference to the suggestions of Mr. Mundy, in his deposition?

A. I will follow the order in which Mr. Mundy referred to the exhibits, as well as I can. The first patent that he refers to is the "Stead" patent, defendant's Exhibit 1, and in his deposition he refers to it as finding therein the same or substantially the same as is shown and claimed in Stow's reissued patent, 3,274, complainant's Exhibit C. In this Stead patent, Mr. Mundy refers to two figures only, figures 18 and 19. These figures represent a pavement composed of blocks made octangular in shape, grouped together in groups of four blocks each, leaving in the centre a square hole, each side of which hole is the size of one side of the block. Through this hole is driven a pin or a spile, and the blocks placed upon the foundation, prepared in the required fig-
243 ure by the well known means, to receive such wooden blocks as stated in the specifications. This pavement made in this manner would present a surface almost entirely smooth, which would be an objectionable feature, inasmuch as it would afford but little resistance to the feet of the animals or horses. In passing over it, also, it is an expensive pavement to make, inasmuch as the blocks have to be prepared with special reference and with special care. It requires a higher degree of skill in making the block, and also in laying the pavement, than it does in laying the Stow pavement. The block has to be made with each side of precisely the same size; if it is not made so, when it comes to be laid, the pavement would be irregular, in that the whole would become shapeless, so far as being practical, or of the right form or shape, to admit of this spile being driven into it. There is also a large waste of material in making this pavement. Something like twenty-two per cent. of material would be lost in making this pavement. The Stow pavement is made of blocks, sawn directly from the plank, without any additional manipulation or handling, or trimming, and they are ready at once to lay in the pavement on the street. In laying them on the street, the blocks are laid in rows, extending from curbstone to curbstone, leaving between each row of blocks a space about an inch in width. This vacant space is co-extensive in length with the rows of blocks. Into

each space then is placed or driven gravel or sand, and when this pavement is completed, it presents a surface that is rough, and affording an easy and safe resistance to the horses' feet in passing over it, so that they will not slip. It is also a much cheaper pavement in its construction than the Stead pavement, requiring less labor, less care or skill, and less time in constructing it. Also, there is no waste of material in forming the blocks, as is the case in the "Stead" pavement, and are the simplest and easiest to make of any known to mechanics and science, features of prime necessity in the construction or making of any machine or implement, or in the validity of any patent.

1573. Q. Except in the line of the centre hole, through which the spile is driven, would there be anything in the Stead patent to stay the feet of draught animals that might be used upon it?

A. There is not.

1574. Q. As to all the sides of the blocks in the Stead pavement, excepting those which form the centre aperture, how are they as to being in contact with each other?

A. Each one is in contact with the side of another block.

1575. Q. Is there anything in the Stead patent indicating the size of the blocks to be used?

A. There is not.

1576. Q. What would be the distance between this centre aperture, or of any two series of blocks, on the supposition that the blocks themselves were eight inches in diameter?

A. The distance from the centre of one aperture to the centre of another would be the same as the diameter of the block, and in this instance it would be eight inches.

1577. Q. What effect would the juxtaposition of the sides of these blocks have upon its durability?

A. It would have a tendency to speedily decay.

1578. Q. How is that, if at all, remedied in the Stow pavement?

A. That is done by so much less surface coming in contact with another block.

1579. Q. Supposing the block in the Stead patent to be eight inches in diameter, what would be the width of the sides of the block,
244 being octagonal in shape?

A. It would be about three inches square. This I arrive at by approximation, and not strict calculation. It would be about two and a half inches.

1580. Q. Then, if I understand you, the aperture in the centre of these blocks would be about two and a half inches square, if the blocks were eight inches in diameter?

A. Yes, sir.

1581. Q. Is, or not, the spile in the Stead patent occupying this aperture the same, or the equivalent of the wedge shaped block described in the Stow reissued patent above referred to; and if not, give your reasons?

A. I do not think it is the equivalent of the wedge shaped block in the Stow reissue, because the wedge shaped block described in the Stow reissued patent extends uniformly from side to side of the street, co-extensive in length with the block. They are placed apart the width of the block, and when rammed into the foundation, it gives a surer foundation to the wide blocks, because there is more of it driven into the surface; secondly, the foundation is made stronger and firmer, and is more durable.

1582. Q. Did you ever know or hear of any pavement laid according to the specifications of the Stead patent?

A. I never did.

1583. Q. Would it, in your judgment, be a practical pavement for use in the streets of cities?

A. I do not think it would, from the fact that it would present such a smooth surface that draught horses, in passing over it, would slip, and, as a consequence, would sustain more or less injury. In addition to that, it would be so expensive to lay; it would be impracticable in that sense, because of the additional expense.

1584. Q. Will you now take up the second exhibit of the defendant, with reference to the same points?

A. The next exhibit referred to by the defendant in Mr. Mundy's testimony is Wood's patent, being defendant's Exhibit No. 2. The pavement described in this patent is made of wedge shaped blocks, with the blocks cut off at about two-thirds the length of the wedge; I should think it was that. These blocks are then laid upon the foundation alternately upon their larger and smaller ends, with no space between them, for the filling in of sand, gravel, cement, or any other substance. This in no way or manner resembles any or either of the Stow patents. The Stow patent provides for a space between each row of blocks, in which are driven or placed gravel and sand. In this Wood patent nothing of that kind is provided.

1585. Q. What would be the character of the surface of the street formed in that way?

A. There are two features that he has shown pertaining to the surface of the street in the Wood patent. One would represent the surface of the street as being entirely solid and smooth. Another form he has, he permits the ends of the blocks that are laid with the larger ends up to extend slightly above the upper surface of the blocks that are laid with the smaller ends up, but with no space between for sand or gravel to be placed. In this second instance there would be then a rough surface.

1586. Q. What would be the effect of the use of the street upon this, this irregular surface?

A. The surface of the street would present a rough surface for the horses' feet, provided the blocks were not made too large.

1587. Q. Which of the blocks would receive the pounding from the travel over it?

A. The blocks extending the highest.

245 1588. Q. And what would be the effect of that, or what would be the tendency of that, both in respect to settling these longer blocks, and wear upon them?

A. That would have a tendency to wear them more readily and rapidly, and also to settle more rapidly.

1589. Q. Would not a pavement constructed in that way, laid upon a sand foundation, very soon become practically a level surface?

A. It would.

1590. Q. Then the alternative condition of laying the pavement described in Wood's patent would be scarcely a practical alternative, would it?

A. I think it would not.

1591. Q. How would it be in laying the pavement according to the Wood patent in respect to this tendency to decay, as compared with the Stow pavement?

A. I think its tendency to decay would be much greater than the Stow pavement, because of the juxtaposition of all the sides of the blocks with each other. Water would get in there, and the effect would be it would decay more rapidly than otherwise.

1592. Q. How would it be as to the expense of preparation of the blocks?

A. It would be much more expensive than the Stow pavement. The blocks would have to be made specially, requiring a degree of skilled labor; and there is also the attendant waste of material, and the extra time in making. It would substantially be an impracticable pavement on that account.

1593. Q. Do you find in this, then, the same, or an equivalent of the devices described in any of the Stow patents?

A. I do not.

1594. Q. Go on to the next exhibit referred to by Mr. Mundy.

A. The next patent referred to by Mr. Mundy is Sir John Scott Lillie, introduced as defendant's Exhibit No. 4. The pavement described in this invention consists in having small stone cemented together by any suitable cement, and casting them in molds of convenient size, either of an equilateral or quadrilateral shape, so as to admit of their being laid on streets, and having three additional surfaces to be presented to the traffic when repairs are necessary. Also in introducing between such blocks alternate rows of wooden blocks, as well as between solid stone blocks, for the purpose of diminishing the noise arising from the traffic. This pavement, it will be seen, leaves no place between the blocks. There is first a stone block and then a wooden block. They are laid upon the street in alternate rows, close together, leaving no space for any cement or for any gravel or sand to be placed between them, or rammed down. This does not resemble the Stow pavement. The Stow pavement in no manner or form uses blocks of stone or solid stone, consequently it does not have alternate rows of stone and wooden blocks. Hence there is no resemblance between the two pavements, and I do not find the same feature or thing, or substantially the same, in the Lillie pavement that I do in the Stow pavement.

1595. Q. Does this apply to all of the patents of the complainant described in these proceedings?

A. It does.

1596. Q. What would be the comparative expenses of the Lillie pavement and the Stow pavement?

A. The Lillie pavement would be far more expensive. It would be utterly impracticable in this country.

1597. Q. This contemplates an artificial stone, does it not?

A. Well, it contemplates a stone block, made of small stones cemented together, by any suitable cement, and it would have to be
246 made in some form or shape to answer the purpose—some specific form or shape to answer the purpose. Or it can be made of full sized stones, which would require special preparation or manufacture, which would be expensive.

1598. Q. How would the character of the surface of such pavement compare with that described in the Stow patents?

A. If the stone blocks were smooth upon the surface, it would present a smooth surface. If the stone were made rough, so far as the stone part of the surface would go, the surface would be rough when first laid down, but would soon become smooth by wearing, and as the result then, the surface would be smooth.

1599. Q. Does the patent call for any roughness of the exterior?

A. It does not.

1600. Q. Was there any drawing attached to that patent, or a copy of it, which you have examined, showing the character of the surface?

A. There was none.

1601. Q. Is there anything in the patent, or claim of the patent, showing that roughness of surface is a feature of the invention?

A. No, sir; there is not.

1602. Q. Pass on, if you please, to the next exhibit of the defendant referred to.

A. The next exhibit referred to by Mr. Mundy is the American patent of Edward Whitehead, defendant's Exhibit No. 7. The pavement described in this patent is made of blocks having a shoulder upon two sides of the blocks, and when placed in position on the street, the shoulder of each block rests on the shoulder of its neighbor, being placed close together, leaving no space between them for gravel, sand, or anything else. And also placing these blocks into a metallic frame or curb, forming a larger block, or a series of blocks in one block, in a curb. The object of this, the inventor claims, is to enable him to lay the pavement much more rapidly. But in neither form described in this patent, do I find the same character of pavement described or claimed in either of the Stow patents. The surface of this Whitehead pavement, where the blocks are joined, presents a crevice or slight depression in the surface, which is caused by trimming off the edges of the blocks. This, however, is very slight.

1603. Q. Does it answer the purpose accomplished by the space between the blocks in the Stow pavement?

A. It does not.

1604. Q. Why not?

A. Because the places in the Stow pavement extend clear to the entire length of the block, and are filled with gravel and sand, while these are merely a slight champering off of the edges to present an indentation on the surface.

1605. Q. Would or not the surface in that case be practically a smooth surface?

A. It would afford a slight resistance to the horses' feet.

1605½. Q. What would be the effect of the wearing away of the pavement upon that indentation; as the pavement wore down below that indentation, what would be the character of the surface?

A. It would be a smooth surface uniformly.

1606. Q. What is apparently, according to the specifications and drawings, the depth of that creasing?

A. Would not be to exceed a half an inch. Might be three quarters.

1607. Q. From practical observation, do you know whether or
247 not this pavement is worn away by use in the streets, as they are generally used in Chicago?

A. Oh, yes, sir.

1608. Q. To what extent have you seen the blocks worn down?

A. I have seen the blocks worn down so they would not be over

1609. Q. What was the ordinary length and depth of such blocks?

A. Well, they are the usual length that street pavements are made here. They are from six to eight inches.

1610. Q. In this Whitehead patent, are the blocks laid close together?

A. They are.

1611. Q. Do they or not require special pains and labor in preparation?

A. Yes, sir; they require to be specially made. The two shoulders in each block must be cut and prepared with exact precision. They must be of the same depth and of the same length.

1612. Q. Was there not in the preparation of these blocks waste of material?

A. There would be a very great waste of material, judging from the figure now before me. I should think there would be a waste of thirty per cent.

1613. Q. How would the laying of the blocks close together affect the durability of this style of pavement?

A. In this form of constructing a pavement, I should say they would greatly affect its durability. The tendency to rot, I think, would be far more than in the Stow pavement.

1614. Q. Pass now to the next exhibit referred to by Mr. Mundy.

A. The next exhibit referred to by Mr. Mundy in his deposition is the American patent of William H. Chappel, introduced as defendant's Exhibit No. 6. The pavement described in this patent consists in preparing the street to the proper level, then laying a board foundation, and upon the board foundation are laid the blocks, set in rows as in the ordinary form of pavement. Between each row is laid a strip of lumber two and a half inches in width. All of this material forming the pavement is first prepared by being dipped in a chemical solution to resist decay. The space above the two and a half inch strip is filled with a solution of sand and gravel, and so forth. It is substantially the old Nicholson pavement, with the blocks and strips and boards prepared by being dipped in a chemical solution as I said, to resist decay. In this I do not find embraced the things that are described in the claims in either of the Stow patents, the construction of this Chappel pavement being substantially the same as the old Nicholson pavement.

1615. Q. What is the only difference between that pavement and the pavement described in the Nicholson patent, as you understand it?

A. The preparation of all the wooden material being made by dipping it in this chemical solution. That is the only difference.

1616. Q. How would a pavement of that kind compare in expense and labor of preparation with the Stow pavement or either of them?

A. It would be more expensive, because there would have to be covered the entire surface of the street with this board foundation, which is not done in the Stow pavement, and it would have to use a short strip two and a half inches wide between each block, which is not employed or used in any of the Stow pavements in that form.

1617. Q. Is the previous preparation of the blocks and boards used in that kind of pavement of any value in your judgment?

248 A. That might prevent the decay of the blocks, but so far as construction otherwise, they are of no value whatever.

1618. Q. Do not the wooden blocks as ordinarily laid in the streets in the city of Chicago wear out by use rather than decay?

A. They do, as a rule; almost entirely they do.

1619. Q. Then, if the natural wood will last without decaying until it wears out, would the preparation of the blocks so as to prevent decay be of any practical use?

A. Not any at all.

1620. Q. Go on to the next exhibit referred to by Mr. Mundy.

A. The next exhibit referred to by Mr. Mundy is the American patent of B. F. Miller, and is introduced as Defendant's Exhibit Number 8. This patent describes a pavement laid upon the street, which has previously been raised to the proper grade. The blocks are laid at an angle of about forty-five degrees, each block resting upon its neighbor forward. The blocks are close together, leaving no space between them for gravel, sand, or any character or kind of filling, and in no way resembles any of the matters or things that are described or claimed in any of the Stow patents. There are various figures in this patent representing

different forms and modifications of this invention, but in no one is there shown the blocks placed in rows on a sand foundation, leaving a space between them, as is shown and described in the various Stow patents. Hence, I see nothing in it that resembles the various Stow patents in any form or manner.

The next patent referred to by Mr. Mundy is the American patent of T. Cowing, and is introduced as Defendant's Exhibit No. 10. This pavement described in this patent is made by the blocks being made in wedge shaped form, cut off at about two-thirds their distance, leaving one end of the block larger than the other. They are then laid on the street upon a sand foundation upon their larger end, leaving between the blocks a space extending from the surface to near the lower end, in which is placed and located gravel and sand. This pavement does not resemble any of the matters and things described or claimed in the various Stow patents, inasmuch as the place between the blocks does not extend to the surface of the street or to the entire depth of the block. The block has to be made specially, or specially prepared; and, secondly, is more expensive to make than is the Stow pavement.

1621. Q. Are the blocks in contact with each other?

A. The blocks are in contact with each other at their base, and the wedge of gravel does not extend down to the sand foundation or gravel foundation.

1622. Q. In a pavement constructed in that way, would it or not be practicable to drive gravel down to or below the base of the block?

A. It could not be done, as the blocks at the base touch each other, coming close together.

1623. Q. Go on to the next exhibit.

A. The next patent referred to by Mr. Mundy is the patent of S. C. Prescott, and is introduced as Defendant's Exhibit No. 13.

1624. Q. What is the date of the patent?

A. Dated June 30, 1871.

1625. Q. Well, what do you find described in that patent?

A. This pavement described in this patent consists in the blocks being laid upon a sand foundation, extending from curbstone to curbstone, and a space is left between the rows of blocks, and the spaces between these rows of blocks are filled with cement, concrete, and so forth,
249 and are driven about three inches below the surface of the block into the sand below. But the application for this patent was filed, as I see from a memorandum upon the surface, long after the Stow application was filed, consequently it does not go back in point of time as far as the Stow patent.

The next exhibit referred to by Mr. Mundy is the American patent of R. H. Willett, and is introduced as Defendant's Exhibit 12. The application for this patent, from a memorandum in pencil upon it, I see was filed February 8, 1871, which was subsequent to the application of Mr. Stow.

1626. Q. What do you find in this Willett patent?

A. The pavement described in this specification makes the block for the pavement wider at the centre than at either end. The block is then placed upon a sand foundation, leaving a space between each row of blocks. The object of these blocks being wider at the centre than at either end is to present or provide a double wedging from the bottom and from the top of the block.

1627. Q. Do you find in it the equivalent of the Stow pavement?

A. I find in this the blocks are made in a special way, requiring an extra amount of labor and skill to make them, while the Stow block is made in the simple, cheap manner heretofore described by me, and in

this respect it differs from the Stow pavement, and also in filling the space between with a cement it would be exceedingly difficult and impracticable to fill the spaces as is done in the Stow pavement, because the centre of this channel or space between the blocks is narrowed down to a very narrow space. The specification provides that the space at midway in the length of the block shall be a half an inch, and at each end of the block it is much wider; consequently, in ramming down from the surface to the bottom it would be impossible, in theory, to fill the space below this narrow space in the channel with concrete or gravel, as he describes; consequently, I do not find substantially the same features or characteristics employed in the construction of the various Stow pavements.

1628. Q. How would be the expense of constructing that pavement as compared with the Stow?

A. It would be much more expensive than the Stow pavement, inasmuch as the blocks would have to be specially prepared. There would have to be four trimmings to each block, so as to narrow each end of the block, requiring a trimming or champering off of each side of the block at each end.

1629. Q. Would it, in your judgment, be practicable to fill the spaces between the blocks, and especially that portion of the space below the centre, with sand and gravel, in the ordinary way of constructing pavements?

A. I do not think it would be. The space at the centre of the blocks would be so narrow as to make it impossible to ram the space below.

1630. Q. Returning for a moment to the patent of Prescott, does not the construction of the pavement as described in that patent contemplate a solid material between the lower portion of the blocks and extending down into the foundation below the blocks, or a substance which becomes solid by hardening after it has been introduced, similar to a wooden wedge, as described in Stow's reissued patent before referred to?

A. Yes, sir; it does.

1631. Q. Would not a pavement constructed in that way be substantially the same as the pavement of Stow, constructed with a wooden wedge between the rows of the larger blocks?

A. Yes, sir; accomplish the same purpose.

250 1632. Q. Simply a different material used in place of the wooden wedges, is there not?

A. That is all; yes, sir.

1633. Q. Go on with the next.

A. The next patent referred to by Mr. Mundy is the American patent to J. A. May, and is introduced as Defendant's Exhibit No. 15. The pavement described in this patent is constructed by first laying strips of board longitudinally with the street, and then laying transversely on the street, and across on top of these strips of board, strips of board extending transversely on the street. These are separated sufficiently to admit of the lower end of the block passing between them, the block first being specially prepared with a shoulder and tennon, so that it rests upon this strip laid across the street. The blocks are laid checkered, so that there is no continuous channel between them, extending from curbstone to curbstone. This channel which is left between the blocks, he provides, may be filled with pieces of wood, in place of either gravel or other material generally used, and also in making these pieces of wood in depth several inches greater than the blocks are, so that they can be driven down into the sand below. This very materially differs from any and all of the patents of Mr. Stow involved in this case.

It would be very expensive to make this pavement as described by Mr. May in his patent. The blocks would have to be made with a tennon, and then there would have to be a strip extending across the street transversely, all of which would make it much more expensive than the Stow pavement. Hence, I do not find in the May patent the matters and things described and claimed in any or either of the Stow patents.

1634. Q. What is the particular thing said to be covered by and claimed in this patent of J. A. May?

A. It is a pavement consisting of the rabbeted blocks and strips of board, arranged so as to receive the end of the block rabbeted or tennoned between them, and the pieces of wood that are driven down between the blocks.

1635. Q. What is the date of that patent?

A. This patent is dated March 21, 1871.

1636. Q. What is the next exhibit?

A. The next patent referred to by Mr. Mundy is the American patent of A. B. Morong, and is Defendant's Exhibit 16. The application for this patent, as shown by the certified copy of the file wrapper, was filed September 5, 1872, and is patented October 29, 1872, and is since any of the patents granted and issued to Mr. Stow that are involved in this suit.

1637. Q. Have you examined the other exhibits of the defendant, being copies of letters patent, and which are not referred to in the deposition of Mr. Mundy; if so, will you please refer to them, and give your opinion as to whether they are similar or unlike the invention described in the several Stow patents involved in this litigation?

A. I have examined the other exhibits not referred to by Mr. Mundy. The American patent of H. McDougall. This invention consists in providing a guide to separate the blocks while they are being laid and has nothing to do with any device covered by Stow patents. The American patent of C. Gates, introduced as defendant's Exhibit No. 11. The pavement described in this invention is made of blocks prepared in a special manner; the lower surface of the block is made wedge shaped, partially; that is driven into the sand foundation and the blocks
251 come close together; the top edge of the blocks is champered off slightly; but this does not resemble any of the matters and things claimed or described in any of the Stow patents. There is no channel between the blocks to be filled with gravel or sand. The blocks are made in a special manner, requiring a great deal of extra labor. There is a great deal of loss in the material used in consequence of trimming off the blocks to form the shape they are in, and it would be an impracticable pavement. There has never been any of it laid since invented. It is expensive.

1638. Q. Have you, for a series of years last past, been in the habit of noticing the laying of the street pavements in Chicago?

A. I have; yes, sir.

1639. Q. Are you familiar with the manner in which the pavements have been laid, in a general way?

A. I am, in a general way, on most of the streets. I could not say that I have seen it laid on all of the streets, but I have on a large portion of the streets.

1640. Q. Were you present at the experiments made, which have been referred to in the depositions of some of the witnesses for the complainant, at or near 131 South Jefferson street, in Chicago, on the 9th and 10th of December, in the present year?

A. I was, on the ninth and tenth.

1641. Q. In the conducting of those experiments, were the paving blocks laid substantially in the same way as they are laid in the streets of the city?

A. Precisely the same way.

1642. Q. What is your judgment as to the practicability of driving a column of sand or gravel between the blocks, as described in the Stow patent of December 31, 1872, below the base of the blocks?

A. I think that there is no difficulty in doing it. In these experiments that I witnessed on the 9th and 10th of December, the foundation was prepared the same as it is prepared for the streets by dressing it with sand previously. The ground was spaded up, so as to make it soft, and then upon the surface was placed a dressing of sand, I should think about four inches deep. That was rammed down by a rammer; this rammer was a piece of oak scantling, four by six, and about two feet and a half long. A portion of this surface, before the blocks were laid, Mr. Stow distributed flour over it. Then the blocks were set on this foundation over where the flour was spread in the manner as they are laid in the streets, as they are set in the streets, leaving a space of about an inch. Then the gravel was spread or filled in to this space and a rammer was used by a laboring man there just as they use them in the streets, rammed down, and then they were filled and rammed again. The section that was laid there was four feet by about six feet. After it was all laid and rammed in this manner, then portions of it were removed to learn what was the effect, and I found that the space or channel of gravel between the blocks had penetrated the surface of the sand foundation from half an inch to three-fourths of an inch. The place where the flour was spread beneath this channel we could see; as an additional proof that the gravel or sand had penetrated the foundation was that the flour was pushed down. The gravel would be placed immediately on top of the flour and it was driven down and the flour had settled accordingly.

1643. Q. In the ordinary way of laying the pavement would there be any difficulty resulting from the formation of an arch, arching over from one block to another, to prevent the gravel and sand from going down?

252 A. I do not think that that could occur sufficiently to amount to any practical difficulty in the least.

1644. Q. In driving this gravel through a channel of that sort, would it or not encounter the same difficulties that would be encountered in attempting to drive a column of sand through a tube?

A. I do not think that it would.

1645. Q. Why not? Give your reasons.

A. In driving a column of sand through a tube, the column of sand that is being driven through at each point is surrounded by firm resisting walls. In driving the gravel through or down this channel, between the blocks in the wooden pavement, there are two sides of the channel that have any resistance, and from my observation I saw that there was no difficulty in driving the gravel through the channel in the manner described. In driving it through a tube, if the tube were sufficiently long, there would be a difficulty presented by the friction between the inside of the tube and the column of sand, but no such difficulty is presented in driving through a channel between the blocks of a wooden pavement.

1646. Q. Are the walls of the two sides of the channel fixed and immovable?

A. They are not; they yield, while the walls of the tube are fixed.

1647. Q. Would not, then, the arch of the blocks be sufficient in almost every case to break down every arch there might be a tendency to form in the process of driving the gravel?

A. I should think it would; it would take but a slight volition.

1648. Q. Have you ever made any examination of the wooden pavement in the streets of Chicago for the purpose of ascertaining whether, as laid in the city, the gravel was actually driven below the base of the blocks; if so, when and where?

A. The twenty-seventh of this month I went with Mr. Stow and a laborer, whose name I have forgotten——

1649. Q. The same man that was a witness here?

A. The same party that was a witness in this case.

1650. Q. Hanson?

A. His name is Hanson, upon Wabash avenue, just north of Hubbard court, and there this laborer took up some five or six blocks of the pavement and I examined with special reference to the column of gravel in the channel being driven below the lower end of the block and also with the channel being filled up uniformly from top to bottom; I found that the gravel extended below the block about half an inch, from half to three-quarters of an inch, and that the channel was filled firmly and compactly with gravel or sand, the material used, whatever it was.

(Objected to as being new matter, and not in rebuttal.)

1651. Q. Was or not this column of gravel frozen so as to be at the time practically solid?

A. It was, so that when the block was removed the surface of the column of gravel driven into the channel was preserved intact and complete the entire depth.

1652. Q. So far as you know or were able to ascertain on this examination, was this pavement on Wabash avenue laid practically the same as the other pavements laid in this city upon sand foundation?

A. It was.

1653. Q. Did you notice the pavement on Wabash avenue as being laid—to observe the manner in which it was put down?

A. I did; I was in the habit of passing up and down Wabash avenue every day while they were laying it this side of Twelfth street—passing down in the morning and up in the evening, on foot.

253 1654. Q. What was the method adopted there, the method pursued in laying that pavement?

A. The street was raised to the proper grade, and dressed off with sand; then the blocks were laid across the street obliquely, I should think at an angle somewhere from forty-five to forty degrees; the blocks were placed upon the sand foundation, leaving a channel about an inch in width; these channels were then filled about two-thirds full with gravel; then a rammer was used by the workman and this gravel was rammed down between the blocks, in the channel, after which a second dressing or filling of gravel was made; this also was rammed; then followed a top dressing.

1655. Q. How did the ramming of the gravel between the blocks in the experiment which you noticed on Jefferson street compare with that made use of in laying the pavement on Wabash avenue, as you observed it?

A. I should say they were just about the same; not any difference in the amount of ramming or number of blows.

1656. Q. Were you present at and did you observe the experiment

which resulted in the exhibit introduced in evidence here in the course of Mr. Hauson's testimony?

A. I did not see that made.

1657. Q. What, in your opinion, would be the effect of travel and the passage of heavy teams over this wooden block pavement, as the streets are used in the city of Chicago, particularly where the streets are newly filled?

A. Well, it would have a tendency to settle somewhat and making firmer the filling and foundation.

1658. Q. Would or not this tend to carry the paving blocks themselves below the gravel and down to the bottom of it, even if when newly laid and the gravel extended below the blocks?

A. The settling of the blocks on newly made foundation would have a tendency to make them settle faster than the filling would, I should think.

1659. Q. Would not the main pressure of loaded teams come upon the blocks?

A. Certainly it would.

On December 31, 1875, parties met pursuant to adjournment when the examination of Mr. Cowles was continued

By Mr. JEWETT:

1660. Q. Have you, since the adjournment, examined the English patent of Henry Austin, Defendant's Exhibit No. 3, and do you understand the same? And, if so, please state what you find in said patent, and whether the devices described therein are the same or similar to any of the devices described in the patents sued upon in this case, and state whether the same are similar or dissimilar.

A. I have examined the patent referred to in the question, and if I understand the same, this is the patent of Henry Austin, and it consists in taking any suitable number of planks, or slabs, or pieces of wood of convenient size and thickness for a foundation, and this foundation is to be glued, cemented, or otherwise fastened together in compartments, upon which foundation is glued or cemented wooden blocks of any convenient shape or size, without any fastening or connecting together of the blocks and with intervals or spaces between them to the entire depths of the blocks. These intervals or spaces may be of the width of one inch and a half, or thereabouts, and are to be filled in with broken stone or broken slate, granite, gravel, sand or any hard or fibrous substance; this substance, or filling, to be cemented or concreted together with liquid lime or cement, poured in, or with pitch, or caoutchouc dissolved in nap'tha, melted or poured in, or with any other liquid materials. The compartments which were, I understand, sections of pavement, are to be strengthened by means of ledges glued across them underneath. And for the purpose of securing the whole pavement together, when wood is the foundation, the compartments should fit into each other, and be glued or secured or otherwise fastened on to separate pieces of timber laid underneath. I do not find described in this patent the same thing, or substantially the same thing, described or claimed in any or either of the Stow patents. The Austin patent provides a foundation of boards, wood, slabs, or metal, upon which he glues or cements his blocks. The Stow patents do not provide any foundation, the blocks placed directly on the sand. Hence I find that there is no similarity between the Stow pavements, as de-

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scribed in his patents, and the Austin pavement, as described in the Austin patent.

1661. Q. Did you ever know of any pavement being laid in accordance with the specifications in the Austin patent?

A. I never did.

1662. Q. How would it be as to expensiveness, compared with the Stow pavement?

A. It would be so expensive, in my judgment, as to be utterly impracticable.

Cross-examination by Mr. BOND:

1663. C. Q. What kind of a pavement do you find described and shown in complainant's patent Exhibit A, reissued and introduced as Complainant's Exhibit C in this case?

A. I find the pavement described in the patent referred to in the question consists of first bringing the street to proper grade and dressing it with clear sand, loam, or loose earth, free from stone, within four or six inches of the street grade, according to the length of the blocks, and smoothed off so as to conform to the desired arch or crown of the street. Then there is placed a row of blocks from curb to curb, upon the street, and then is placed a narrow wedge-shaped block, and then a block like the first one, and so on, alternating with the rectangular block and wedge-shaped block. Then the wedge-shaped block is driven down, and the space made vacant by driving the wedge-shaped block down is filled with gravel. I also find that he describes a second form, in this same patent, which consists of dressing the street as for the same as in the first instance, and then taking the larger blocks and cutting one end of the block obliquely, and then placing this end so cut on the surface, and another block or series of blocks beside it, and so on, the blocks joining, presenting a smooth surface. The last form of pavement referred to is designed for sidewalks, and so on; not for streets. Before the blocks are laid on the street, the sand or earth foundation should be thoroughly wet when the blocks are put down. The larger blocks, he provides, should be from four to six inches long, and about three inches thick, and of any convenient width, and the narrow or thin blocks should be about an inch thick, and of convenient width, but he does not confine himself to these precise dimensions.

1664. C. Q. Is not the earth a sufficient foundation, without any sand, within the terms of that patent, Complainant's Exhibit C?

A. I understand that the sand is put on the surface of the street for the purpose of facilitating the laying of the blocks, and more readily driving the thin block down into it, and thus compact it under the block and make it a strong foundation.

255 1665. C. Q. Does not the specifications of this patent contain this statement, referring to Exhibit C: "The nature of my invention consists in putting down a pavement of wood, or other suitable material, upon a foundation bed of sand or loose earth," and in the next section, in "constructing a street pavement the street is first filled with clear sand, loam, or loose earth, free from stone"? Under those statements, do you find sand to be any essential part or feature of the foundation?

A. I do not know that the sand is an absolute necessity, that is, that the foundation should be of precisely that material, but the surface should be dressed off with sand, or something of its equivalent nature, so that the blocks can be placed upon it readily, and the center blocks

driven down. If the foundation was hard clay substance, it would be difficult to drive the block down.

1666. C. Q. Do you find the gravel or broken stone filling to be essential for filling the spaces between the main blocks in the pavement described in this patent?

A. The space or channel between the blocks should be filled with gravel equivalent to answer the purpose of the patent.

1667. C. Q. Would solid wood be an equivalent?

A. It would not. It would not answer all the purposes that the gravel or sand does.

1668. C. Q. Why not?

A. Because the wood would decay, while the gravel would not; and furthermore, if it were filled with wood, there would be a smooth surface presented, which would make it difficult or almost impossible for horses' feet to have a hold or sure footing.

1669. C. Q. If the wood in the places for narrow blocks were left a little lower than the surface of the main blocks, would not that obviate your last-named difficulty?

A. It might obviate it for a short time, but the longer blocks would soon wear down even with the other blocks, and thus the same difficulty would be presented.

1670. C. Q. Do you think, then, that it would practically destroy this pavement to fill the holes or channels with wood, or fill them so near the top that no gravel would be necessary or could be held in place?

A. I think it would not be as serviceable or so good a pavement as this described.

1671. C. Q. Would there be any tendency in the use of the street to drive the main blocks down to a level with the secondary blocks, if they were left half an inch lower than the main blocks?

A. Yes, I think there would be, if the street were newly filled or dressed. Passing draught teams, heavy loads, would have a tendency to compress or press down the blocks highest up.

1672. C. Q. In the original patent, Complainant's Exhibit A, is not that part of the upper figure which is marked with the word "completed," shown to be filled with wood in two of the channels, and with gravel or concrete in one of them?

A. The drawing in two of the channels shows the thin block to come out to near the surface, and one is filled with gravel or concrete, but in his specifications he seems to lay the greater stress upon the block being driven down to about half the width of the larger block, and filling the space thus made vacant by gravel or concrete. He merely says in one place in the specification, that the wedge-shaped blocks may be made a little longer than the larger blocks, and driven down a distance of about three-quarters of an inch or so below the larger blocks.

1673. C. Q. Would not a pavement with the modified construction there stated, that is in the form stated in the section which I now
256 read, to wit, "The blocks No. 1 are to be filled with gravel, or the said blocks No. 2 may be made some two or three inches longer than the blocks No. 1, and driven down until their upper ends are only one-half or three-quarters of an inch, or thereabouts, below the upper ends of the blocks No. 1, leaving narrow grooves merely to give a foothold for the horses, or other animals traveling on the pavement," by a pavement constructed within and according to the specification of the Stow patents, Exhibits A and C, in one of its forms, and is not

that form made equivalent to the one where the spaces are partly filled with gravel?

A. I don't know but what it would.

1674. C. Q. Do you find it to be essential within the terms of this patent that the thin blocks, as you call them, should be sharpened or made wedge-shaped?

A. The patent provides that they may be either wedge-shaped or not.

1675. C. Q. When they are square-ended, or made in accordance with the section which I now read from Exhibit C, to wit, "When the foundation bed is composed of sand and loose sandy earth, it will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square-ended blocks will operate as wedges, and on being driven down into the foundation bed will pack the same sufficiently," would not the driving of such blocks into loose or sandy earth tend to loosen the foundation under the main blocks, rather than to pack it?

A. Not necessarily.

1676. C. Q. Would not the line of compression under the block which is being driven stand at an angle outward from each edge of the square-ended blocks, and would not the driving of the square-ended block tend to carry down more earth than the simple width of the block which was being driven, and thereby leave cavities under the support of the main blocks, if driven to any considerable distance?

A. I do not think that that would be the case from necessity.

1677. C. Q. Do you find it essential or material within the terms of this patent, Exhibits A and C, that the blocks, either main or thin, should be of wood?

A. The inventor, in his specification, says: "While I regard my invention as most properly applicable to wooden pavements, it is manifest that said blocks No. 1 may be of dressed stone, or of a concrete composition, moulded into the form of blocks, of dimensions similar to those shown in the drawings, or in the form of continuous blocks, and so forth; and the blocks No. 2 may be of dressed stone, brick, or wood, or of any suitable material that will bear to drive down into the foundation below."

1678. C. Q. In view of this statement, do you deem it to be essential or material that the blocks should be made of wood?

A. While the blocks when made of wood would be cheaper, and would make the pavement less expensive, still they could be made of the material he mentions in that clause just read in response to the last answer.

1679. C. Q. When made in accordance with the modification last named, in what respect would the pavement differ from that shown in the Defendant's Exhibit No. 4, English patent to Sir John Scott Lillie, or, in other words, is it not identical with the Lillie pavement, with the exception that Lillie does not specify the driving down of any of his blocks below the adjoining blocks?

A. The Lillie patent provides that the stone should be cemented together by any suitable cement, and casting them in moulds of a
257 convenient size, and of an equilateral and quadrilateral shape, so as to admit of their being laid on streets, and having three additional surfaces to be presented to the traffic when repairs are necessary. The Stow patent does not provide that the stone shall be so made that it can be used by turning it over from side to side when pairs are necessary. The Lillie pavement does not provide that the

blocks shall alternate with narrow and wide blocks, and that the narrow blocks shall be driven down below the larger ones.

1680. C. Q. Does not Stow, in his specification, say: "The blocks No. 2 may be about one inch thick, and of any convenient width; but I do not limit myself to these dimensions"? Under this latitude, may not what you have called the thin blocks, which are the blocks No. 2, be made of equal size with the main blocks, or the blocks No. 1?

A. I do not think they could, because in his drawing he provides that the thin blocks shall be very considerably narrower than the thick blocks; and in his specifications he speaks, and makes it a prominent feature, that the thin block, block No. 2, shall be about an inch in thickness. And while he says in his specifications that block No. 2 may be about an inch thick, and any convenient width, I do not limit myself to this dimension. He evidently does not mean, nor would the language of the patent imply, nor would the drawings show that he intended, that the two sets of blocks should be of one size or dimension.

1681. C. Q. If that is an essential feature of the Stow invention of pavement, as described in the Exhibit C, what do you make of this statement of the patent: "Nor is it absolutely necessary that the blocks when used be sawed or dressed into regular forms, and set in regular tiers, as a very good cheap pavement, involving the principle of my invention, may be made of split wood of irregular surface, set on their ends, a proper proportion of them, at regular intervals, 'as near as may be driven down into a foundation bed,' so as to produce the requisite packing of the same"? Does not this sentence just read fairly imply that the blocks may be all of the same size, and still be within the scope of this patent?

A. The paragraph you have read does not of necessity, in my judgment, imply that the blocks should be of uniform size; but, taking that in conjunction with the other portions of the specifications, it would seem necessary that the blocks should be of different sizes.

1682. C. Q. Does he not twice, in his specification, say that he does not limit himself to the dimensions stated—once on the first page, and once on the second?

A. In the clause referred to on the first page he refers to the street pavement, and while he says he does not limit himself to these dimensions, that does not imply, in my judgment, that the blocks could, or should, or that he intended to make them all of uniform size. The other refers to pavement of sidewalks.

1683. C. Q. Are not the blocks shown in the second figure of the model B, as it is marked in the reissued patent, all of the same size and configuration?

A. They are the same width, but that model is not intended for street paving; it is for sidewalks and cellar floors.

1684. C. Q. Would it make any difference whether those blocks were laid for a cellar floor or for a street pavement, so far as any invention is concerned?

A. The inventor states in his specification that they are expressly designed for sidewalks, and ground and cellar floors.

1685. C. Q. In the modification suggested of the use of split or
258 other irregular formed blocks, is there any provision that the larger or smaller ones should be driven into the earth?

A. It would not be practicable to make a pavement and drive the larger blocks down.

1686. C. Q. Why not, in the form I have suggested?

A. Because, in my judgment, a pavement constructed of larger blocks,

driven down as you suggest, would make an impracticable pavement, so far as durability or preventing any uneven surface for the carriages and vehicles to pass over.

1687. C. Q. Then you think this suggested modification worthless, do you?

A. Well, in what way? What do you mean by saying "this suggested modification"?

1688. C. Q. The one made of split blocks; where they are irregularly driven down.

A. Well, I did not say it would be absolutely worthless.

1689. C. Q. Is it not—the idea of that section, if this modification is described—that the blocks should be as nearly as practicable all of the same size?

A. I do not so consider it.

1690. C. Q. Does he say split some of them coarse and some of them fine?

A. Taking that clause referred to in conjunction with the other parts of the specification, I think that the size of the blocks should vary.

1691. C. Q. In this modification, is there any suggestion that the blocks should be placed in uniform rows so as to produce uniform channels?

A. No, he says that is not absolutely necessary.

1692. C. Q. Then if this modification is within the scope of the patent, it is not essential, is it, that there should be uniform rows of blocks, transverse or diagonally across the roadway, with corresponding channels?

A. In this clause he says that it is not absolutely necessary that the blocks, when of wood, should be sawed and dressed into regular forms, or set in regular tiers, as a very good, cheap pavement, involving the principles of my invention, may be made of blocks ot split wood, made of irregular forms, set on their ends, &c.

1693. C. Q. Would not a pavement constructed in exact accordance with figures 18 and 19 of Stead's patent, Defendant's Exhibit I, compact the foundation just exactly the same as this modified form of the Stow, which we have just been considering?

A. That would depend on the size of the blocks.

1694. C. Q. If we should make blocks of the Stow patent of stone, six inches long and six inches wide, would they not naturally be cubical in form?

A. Why, if a block were made with all of the sides six inches by six inches, it would be a cube.

1695. C. Q. When in this form, could they not be turned over for repairs, or used either side or end up?

A. They could, but Mr. Stow does not contemplate or provide any such use of his block, in the repair of the street. It would not be following his specifications of patent to do so.

1696. C. Q. Does he not say, in speaking of his blocks for the floors of buildings, that "I prefer to make them larger, say from four to six inches wide, and from six to twelve inches long"; six inches being mentioned as to both dimensions, would it not be within the specification to make them six inch cubes?

A. Well, while he says and uses the term "six" in both dimensions referred to, he does not mean that in either form he suggests here that the precise size of each block shall be six inches. He says that a block may be made from four to six inches wide, and from six to twelve inches long.

259 1697. C. Q. Would not a six inch cube be within the specifications?

A. No, sir; I don't think it would, because he did not intend that blocks shall be made six inches square.

1698. C. Q. If you take the greatest width and the shortest length mentioned, would you not, in each case, have six inches?

A. If you took that precise form you would, but it is not the idea that the inventor expresses in his specification.

1699. C. Q. If made twelve inches long, would they be laid with their lengths put horizontal or vertical in practice?

A. Why the twelve inches would be laid the longer way of the block—would be laid horizontal.

1700. C. Q. When laid in that form, could not three of the sides be used either in constructing or repairing the pavement; I mean either side used for the surface of the pavement, if made of dressed stone?

A. If the stone were twelve inches long, six inches wide, and six inches deep, it could be turned over and used, but Mr. Stow, in the patent referred to, does not contemplate anything of the kind; that would be the exact dimensions when the stone was laid, but when it was used, of course it would be worn away, and, as a consequence, when it came to be turned over on a different place from what it originally was, the stone would be thinner than when originally laid.

1701. C. Q. That is, when you turned it a quarter over, and when turned half over it would fill the place, would it not, the same as before?

A. It would fill it one way, but it would not be as high.

1702. C. Q. What is the difference between the pavements, so far as their construction is concerned, claimed in the first and third claims of the complainant's patent, Exhibit C?

A. The first claim is a pavement composed of alternate layers of square ended and wedge shaped blocks, the wedge shaped ends of the latter being driven into a foundation bed of sand or earth, substantially, and for the purpose described. The third claim is a pavement composed of wood, either in whole or in part, or other suitable material, laid on a foundation bed of sand or loose earth, as described, a portio of the blocks being driven down into the sand foundation bed, to pac the same, substantially as and for the purpose specified.

1703. C. Q. The first claim is where the pavement is composed of alternate tiers of square and wedge shaped blocks; the wedge shaped blocks are driven into the foundation of sand; the third claim is a pavement composed of wood, or in whole or part of other suitable material, laid on the same foundation, and a portion of the blocks driven into the sand foundation?

1704. C. Q. Are not a portion of the blocks driven into the foundation in the pavement claimed in the first claim?

A. Half are; the tier of wedge shaped blocks being driven into the sand.

1705. C. Q. Would not a pavement constructed like that shown at figures 18 and 19 of the Stead patent, Defendant's Exhibit I, in view of the modification suggested by Stow in his specification, be an infringement of the third claim of Stow's patent, in your opinion?

A. The section of pavement referred to in the figures 18 and 19 of the Stead patent are composed of octangular blocks, so placed as to leave a square recess or interval between them, into which may be inserted a corresponding piece; this block is a specially prepared block, in the form and manner described; the Stow patent does not con-

260 template this form of block so made or so prepared; therefore, I do not think the Stow pavement would be the same as the figures referred to.

1706. C. Q. Would not the pavement shown in those Figures 18 and 19 be composed of wood?

A. The inventor says, in his specification, that the blocks are made octangular in form, and placed with the fibre vertical.

1707. C. Q. What are they made of?

A. From that description I would infer that they were made of wood. He speaks in the first of this specification that he forms his pavement of wooden blocks.

1708. C. Q. Is not that pavement, as shown in those figures, laid upon a foundation of loose earth?

A. He says in the first part of his specification, "the foundation being first suitably prepared to the required figure, by the usual well-known means, to receive such wooden blocks."

1709. C. Q. Does he not say that his wedge-shaped blocks M are driven into the earth?

A. He says, referring to figures 18 and 19, "into which"—meaning the square recess between the blocks—"may be inserted a corresponding piece, M." He says further on, "I should recommend a pile to be driven into the earth, through the square recess or interval, of about the size and form represented by the dotted lines in figure 19."

1710. C. Q. Do not the dotted lines represent a wedge-shaped block, or, as he calls it, a "pile"?

A. I suppose it does.

1711. C. Q. In the completed pavement, would not the number of these wedge-shaped blocks equal that of the octagon blocks, or very nearly equal it, according as they came out at the sides?

A. It could not possibly equal the number of the octagon blocks. I should judge it could not exceed the number of octagon blocks, unless you started from the curb by driving one of those small piles. Then it would be a very small number over half the number of octagon blocks.

1712. C. Q. Taking a row of octagon blocks from curb to curb, and driving in the piles ready for the next row of octagons, if you begin with the pile at the curb and ended with one on the opposite curb, would you not have one more pile than octagon blocks in each row?

A. If you used a single row of octagon blocks and drove a spile at each oblique side of the block, you would have the one excess you speak of; but that is not the way in which the inventor contemplates to lay the pavement. In figures 18 and 19 he refers to a portion of a roadway formed by a series of rectangular blocks L L, placed with the fibre vertical, so as to leave a square recess or interval between them, into which may be inserted a corresponding piece M.

1713. C. Q. What difference would it make as to the number whether you laid the pavement in that way—that is, laid all of the main blocks first and drive the wedge blocks in afterwards, or whether you laid them as suggested in my last question?

A. Upon further reflection, I see that the spiles would equal the number of rectangular blocks.

1714. C. Q. Would not Steads block's, marked M in Figure 18 and M in Figure 19, compact the foundation when driven in?

A. They would to a certain extent, but I do not think they would as much as driving the wedge-shaped block in the Stow.

1715. C. Q. Why not?

A. Because there would be more in a section of the Stow pavement, I think. There would be more of the narrow block or thin
261 block driven below in proportion to the large blocks than there would be in the Stead.

1716. C. Q. When driven the distance shown in Stead, would they not compact the earth even better than the one shown in Stow's patent, Exhibit C, where they are driven only the distance of a very blunt wedge part?

A. In the Stead patent I do not see as there is any provision made as to the depth that they should be driven. It simply says, "I should recommend a pile to be driven into the earth through the square recess or interval, about the size and form represented," &c.

1717. C. Q. How much or to what extent can you compact loose earth or sand when there is no weight resting upon it except that of wooden or stone blocks, by driving wedges into it?

A. You could compact it to the extent of the displacement by the wedge.

1718. C. Q. When there is so little weight resting upon the earth, and being solid beneath, does not that displacement raise the sand or earth at the sides of the wedges, instead of compacting anything?

A. I do not think it would raise to the extent of the displacement. If there were no weight upon the surface immediately adjoining the wedge, it might raise a little, but I do not think it would raise sufficiently to compensate for the displacement made by the wedge.

1719. C. Q. Have we not, in Figures 18 and 19 of the Stead patent, a pavement composed of wood, laid on a foundation of loose earth, and a portion of the blocks driven down into the foundation, packing the same to a certain extent?

A. We have, with the blocks made and specially prepared in a specific manner and form.

1720. C. Q. Are not the blocks shown in the Stow patent, Exhibit C, marked No. 1, as old in form as the blocks shown in these figures in the Stead patent?

A. I don't know that I could answer that question, inasmuch as I have no information as to how old the form of blocks referred to in the Stead patent are.

1721. C. Q. Are not blocks in the identical form of the blocks No. 1, of the Stow patent, described in the Austin patent, Defendant's Exhibit 3—are they not shown in the McDougal patent, Defendant's Exhibit 5, in the Nicholson patent, Defendant's Exhibit 30, and in a number of the other patents exhibited by the defendant?

A. I don't know but they are.

1722. C. Q. Are not the blocks shown in Figures 4 and 5 of the Stead patent very similar in form to the Stow main blocks?

A. Figure 4 is a top view of a section of pavement in the Stead patent, and Figure 5 is an elevation of the same. Figure 5 shows that the blocks are slightly wedge form—that is, they are wider at the top than they are at the bottom—so when they are laid on the street, from curb to curb, they would form an arch, and to accomplish this they would have to be specially prepared.

1723. C. Q. Are not the side blocks of Figure 5 rectangular, and is not the centre wedge block simply the crown block of the whole series, being simply one wedge block in one way across a roadway?

A. The drawing does not show them to be so, Figure 5 being an elevation of Figure 4, with three blocks shown there. All of them may be slightly wedge form.

1724. C. Q. When the octagon blocks are made of sections or
262 logs, if you hewed off the sap-wood how much waste would there be in reducing them from circular to octagon form?

A. That would depend on the size of the log originally and the size of the octagon form after they were reduced.

1725. C. Q. Have you ever laid any pavements?

A. I have not.

1726. C. Q. Do you know what it costs to lay a pavement?

A. I do not, sir. I am not a practical paver, nor am I a paving contractor.

1727. C. Q. Have you computed the expense of material and time and labor necessary to construct any of the pavements exhibited in the defendant's several exhibits?

A. I have not specifically calculated the expense of constructing a pavement.

1728. C. Q. Then you do not know how much it would cost to lay any of them, do you?

A. I do not—not the exact figures, only from what I hear as to what they are laid for.

1729. C. Q. What causes wood to rot?

A. The usual cause for the rotting of wood is the change from moist to dry.

1730. C. Q. Why would not that change occur very frequently where you had a space of gravel, or cells, or air places between them, than it would where blocks are laid contiguous and the fine mud of the streets got in between them?

A. I do not know that I could give the scientific explanation why they do not.

1731. C. Q. Do you know it to be a fact that the blocks decay more rapidly in one case than in the other?

A. From observation, I understand that in the case where the air-passages or channels referred to are filled with gravel and sand, as a rule the blocks do not decay so as to affect them very particularly while the blocks last in an ordinarily traveled street. I do not know that I am prepared to say how the fine mud of the street alluded to would come in between the crevices of the blocks to affect them.

1732. C. Q. Have you not already stated that you never saw the wood pavement where the blocks were laid contiguous to each other?

A. I do not remember as I have.

1733. C. Q. Where have you ever seen any pavement laid with the blocks contiguous to each other?

A. I believe I have seen pavements laid in that form at the intersection of some of the streets in Chicago, but at the intersection of what streets I do not now remember; but I would not be positive that I have not seen them laid in that form.

1734. C. Q. Do not the horse-railway companies in this city lay them in that manner between their tracks?

A. I understand they do, but I also understand that they wear out much quicker than they decay or before they decay.

1735. C. Q. Have you ever seen a pavement that rotted because the blocks were laid contiguous to each other?

A. I don't know that I ever did.

1736. C. Q. Did you ever see one that rotted where they were laid with gravel spaces between the rows?

A. I don't know that I ever did, where the gravel came into contact

with the wood, as the pavement usually, in the ordinary wear of the street, would be worn out before they would rot.

1737. C. Q. You do not know different, as a fact, do you, that one will rot any faster than another, do you?

A. Which do you mean?

1738. C. Q. I mean where the blocks are laid contiguous to each other, and where they are laid with gravel spaces between the rows?

A. I know, from general observation, that where blocks or pieces
263 of wood are placed joining each other, and laid out where the weather affects them, both wet and dry, that decay will take place between the blocks where they are joined; but I do not know that I know of any instances where blocks laid with spaces between them and filled up with gravel or sand between them, would decay as quickly, from the reason that the gravel or sand filling said channels or spaces will retain the moisture.

1739. C. Q. If you lay two boards one upon the other upon a gravel filling, or upon the earth, will not the under one rot first?

A. I do not know that I ever witnessed any experiment of that kind.

1740. C. Q. Does not a post frequently rot off at the ground line when both ends are sound?

A. It frequently does.

1741. C. Q. Why would not this same principle operate by placing wood in contact with gravel, where these alternations between wet and dry take place?

A. If there were no travel on a street, and a pavement laid with the channels between the blocks filled up with gravel, and there was no wear upon it, undoubtedly in time the pavement would decay, but wooden pavements, as a rule, are worn out before they have time to rot out, at least in Chicago.

1742. C. Q. Then a provision against rotting is of but little consequence, is it?

A. That depends on the amount of wear upon a street. If the wear is very great, there would be no necessity for any provision against rotting.

1743. C. Q. Have you ever been in England?

A. I never have been in England.

1744. C. Q. Then you do not know, do you, whether Stead's pavement was laid there or not?

A. I do not, sir.

1745. C. Q. What kind of a foundation does Wood use under his pavement, as shown and described in his patent, defendant's Exhibit 2?

A. He speaks of his pavement being laid on a foundation of mere shingle, gravel, or sand.

1746. C. Q. Are not the blocks in his pavement laid in rows or tiers?

A. He speaks of laying them in series.

1747. C. Q. Does he not provide that a portion of his blocks may be laid higher and then driven down?

A. His blocks are made pyramidal in form, alternately laid upon the larger and smaller ends. A portion of the blocks are laid so that their upper surface is a trifle lower than the balance in some of the illustrations he gives of his pavement.

1748. C. Q. In the form of Wood's pavement described in the modification which I now read, would it not make a level, even, and practical pavement? I sometimes make those series considerably taller—say one inch to three inches, more or less—and I then fill in the spaces *cco* between the alternate series with concrete and asphalt, or other bituminous substances added, and mixed with gravel, sand, or such like material?

A. It would present a surface alternating with wood and the substances mentioned; but it would be, as compared with the Stow pavement, a very expensive pavement to make, because the blocks would have to be prepared in a specific and particular manner and form.

1749. C. Q. How much would it cost to make it by the yard, and how much does it cost to make Stow's pavement by the yard?

A. I could not give you the exact figures in either case; but I know, from observation, that to make a block of the Wood pavement
264 would cost more than to make a block of the Stow pavement, because the blocks in the Wood pavement have to be made pyramidal in form, which would require extra labor and time, and would be a loss of material, as compared with the block in the Stow pavement.

1750. C. D. How much loss of material would there be in cutting wood blocks from bolts in the same way that the Cowing blocks are made?

A. In the Cowing patent the blocks are made wedge-shaped, and are required to be beveled off only on two sides. In the Wood patent the blocks are made pyramidal, and the blocks would have to be dressed off on four sides. And admitting that the dressing off is the same on each side of the Wood pavement as it is on the two sides of the Cowing pavement, then the labor would be greater, and the loss of material would be greater, in the Wood block than in the Cowing block.

1751. C. Q. Is there any loss of material in the Cowing blocks in the way they are made in practice?

A. If the blocks are sawed directly from the bolts in the Cowing patent there would be no loss of material. If they are made by first sawing them into rectangular blocks, then there would have to be an extra amount of work in trimming them off, and consequently a loss of material.

1752. C. Q. May not the Wood blocks be sawed from bolts with but very little loss of material?

A. They could be with very little loss of material, but it would take more time and labor than the making of the Stow block.

1753. C. Q. In what respect, if any, does the pavement shown and described in the complainant's patent, Exhibit B, differ from that shown and described in the model B of the drawing of the complainant's Exhibit C?

A. The block in complainant's patent, Exhibit B, is made what he calls wedge-shaped, which he makes by beveling one side only. This block is placed on the sand foundation of the street, with the wedge-shaped ends downwards, with a place between them, which he fills with gravel or sand. In model B of complainant's Exhibit C the blocks are made in the same form, but not so long, and when placed in position in sidewalks and ground floors where they are, there is no space between them to be filled with gravel or sand.

1754. C. Q. Are not the blocks the same in form?

A. They are the same in form, excepting those in model B of Exhibit C are shorter than those in Exhibit B.

1755. C. Q. What difference, if any, would that make?

A. The only difference would be that the blocks in model B, Exhibit C, would not last as long, or stand the same amount of heavy service that those in Exhibit B would.

1756. C. Q. If the gravel shown in the drawing of the complainant's patent, Exhibit B, was as thoroughly tamped or rammed as the gravel was in the experiment which you saw made over by Jefferson street, would not the gravel go below the shorter edge of the blocks?

A. It would.

1757. C. Q. Would it not compact the sand the same in this form of the block as it would if the block was square at the bottom?

A. The gravel in one channel would compact the sand under the block having its beveled edge facing the gravel. I do not think that it would compact the sand under the other or opposite block, as the gravel would not go down.

1758. C. Q. In what respect, if any, does the pavement shown and described in complainant's Exhibit B differ from that shown and described in complainant's Exhibit F?

265 A. The pavement in complainant's Exhibit B is made with the principal block having the lower edge a wedge-shaped form by beveling one side only. This block is placed with its wedge-shaped end downward upon the street, previously prepared or dressed with sand. The spaces between the blocks are filled with gravel or sand extending only to the surface of the foundation. In the pavement shown in complainant's Exhibit F the blocks are made rectangular without this wedge-shaped end, and the spaces between the blocks are filled with gravel or sand, and is rammed down below the lower end of the blocks into the sand foundation, in order to pack or compress the sand under the blocks.

1759. C. Q. Is not the pavement shown in the De Golyer patent, complainant's Exhibit D, laid, so far as the blocks are concerned, in the identical manner in which they are shown to be laid in Figure 1 of the complainant's patent, Exhibit F?

A. In the De Golyer patent, complainant's Exhibit D, the pavement has a board foundation laid upon the surface of the street. The blocks are then set in rows on this board foundation, with spaces between, and the intervening space is filled with gravel or sand.

1760. C. Q. Leaving out of view the foundation or the material of which it is composed, are not the two pavements shown to be laid in the same way?

A. I should have said, in answer to your last interrogatory, in addition, that under the board foundation he provides sleepers, as he calls them, laid transversely across the street, upon which the ends of the board foundation rest.

1761. C. Q. Previous question read to the witness.

A. If you were to dispense with the board foundation and the sleepers mentioned in the De Golyer patent, and then lay the blocks directly on the sand foundation so far as laying blocks with intervening spaces, they would be alike.

1762. C. Q. In the process of construction are not the blocks laid on a foundation, whatever that may be, in the same way in both patents, Exhibits D and E?

A. So far as the manipulating of the block, and admitting that they are both constructed precisely alike, the mere process of setting the block on a board foundation and upon a sand foundation, they would be alike.

1763. C. Q. Is that the same process of setting the blocks and keeping them in line by means of a guide, shown in the McDougal patent, defendant's Exhibit 5?

A. In the McDougal patent, defendant's Exhibit 5, the tool or implement that is used to keep the blocks straight and to form the channel—the tool or implement used is constructed with a series of teeth or pins sufficiently long to extend above the block and planed in a head resembling a rake, while that used in the complainant's Exhibit F is a strip of board sufficiently wide to extend above the block.

1764. C. Q. They are both guides, are they not, for preserving the parallelisms of the rows?

A. They are.

1765. C. Q. With the exception of making the foundation in sections, are not the pavements shown in the De Golyer patent, complainant's Exhibit D, and McDougal's patent, defendant's Exhibit 5, the same as the pavement shown and described in the Austin patent, defendant's Exhibit 3, and were not those pavements frequently called Austin's pavements by reason of their resemblance to the pavement described in Austin's English patent?

A. In the Austin patent there is one form described wherein he says: "If the blocks be square or oblong the ends may be laid together
266 without intervals or spaces between the ends, and forming parallel lines, the intervals in the lengths only to be filled in, as herein described." That would be substantially the same, so far as the laying of the blocks upon a board foundation—substantially the same as the De Golyer patent and the McDougal patent. I do not know whether the De Golyer pavement or the McDougal pavement was ever recognized or known as the Austin pavement.

1765½. C. Q. Does not Austin also say: "Glue or cement the wooden blocks of any convenient shape or size, without any fastening or connection together of the blocks, or with intervals or spaces between them, to the depth of the blocks. These intervals or spaces may be made of the width of an inch and a half, or thereabouts, and are to be filled with broken stone, bruised or broken slate, screened gravel, sand, or any hard or fibrous substance?

A. Yes, sir; it does.

1766. C. Q. Then is not the sole difference between the Austin pavement and the Stow pavement, as described and shown in the patent Exhibit F, the difference in the foundations?

A. No, sir; I should think not.

1767. C. Q. Why not?

A. There is not only the difference in foundation, but Mr. Stow, in his patent, complainant's Exhibit F, rams the filling between the blocks down below the block into the sand foundation for the purpose of compressing the sand beneath the block.

1768. C. Q. If you should take the wood foundation out from underneath the Austin pavement, would not the ramming of the filling have identically the same effect upon the sand or earth foundation that it has in the Stow pavement, shown in his patent, Exhibit F?

A. If you were to ram the filling between the blocks in the Austin patent sufficient, and if the foundation was sand, precisely like that in the complainant's Exhibit F, then the column of gravel filling the space between the blocks would penetrate the foundation; but Mr. Austin, in his patent, makes no such provision. He makes no suggestion to that effect in his specifications.

1769. C. Q. Were not pavements similar to those shown and described, but not claimed in the De Golyer patent, Exhibit D, and the McDougal patent, defendant's Exhibit 5, largely laid in this city about the time those patents were granted?

A. I have seen pavements laid in the city of Chicago like that described in the De Golyer patent, and also pavement like that described in the McDougal patent, but how extensive they have been laid, I do not know.

1770. C. Q. In the laying of those pavements, was not the filling

rammed just the same as it is in laying the pavement, like that shown in the Stow patent, Exhibit F?

A. The filling between the blocks, in the De Golyer and McDougal patent, was rammed, and so also is the filling between the blocks in complainant's Exhibit F. But the effect could not possibly be the same, because in two of the mentioned patents there was a board foundation beneath the blocks, while in the complainant's Exhibit F there is no board foundation; consequently, the same effect would not have been produced so far as the column of gravel penetrating the sand foundation below the block goes in the De Golyer and McDougal patent, as it does not in the complainant's Exhibit F.

267 1771. C. Q. Was not the filling in laying the pavements, like those shown in the McDougal and De Golyer patents, rammed as compactly and thoroughly as it is rammed in laying the pavement like that shown in Exhibit F?

A. It might have been; but I could not say definitely whether it was or not, not noticing that particular feature at the time I saw these pavements being laid as much as I have since, in witnessing the laying of the Stow pavement.

1772. C. Q. Does not figure 1 of sheet 2, of the Nicholson patent, defendant's Exhibit 30, show parties ramming the filling in that pavement?

A. The figure referred to does show the workmen ramming that pavement, but it is done with a different tool or tools than is used, or what I have seen used, in laying the Stow pavement. In this pavement two men are required to do the one act of ramming, while in the Stow pavement, as I saw it laid, but one man was required to do the same work.

1773. C. Q. What is the ramming device shown in that figure of the Nicholson patent?

A. I believe the implement used, as shown in the figure referred to in the Nicholson patent, is called a swedge and maul.

1774. C. Q. Is not that the instrument alluded to in the specifications to complainant's patent, Exhibit F, where it is stated, "I then drive the gravel or sand in said places into the sand foundation below, by means of a swedge and maul, or other suitable instrument"?

A. Well, I guess it is.

1775. C. Q. Is not the instrument now more frequently used called a tamping iron?

A. I believe it is.

1776. C. Q. If the gravel places shown at the left of figures 1 and 2 of May's patent, defendant's Exhibit 15, were thoroughly tamped, would not the gravel be driven below the bottom of the blocks, the same as in the Stow patent, complainant's Exhibit F?

A. If the foundation under the blocks referred to, or that portion of the pavement referred to, has sand foundation, then the filling between the blocks, if sufficiently rammed, would penetrate the sand beneath.

1777. C. Q. After the pavement is completed, could you tell from its appearance whether it was laid according to the Austin specification—the fourth modification of Wood, the Nicholson, the McDougal, the De Golyer, or Stow's patents, Exhibits B, C, and F?

A. If all these patents referred to presented a surface of wooden blocks extending across the street, with spaces between them filled with gravel and rammed down, in passing over the surface of the pavement so laid, the appearance would be like that of the Stow pavements; the

gravel spaces of the Wood pavement would appear wider than those of the Stow pavement.

1778. C. Q. In the experiments which you witnessed at 131 South Jefferson street, how was the gravel put into the channels? Were they filled then, or only partly filled, and how many strips of filling was there used in making that experiment?

A. The gravel was placed in the channels by the shovel, in the hands of a workman. Some of the places were filled about two-thirds full, and then were rammed down, and some, I believe, were filled entirely full, and they were rammed down; then they were filled again, or
268 the space made vacant by the ramming down was filled and rammed again. There were only two rammings.

1779. C. Q. What depth of sand was used for a bed or foundation?

A. About four or five inches.

1780. C. Q. On what kind of earth or soil was it placed?

A. It was the ordinary natural soil—surface soil.

1781. C. Q. Hadn't been dug, or anything?

A. Loosened or spaded up.

1782. C. Q. To what depth, or about what depth was it spaded?

A. I did not see the immediate act of its being spaded, consequently I could not say how deep it was; but noticed that it had been loosened, and Mr. Stow and the workman said he had spaded it up.

1783. C. Q. Was this foundation at any time rammed before the blocks were placed on it?

A. It was.

1784. C. Q. How extensively or thoroughly?

A. The workman took a piece of what I suppose was oak scantling—might have been some other kind of wood—about two feet and a half long; it was, I should think, four by six, in the cross section. The end used in ramming was square with the sides. And with that he went over the surface, and rammed it thoroughly.

1785. C. Q. That was after the sand was put down, was it not?

A. This was after the sand was put down. To satisfy myself as to the character of the ramming, before the blocks were laid, I stepped or walked over the surface and my boots made but a very slight or no practical indentation.

By Mr. JEWETT:

How much do you weigh?

A. I was weighed since I witnessed this experiment referred to—I was weighed—and weighed two hundred and ten pounds.

1786. C. Q. Was the gravel tamped with a tamping iron?

A. It was.

1787. C. Q. To what extent was the tamping applied or continued?

A. It was applied, so far as I could judge, about the same as I saw it done in laying—when they were laying the pavement on Wabash avenue, this fall.

1788. C. Q. About how many blows were struck in the same place, as nearly as a workman would ordinarily strike?

A. Sometimes he would strike one blow in a place, sometimes he would lap them on the last blow.

1789. C. Q. Was the gravel used clean beach gravel, or was it mixed with sand?

A. It was what I think is called bank gravel. Mr. Stow said he got the gravel from the city.

1790. C. Q. By bank gravel you mean it had sand and dirt mixed with it?

A. Slightly, yes; there was some there that hadn't as much dirt in as others.

Redirect examination by Mr. JEWETT:

1791. Q. In the comparatively shallow and wide cavities formed by the projection of the alternate blocks as described in the specifications of the Wood patent, would it, in your judgment, be practicable to pack any loose gravel so as to make a solid and even surface without
269 the use of bituminous or other adhesive element?

A. I do not think that by the use of gravel or sand simply and alone, that a practical and serviceable surface could be made.

1792. *C.* In laying a pavement, according to the specifications of the complainant's patent, Exhibit B, is it not contemplated that the blocks themselves, or the bevel ends of the blocks, should be driven into the foundation?

A. It is.

1793. Q. What effect would that have upon the sand between the bevel edge of the blocks driven down, and the straight side of the block opposite to it?

A. I should think that it would have a tendency to compact it.

1794. Q. Then in driving down a column of gravel between the blocks you would strike a compact body of sand under the channel, would you not?

A. Yes, sir; I would.

1795. Q. What effect would that be likely to have upon the extension of the column of gravel below the upper edge of the bevel in the blocks?

A. It would have a tendency to raise it.

1796. Q. Would it not require great efforts, largely more force to drive a column of gravel below the upper edge of the bevel in that case than it would if the blocks rested the square ends directly on the sand foundation?

A. I should think it would.

Recross-examination by Mr. BOND:

1797. C. Q. What benefit or advantage is derived from driving the gravel below the lower edge of the block?

A. It has a tendency to compact the sand under the block to the extent of the displacement.

1798. C. Q. That is the only benefit, is it not?

A. And also it would assist in holding the blocks in firm position, and would prevent them from lateral movement, in my judgment.

1799. C. Q. How much would a gravel column prevent a lateral movement?

A. I could not tell. One single column of gravel, standing by itself, might not prevent to any great degree a lateral movement, but where they are employed so frequently and so repeatedly as they are in the Stow pavement, I think they would quite materially assist in preventing a lateral movement.

1800. C. Q. Could not the blocks move laterally in the Nicholson pavement, as used here when they were nailed to the foundation between the wooden strips?

A. I have noticed that in the Nicholson pavement, but I never noticed a lateral movement in the Stow pavement.

1801. C. Q. They are all of them recent in their construction, are they not?

A. Yes, sir; they are laid since the Nicholson pavement was laid.

270 The complainants then introduced certified copies of the following instruments:

Application of David L. De Golyer and James K. Thompson for patent in wood pavement, filed January 2d, 1868.

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HENRY M. STOW
vs.
THE CITY OF CHICAGO.

1802. Q. State your name, age, occupation, and place of residence.

A. My name is Richard S. Robertson; formerly resided in New York City, now reside in the city of Pittsburgh, Pennsylvania; aged fifty-four years, and am president of the Emerson Stone Saw Company.

1803. Q. State whether you know the parties to this suit, or either of them; and, if so, how long have you known them, or either of them, respectively?

A. I am acquainted with Henry M. Stow, and have known him since about 1869.

1804. Q. Did you sign, as witness, the application of complainant for patent known as number 134404, dated December 31st, 1872?

A. I did.

1805. Q. Did you ever see a model of the pavement covered by that patent; and, if yea, when and where did you first see it?

A. I saw the model in the office of John Bryan, 43 Broad street, New York, for the first time. This was before an application for a patent was signed. It was in the spring or summer of 1870 that I first saw his model in the office of Bryan. I recollect the dates from the fact that in the summer of 1870, July and August, I put down the Stow wedge pavement in front of the Monongahela House in Pittsburgh, and it was prior to this time that I saw this model.

1806. Q. Did you ever see a printed copy of said model; if yea, when and where did you first see it?

I have seen a printed copy; cannot state the exact date, but it was after I had seen the model.

1807. Q. Do you know of any other matter or thing which may be a benefit to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer.

A. I was connected with the first Stow pavement that was laid in New York City. I purchased the materials thereof, and Mr. Stow was frequently in the office of John Bryan, 43 Broad street, New York. It was one of the occasions when Mr. Stow was in our office that he showed me the model above referred to.

RICHARD S. ROBERTSON.

271 GEORGE F. SMITH, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows, on March 24th, 1877:

Examined by Mr. JEWETT:

Q. What is your name and where do you live?

A. George F. Smith; 43 Hanover street.
Q. How long have you lived in Chicago?
A. Twenty-two years.
Q. What has been your business?
A. Carpenter and paver for the city of Chicago.
Q. Do you recollect the time of the building of the State street bridge, and the laying of the pavement on the north end of the bridge, on North State street, in Chicago?
A. Yes.
Q. Were you employed in doing paving there; and, if so, when was it?
A. In 1864, for the city, and for Mr. William Warner, foreman.
Q. What kind of blocks were used in that pavement?
A. 6 x 6 and 6 x 8 inches.
Q. Who superintended the laying of the pavement?
A. Thompson was the superintendent, but he was not there.
Q. Who was the superintendent actually; who oversaw the job?
A. William Warner was the boss over that job.
Q. How much pavement was laid there in length along the street?
A. About twenty feet in length, and from sidewalk to sidewalk.
Q. What was the north end of that piece of pavement?
A. Stone.
Q. I mean where was it, not what it was made of—the north boundary?
A. On Kinzie; Kinzie runs east and west.
Q. What was there on the south of that strip of pavement?
A. Plank.
Q. How were those blocks laid?
A. They wasn't tight together; they left a little opening between them.
Q. In the crosswise or lengthwise of the street was this opening?
A. It was crossways.
Q. How far apart, about?
A. I cannot tell that. Filled that out with sand. Cannot say exactly.
Q. Give us your best recollection?
A. Perhaps a half an inch.
Q. What were the blocks resting upon?
A. On sand.
Q. How was the pavement finished on top, after the blocks were down?
A. There was sand filled over it, as usual on pavements.
Q. Did you use any tamping iron or swedge between the blocks?
A. No.
Q. Was Mr. Thompson, the superintendent, there whilst you were laying that piece of pavemont, to your recollection?
A. He wasn't there. Mr. Thompson was the superintendent, and Mr. Burley was the commissioner.
Q. Who gave you directions as to how to lay those blocks?
A. William Warner.
Q. Do you know why the space was left between the blocks?
A. For the horses' calks, I suppose.
272 Q. Was the ground sloping down from the bridge to the north where this pavement was laid?
A. It was sloping.
Q. Does that model now before you on the table, marked Exhibit George F. Smith 1, represent fairly the situation of the street and the approach to the bridge at that place?

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A. Yes.
Q. Were you employed in doing paving there; and, if so, when was it?
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A. About twenty feet in length, and from sidewalk to sidewalk.
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A. Stone.
Q. I mean where was it, not what it was made of—the north boundary?
A. On Kinzie; Kinzie runs east and west.
Q. What was there on the south of that strip of pavement?
A. Plank.
Q. How were those blocks laid?
A. They wasn't tight together; they left a little opening between them.
Q. In the crosswise or lengthwise of the street was this opening?
A. It was crossways.
Q. How far apart, about?
A. I cannot tell that. Filled that out with sand. Cannot say exactly.
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A. Perhaps a half an inch.
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A. On sand.
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A. There was sand filled over it, as usual on pavements.
Q. Did you use any tamping iron or swedge between the blocks?
A. No.
Q. Was Mr. Thompson, the superintendent, there whilst you were laying that piece of pavemont, to your recollection?
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Q. Who gave you directions as to how to lay those blocks?
A. William Warner.
Q. Do you know why the space was left between the blocks?
A. For the horses' calks, I suppose.
272 Q. Was the ground sloping down from the bridge to the north where this pavement was laid?
A. It was sloping.
Q. Does that model now before you on the table, marked Exhibit George F. Smith 1, represent fairly the situation of the street and the approach to the bridge at that place?

A. Yes.
Q. What portion of it represents the pavement in question?
A. Where the letter T is on the model represents about the pavement.
Q. What was the balance of the bridge from T to the viaduct?
A. That was plank.

Cross-examination by Mr. BOND:

C. Q. Was you there while the whole of that piece was being laid?
A. I was there all the time, not quite a day. It was finished inside of a day.
C. Q. Who worked with you?
A. Nicholas Reiser and John Geggle.
C. Q. Can you make a sketch showing your recollection of that pavement after it was finished?
A. Yes; I can do so.
(Witness made a sketch which was introduced in evidence as Exhibit G. F. Smith 2.)
C. Q. Does the sketch made by you represent the whole of this wood pavement, or only a part of it?
A. That is only a part of it.
C. Q. At which end did you commence laying; that is, by the plank or the cobble-stone?
A. By the stone.
C. Q. On what kind of a foundation was that section of the pavement laid?
A. On sand.
C. Q. Was that sand rammed or pounded down any before you put the blocks on it?
A. Yes; it was.

Redirect examination by Mr. JEWETT:

Q. Look at this model, G. F. Smith 3, and state whether or not that fairly represents the pavement, with the exception that the blocks are close together laterally.
A. No; there was an opening between the blocks like in my drawing.
Q. Is your drawing, attached as an exhibit to your deposition, drawn upon a scale, or with any accuracy as to dimensions or distance?
A. The blocks were 6 x 6 and 6 x 8. No scale about the drawing.
Q. Can you remember whether some of the blocks were not close together?
A. On the ends, not crossways. There was an opening between the rows.
Q. Do you know how long that piece of pavement remained there?
A. That I cannot say. The horse railroad went across it after we got through.
Q. Did you ever see any portion of it taken up?
A. No.
Signature waived.

JOHN GEGGLE, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows on March 24th, 1877:

Examined by Mr. JEWETT:

Q. State your name and where you live.
A. John Geggle; reside corner Ada street and Wentworth avenue.

273 Q. How long have you lived in Chicago?
A. About twenty-two years.
Q. What is your occupation and business?
A. Carpenter.
Q. Have you ever worked for the city of Chicago in paving streets?
A. I have worked on the streets.
Q. Did you assist in laying the block pavement on the north end of State street bridge in 1864?
A. Yes.
Q. How long were you engaged in laying that piece of pavement?
A. One day.
Q. How much of it was there in length along the street?
A. About twenty feet.
Q. What was the north line of the pavement?
A. Stone pavement.
Q. On what street?
A. On Kinzie street.
Q. What was on the south of it?
A. Plank.
Q. How many men were employed in laying down that pavement?
A. Three.
Q. Who were they?
A. Smith, Reiser, and I.
Q. What kind of blocks were used in laying it?
A. 6 x 6 and 7 x 6; also 6 x 8.
Q. How deep were the blocks?
A. Six inches.
Q. Was it laid from curbstone to curbstone across the street?
A. Yes; from sidewalk to sidewalk.
Q. Upon what did the blocks rest?
A. Upon sand.
Q. How were they laid?
A. Where they joined they were tight, but crossways a little open.
Q. How much were they open?
A. Can't tell exactly whether a quarter or half an inch.
Q. How was the paving finished on top?
A. Put sand on it and swept it over.
Q. Was any tamping iron or swedge used in driving down between the blocks?
A. No; just a shovel, and with a broom swept it over.
Q. Was any sand left on top of the pavement when it was finished?
A. Yes; sand was on top.
Q. Does that model before you, Exhibit G. F. Smith 1, represent the situation fairly at that time? I don't mean as to blocks, but as to location of the bridge.
A. Yes; that is the bridge. Here is Kinzie street (referring to the representation of cobble-stone pavement in the model).
Q. What there represents the piece of pavement that you laid?
A. Represented by the letter T.
Q. Did you ever see any of that pavement taken up afterwards?
A. No.
Q. Was Mr. Thompson there, the city superintendent?
A. No.
Q. Who gave you your directions about the laying of the pavement?
A. Mr. William Warner.

Cross-examination by Mr. BOND:

C. Q. Do you know how long that pavement remained there?
274 If so, please state.

A. I don't know whether it's there yet or whether it's torn up. I cannot say.

C. Q. At the time that you were doing that work, were you employed by a contractor or by the city?

A. I worked for the city.

C. Q. Might not Mr. Thompson have been there when you first started the pavement?

A. As much as I know I didn't see him. I can't say.

C. Q. Did you use rammers of any kind on that pavement?

A. Used a pounder to level it off.

C. Q. Was that on the blocks or on the filling?

A. On the blocks and filling altogether.

C. Q. That is the ramming was done after the work was put in?

A. Yes; the rammer was a foot square.

C. Q. Was it after the sand was put into the cracks?

A. Yes.

C. Q. Please describe how the rammer was made.

A. A foot square and six inches deep.

C. Q. Was there a handle on it?

A. Yes; a handle to it.

C. Q. Please look at the drawing made by Mr. Smith, marked Exhibit G. F. Smith 2, and state whether or not that shows the pavement as you remember it.

A. Yes, about the way it was laid; an opening between the rows crossways and the blocks together at the ends.

C. Q. What kind of a foundation did those blocks rest on?

A. On sand.

C. Q. Was that sand rammed or pounded down any before the blocks were laid?

A. Yes; it was rammed.

C. Q. Do you know what the object for leaving the space was? If so, please state.

A. That I cannot say; whether the horses should have a sure footing or not.

Signature waived.

MICHAEL ZEEP, a witness introduced on behalf of the complainant, being first duly sworn, testified as follows on March 24, 1877:

Examined by Mr. JEWETT:

Q. Give your name and where you live.

A. Michael Zeep; 61 Alexander street, in Chicago.

Q. How long have you lived in Chicago?

A. Next July eleven years.

Q. What is your business?

A. I work on the streets for ten years now for the city.

Q. Did you have anything to do with the laying of the short strip o block pavement at the north end of State street bridge in 1864?

A. I make repairing on it. I cannot tell the year—'67 or '68.

Q. Did you assist in laying it down then?

A. No.

Q. How long had it been laid down before you ever saw it?

A. I cannot tell. The blocks were all rotted. When I make the repairs there was holes in the blocks and rotten.

Q. When was it you made these repairs?

A. I cannot tell whether '67 or '68. I am not certain of the year.

275 Q. What did you find to be the condition of the blocks when you repaired the pavement?

A. They were on the sand, blocks about 6 x 6, and 6 x 8; can't tell certain.

Q. Were they sound or rotten at that time?

A. They were rotten.

Q. How deep were they at that time?

A. I can't tell. In some places they were worn out; some places there were holes; can't tell whether five or four inches.

Q. Was the pavement taken up and repaired because the blocks were rotten, or because the blocks were worn down and worn out?

A. The blocks were rotten.

Q. How, at that time, did the blocks appear to have been laid as to their closeness together?

A. I cannot tell that; the blocks were rotten; I didn't observe that.

Q. Did you notice whether or not there was anything between the blocks?

A. The blocks were rotten, and I didn't pay no particular attention. There was dirt and sand.

Cross-examination by Mr. BOND:

C. Q. In repairing the pavement how did you fix it?

A. I paved it the same as they do now; put gravel between when they repair it.

C. Q. How much of it did you repair or go over?

A. I could not say how many yards were repaired.

C. Q. Did you relay the whole of it or only a part?

A. Not all.

C. Q. Do you know how long it stayed there after you fixed it?

A. I cannot tell that; the north side got a new foreman, and I didn't go over there any more.

C. Q. When you relaid it in '67 or '68, as far as you did relay it, did you stand your blocks on the sand, or did you put plank under them?

A. We paved it right over the sand.

Redirect examination by Mr. JEWETT:

Q. Did you take up any of the sound blocks of that pavement or were there any sound blocks?

A. The most were rotten. There were piedes good, but most were rotten.

C. Where there any good, sound blocks, how were they laid as to being close together?

A. I can't tell; I didn't look for that; we used 3 x 6 in relaying.

Signature waived.

WILLIAM H. WATSON, a witness previously examined in this case, being recalled on behalf of the complainant, testified as follows, on March 24, 1877:

Examined by Mr. JEWETT:

Q. Mr. Watson, you have been examined as a witness in this matter once before, have you not?

A. Yes, sir.

Q. In the course of your previous examination you have said in substance that some of that pavement at the north end of State-street bridge laid down in 1864, was taken up, I believe?

A. Yes, sir. I saw some blocks there that were taken out of the street there at that time.

276 Q. About when was it that you saw those blocks?

A. In the spring of '72.

Q. About what was the size of them?

A. Those that I took up were 6 x 6 inches square.

Q. What was the depth of them?

A. Six inches deep.

Q. Did you see them taken out?

A. No, sir; I did not.

Q. What was the appearance of those blocks at the side as indicating whether or not there had been anything between them?

A. They looked to me as though they had been packed right tight, together—had that appearance. I saw no indenture in the side of gravel or anything of that kind. When I took them down to the office, Mr. Thompson made the remark they were packed in together; put in there as an experiment.

Q. Did you notice from what portion of that piece of pavement these blocks were taken up?

A. I could not tell, sir. I was going down the street in my buggy, and I saw some men throw blocks out of the street; but these laid at the corner of the catch basin. I drove up, put these blocks in my buggy and drove off; merely saw these blocks there; took a good deal of interest in paving; supposed they had been there some time, and took them down to the office to show them to Mr. Thompson.

Q. Do you remember or did you notice at the time whether they were taking up the whole of that piece of pavement?

A. I did not notice whether those were all the blocks; I merely saw these blocks laying there, and out of curiosity took them up; Mr. Thompson made the remark, he was very glad I brought them. They had been there several years, and he was interested in the pavement, and they were put down as an experiment, and were on the sand; they were completely water-soaked; I thought they were oak when I took them up, they were so heavy, but Thompson said they were square pine blocks.

Q. Will you state again what, if anything, Thompson said about the blocks having been laid in contact with each other?

A. I just said here, and Mr. Thompson, I think, made the remark they were just packed right together, one against the other.

Cross-examination by Mr. BOND:

C. Q. If the places between the blocks had been filled with sand instead of gravel, would they not have the same appearance as though they had been laid in close contact?

A. They would show a smooth surface about the same; yes. I should think they would.

C. Q. In all of the pavements where there is a sand top dressing, that sand works down in between the blocks, would it not?

A. Oh, yes, sir. Blocks keep packing together tighter and tighter, and the sand will work in. At that time there was no bank gravel used here in Chicago in paving at all. When there was any places we used the lake shore gravel, and laid all the blocks an inch apart. It would leave an indenture on the sides of the blocks where the gravel would be rammed down. These blocks showed nothing of that kind.

C. Q. If it was lake shore sand, and it was put in the cracks by a shovel or broom and only tamped as it was tamped together with the blocks, then would there be any indenture?

A. No, sir.

Signature waived.

277 In the circuit court of the United States for the northern district of Illinois.

HENRY M. STOW
against
THE CITY OF CHICAGO.

Depositions of Messrs. James K. Thompson, William H. Watson, John W. Munday, George W. Wilson, James Steele, Archie J. McBean, James G. McBean, Thomas Mackin, Henry L. Bristol, and Andrew Jaicks, witnesses introduced on behalf of the defendant, taken before Chas. L. Driesslein, a United States commissioner, special examiner, on July 8, 9, 12, 13, and 14th, 1875, at the office of Messrs. West & Bond, in the city of Chicago:

Present, the complainant, Mr. Henry M. Stow, and Mr. Becker, of the firm of Carter, Becker & Dale, and Mr. Jewett (a part of the time), his counsel, and Mr. Bond, of the firm of West & Bond, representing counsel for defendant.

Mr. Becker is to introduce a certified copy of the records of the circuit court of the United States of America of the ninth judicial district for the northern district of California, case of the Nicholson Pavement Company against Thomas H. Hedge and Richard M. Brandon, composing the firm of Thomas H. Hedge & Company, and Henry M. Stow, marked Complainants' Exhibit K 1, also a printed copy of the opinion of the court, marked Complainants' Exhibit K 2.

(Objected to as immaterial.)

Mr. Becker also introduced copy of contractor's bond, contract for work, special assessment specification, said contract being dated the first day of May, 1875, between William F. Hildreth and the city of Chicago; bond of same date, marked Complainants' Exhibit L.

(Objected to as bond of party not connected with this suit, and as one given since this suit was commenced, and as immaterial.)

278 Counsel for defendant offers in evidence copy of English letters patent No. 8041, granted to David Stead, dated April 23, 1839, for an improved mode or method of making or paving public streets or highways, &c., certified by the United States Patent Office. Same is marked Defendant's Exhibit 1.

Also, English letters patent No. 8657, to Thomas Wood, for an improvement in paving streets, roads, bridges, squares, paths, and such like ways, dated October 7, 1840, and certified by the United States Patent Office. The same is marked Defendant's Exhibit 2.

Also, English letters patent No. 9737, to Henry Austin, for wood pavement, flooring, and veneers, dated May 25, 1843, certified by the United States Patent Office. The same is marked Defendant's Exhibit 3.

Also, English letters patent No. 943, of 1860, to Sir J. S. Lillie, for an improvement in carriage-ways, dated April 14, 1860, and certified by the United States Patent Office. The same is marked Defendant's Exhibit 4.

Also, certified copies of United States patents as follows:

Patent No. 75780, to Hugh McDougal, assignor to himself, Robert Stuart, and Col. McDougal, for an improvement in wood pavements, dated March 24, 1868. The same is marked Defendant's Exhibit 5.

Patent No. 42347, to William H. Chappell, for an improvement in wood pavement, dated April 19, 1864. The same is marked Defendant's Exhibit 6.

279 Patent No. 56303, to Edward Whitehead, for an improved pavement, dated April 10, 1866. The same is marked Defendant's Exhibit 7.

Patent No. 64126, to B. F. Miller, for an improvement in pavements, dated April 23, 1867. The same is marked Defendant's Exhibit 8.

Patent No. 96849, to Vancamp and Hedgman, for an improved wood pavement, dated November 16, 1869. The same is marked Defendant's Exhibit 9.

Patent No. 101,590, to Turner Cowen, assignor to Tallmadge E. Brown, for an improvement in wood pavement, dated April 5, 1870. The same is marked Defendant's Exhibit 10.

Patent No. 108,582, to Carrol Gayetes, for an improvement in wood pavements, dated October 25, 1870. The same is marked Defendant's Exhibit 11.

Patent No. 114,895, to Richard H. Willett, for an improvement in wood pavements, dated May 16, 1871. The same is marked Defendant's Exhibit 12.

Patent No. 116,217, to Shubert C. Prescott, assignor to Howard Smith, and Dora E. Brown, for an improvement in combined wooden and concrete pavements, dated June 20, 1871. The same is marked Defendant's Exhibit 13.

Patent No. 121,544, to Robert C. Phillips, for an improvement in wooden pavements, dated December 5, 1871. The same is marked Defendant's Exhibit 14.

280 Patent No. 112945, to Gordon A. May, for an improvement in wood pavements, dated March 21, 1871. The same is marked Defendant's Exhibit 15.

Patent No. 132632, to Edward P. Morong, for an improvement in laying wood pavements, dated October 29, 1872. The same is marked Defendant's Exhibit 16.

Also, certified copies of file wrappers, in the matter of the following patents, to wit:

Patent No. 75780, to Hugh H. McDougal, assignor, &c.
Patent No. 108582, to Carrol Gayetes.
Patent No. 112945, to Gordon A. May.
Patent No. 101590, to Turner Cowen, assignor, &c.
Patent No. 96849, to Van Camp and Hodgmen.
Patent No. 121544, to R. C. Phillips.
Patent No. 116217, to S. E. Prescott, assignor, &c.
Patent No. 114395, to R. H. Willett.
Patent No. 132682, to E. P. Morong.
Patent No. 84126, to B. F. Miller.

And the same are marked, respectively, Defendant's Exhibit 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26.

281 JAMES K. THOMPSON, a witness introduced on behalf of the defendant being first duly sworn, testified as follows on July 8, 1875:

Examined by Mr. L. L. BOND:

1. Ques. What is your name, age, residence, and occupation?

Ans. James K. Thompson; age, fifty-nine; residence, Chicago; occupation, commissioner of public works in the city of Chicago.

2. Q. How long, and in what capacity, have you been connected with the improvements made by the city of Chicago, more particularly in reference to the street improvements?

A. I have had more or less connection with the street improvements for about sixteen years, I think; at one time I was superintendent of streets.

3. Q. What kind or kinds of pavements have been laid in the city directly upon an earth or sand foundation?

A. I do not recollect of any kind now, except what is called the "Stow foundation," and this that we are now laying, the blocks upon the sand, without a wedge.

4. Q. When you say "Stow foundation," to what do you refer?

A. I refer to this wedge being driven in between the rows of blocks.

5. Q. Please look at the Complainant's Exhibit C, and see which, if either, of the figures in that patent represent the pavement referred to by you?

A. The drawing marked A represents the one I am alluding to as the Stow foundation.

6. Q. What wood pavements, if any, were laid by the city with the blocks directly upon a sand or earth foundation while you was superintendent of streets, if any? Please give the time the pavement was laid, and its location.

A. I think that the first wood pavement that was laid directly
282 upon the ground here was a piece that I had laid myself in the fall of 1864; that was a piece at the intersection or near to the intersection of North State and Kinzie streets; another piece was laid, I think, in 'seventy-one, at the north end of the La Salle-street tunnel. I would not be so positive about the time, but I think it was 'seventy-one; might have been 'seventy.

7. Q. Have you prepared, or caused to be prepared, a model of the pavement laid by you in 1864? If so, will you please produce it?

A. I have prepared a model, and this is about the style of the pavement laid at that time.

(Witness produced the model, and the same was introduced in evidence as Defendant's Exhibit 27.)

8. Q. Please describe particularly the construction of the pavement represented by the model, Defendant's Exhibit 27, as it was laid on the street referred to.

A. After the street was filled there was a bed of sand put over the top of the earth filling, and thoroughly rammed the filling was, and blocks were then set in rows, one inch apart, and the spaces between the blocks were filled with gravel, which was also thoroughly rammed. The blocks that were laid in 'sixty-four was cut from six by six inch timber, six inches in length; that laid in 'seventy or 'seventy-one, the blocks were cut from four-inch plank, I think, and eight inches in length.

9. Q. What pavements, if any, have been laid by or for the city in which the filling between the blocks was rammed so as to project into the sand below the blocks?

A. Don't know of any, sir.

10. Q. Would you know it, if there was any?

A. Well, it is altogether probable I would not, from the fact that I have not taken up any that was laid on the sand.

11. Q. Under what circumstances was it that the city laid or permitted to be laid pavements with the wedges driven down, as
283 shown in complainant's patent, Exhibit C, model A, of the drawing? Please state fully how it occurred that any such pavement was laid.

A. As near as I can recollect, in every instance this pavement was laid by request of the property owners on the street. I do not know of any other circumstances under which it was laid.

12. Q. Do you know who procured that request to be made? If so, please state.

A. I do not know of my own knowledge, sir.

Adjourned to 2 o'clock in the afternoon of July 8.

Met at two o'clock, pursuant to adjournment, when Mr. Thompson's testimony was continued.

Cross-examination by Mr. BECKER:

13. X Q. Does Exhibit 27 represent the pavement laid in 1871, at the end of the La Salle street tunnel, as well as the pavement laid in 1864, at the intersection of Kinzie and State streets?

A. The only difference, as I stated in my evidence before, was, that this is laid with blocks cut from six by six, and the other was cut from four-inch plank.

14. X Q. When was the pavement of 1864 laid?

A. Some time in the year 1864. I am not certain.

15. X Q. Do you know the month?

A. No; I do not.

16. X Q. Do you know whether it was the fore part or the latter part of the year?

A. The latter part of the year.

17. X Q. Was it before or after the State street bridge was finished?

A. I think it was just before the approach was finished, so as to have it all in use when the bridge was done.

284 18. X Q. Was there a bridge then over the railway crossing?

A. A viaduct; yes, sir.

19. X Q. How did the road approach to the railway viaduct? I mean was it an earth approach or a pile approachment?

A. A certain distance was earth, and a certain distance was pile.

20. X Q. Immediately at the viaduct, what was it?

A. Pile.

21. X Q. Not filled in with earth?

A. No, sir.

22. X Q. How far did the earth filling extend from Kinzie street?

A. My recollection, about twenty feet.

23. X Q. The balance, then, was pile work?

A. Balance pile work; yes, sir.

24. X Q. The earth work, then, extended only over your pavement?

A. That was all. I just paved that portion where the earth was filled.

25. X Q. How far below the present pavement was that pavement laid?

A. That I could not tell you. Perhaps three or four feet. I do not recollect.

26. X Q. How much of this pavement was laid there?
A. A piece about twenty by thirty feet; that is my recollection.
27. X Q. About twenty feet from Kinzie street towards the bridge?
A. Yes, sir.
28. X Q. Did you lay it yourself, in person?
A. I commenced it. Of course I did not lay it myself, with my own hands. I gave the men instructions how I wanted it laid, and of course they did it.
29. X Q. Did you lay any of it with your own hands?
A. Yes, sir. I laid some of the blocks at the start.
30. X Q. What was your position then relative to the city?
A. I was superintendent of streets and bridges; had charge of the bridges more particularly.
285 31. X Q. How many men had you in your employ laying that pavement?
A. I do not recollect. A gang usually consisted of from four to six men. I do not know whether they were all there.
32. X Q. What had you been working at previously—your gang of men?
A. The repairs all over town.
33. X Q. Had you been paving Kinzie street on the north side, to State street, on the north side of Kinzie street?
A. No, sir.
34. X Q. You had been making no pavement in that locality?
A. Kinzie street was paved with boulders, and this was a little piece between the boulders and the pile work.
35. X Q. There was some timber on there?
A. The timber has been recently put there—this pile work.
36. X Q. What had the timber been put there for?
A. To sustain the earth filling.
37. X Q. I understood you to say there was a pile of loose timber there.
A. Oh, no. I did not say any such thing. I said the timber work—pile work. There was no timbe' there.
38. X Q. Did you have the timber hauled there for the purpose of making this pavement?
A. I had the blocks, after they were cut with the saw.
39. X Q. Where were they cut?
A. I do not recollect. I think we had at that time an engine running. They were cut there, or at some mill.
40. X Q. The blocks, then, if you remember, were drawn there from some other locality?
A. Yes, sir; were cut out of this board—this timber.
41. X Q. Can you give the names of any one of the workmen?
A. The foreman's name was Warner. Another of the name of Smith.
286 42. X Q. What was Warner's first name?
A. William.
43. X Q. Is he now dead?
A. Yes; he is dead.
44. X Q. What was Smith's first name?
A. I could not tell you, sir; long time ago.
45. X Q. What was his address?
A. That I don't know.
46 X Q. Is he now in the city?
A. Could not tell you that. I think likely he is.

47. X Q. Have you seen him since that pavement was laid?

A. I have seen him several times since that. I have not seen him for some time.

48 X Q. Can you name any other one?

A. No; I cannot.

49. X Q. Are you sure there was any other workman engaged except those two you have named?

A. My recollection is there was three or four.

50. X Q. Is your memory distinct as to that?

A. I would not swear to it.

51. X Q. How long were you occupied making that pavement?

A. I could not tell; not a great while.

52. X Q. Can't you approximate?

A. Not over a day.

53. X Q. Were you there during the laying of the whole pavement?

A. No, sir; I got the men started, told them what I wanted and cleared out; went away.

54. X Q. How much did you raise the street, if any?

A. In the street?

55. X Q. How much did you raise the street, if any?

A. We raised from the boulders, where the boulders stopped, up to this pile work; approach there to the bridge, I suppose in that distance of twenty feet, about a foot; next to the pile work, put in two or
287 three feet of filling.

56. X Q. What was there as original pavement?

A. It never was paved before.

57. X Q. What was it?

A. Dirt, I think.

58. X Q. Loose earth?

A. It was natural; never had been paved before; never had been a street there before.

59. X Q. Never had been travelled over before?

A. No, sir; only some travel over the railroad; there was no street in order to travel on.

60. X Q. The original foundation was sand, then?

A. No; it was natural Chicago ground.

61. X Q. Was it soft?

A. Ordinary ground, like it is in any other part of Chicago.

62. X Q. You raised that with what kind of material?

A. Material as we dig out of a cellar; ordinary earth we get out of a cellar.

63. X Q. You think you raised it about one foot?

A. Raised the whole distance at the pile work. I thought you alluded to the elevation, that is the ascent?

64. X Q. I allude only to this pavement.

A. There was three or four feet.

65. X Q. How much did you raise it up beneath this twenty feet?

A. Between three and four feet, to my recollection.

66. X Q. You raised then the road under this pavement, about four feet from the natural surface?

A. Yes, the surface pitched down (illustrating); there for instance would be the surface of the street; it ran off that way. Now here was the pile work; there is where the earth work was put in, the earth filling and the pavement laid on it. Kinzie street was raised at that time. (Witness drew a diagram, which is attached at the end to his deposi-
288 tion and marked Exhibit Thompson No. 1.) No. 1 is the natural

surface of the street as it was before we commenced paving, commenced filling; No. 2 represents the pavement as completed; No. 3 represents Kinzie street; No. 4 State street; No. 5 end of pile work; No. 6 surface of the boulder pavement on Kinzie street; No. 7 is the pile work.

67. X Q. The remainder of this, between the pile work and the pavement, as I understand you, was piles?

A. Except the end wall that the viaduct rested on; that was stone. Then it was pile work again. We run piles up there for perhaps one hundred and thirty feet, then they came to the stone abutment that the viaduct rested on, then it was pile work again.

68. X Q. I understand you then to say that you raised the natural surface at the place where the street struck the piles three or four feet?

A. Yes, sir; that is my recollection.

69. X Q. Were you there at the time the pavement was completed?

A. I could not tell you, sir. I do not recollect whether I was or not. I was shortly after; I went over to see how it stood.

70. X Q. Did you ever measure the distance between the natural surface and the paved surface at the piles?

A. No, sir, I never did.

71. X Q. Now, why did you put in that kind of pavement at that particular place?

A. I put that in, sir, as an experiment. The idea had struck me as a favorable one, although I was not confident it would stand. I put it in as an experiment, to see if it would stand or not; I could not see any reason why it should not, as stone would stand.

72. X Q. Had you ever made any pavement like that previous to that?

A. No, sir, never; that is the first I ever saw looked like it.

73. X Q. 73. *X Q.* Did you ever put down any pavement afterward like that?

A. I never did.

289 74. X Q. Why did you not fill that place up between Kinzie street and the piles, with earth?

A. I did.

75. X Q. Without any pavement?

A. And leave a mud hole there?

76. X Q. Why did you not put stone down there?

A. I had no stone to put there; I do not know as I should have put it there if I had them.

77. X Q. Have you any reason for putting down this particular kind of pavement in that locality?

A. I gave my reason, as a kind of an experiment.

78. X Q. That was one reason you had?

A. That was a reason; I had no stone, I know; I put it down as an experiment.

79. X Q. Did any one suggest to you that method of pavement?

A. There never did, sir.

80. X Q. Were you acquainted at that time with the Nicholson pavement?

A. Yes, sir.

81. X Q. Had any of the Nicholson pavement been laid in Chicago at that time?

A. Oh, yes, quite a large amount.

82. X Q. How much of the pavement did you lay with your own hands?

A. Well, I could not tell; perhaps not more than one or two rows across the street.

83. X Q. Did you lay as much as that?

A. I think so, just to show the men what I wanted there done.

84. X Q. What did you rest the first row against?

A. Against the planking that sustained the filling there.

85. X Q. Plank that you had put in?

A. Yes, sir; these piles were planked up to retain the filling; I rested the first blocks against that.

86. X Q. Do I understand you the piles were driven along
290 Kinzie street?

A. No, sir; some twenty feet back from Kinzie street, I think.

87. X Q. Do I understand you that the piles were driven at the commencement of this pavement?

A. Row of piles were driven, say at No. 5, on the diagram, Exhibit Thompson.

88. X. Q. Were any piles driven at No. 3, at the commencement of this pavement?

A. No, sir; oh, no.

89. X Q. At which end did you commence to pave, at No. 6 or 3?

A. At No. 5.

90. X Q. And worked towards Kinzie street?

A. And worked towards Kinzie street.

91. X Q. You put your blocks then immediately up against the piles at No. 5?

A. Against the planks, yes, sir.

X Q. 92. How did you support the first row after you laid it?

A. Set them on the ground and they supported themselves.

93. X Q. How did you support the second row?

A. The same way; they supported themselves. Being six inches square they stood up very nicely.

94. X Q. You used no strip to put between them?

A. No, sir.

95. X Q. Used nothing?

A. Nothing but filling between the rows of blocks.

96. X Q. When did you commence the filling of the first row?

A. That I could not tell you, sir.

97. X Q. Did you fill it at all with your own hands?

A. No, sir.

98. X Q. Did you see it filled?

A. Well, I might; I am not positive. I think I did. I think I was them filling it. That is my recollection; that is, after they got some considerable of it done.

99. X Q. Did you see the filling of the second row?

A. I could not go into particulars, sir.

291 100. X Q. Can you swear that you saw the filling of any one of the rows?

A. My recollection is I saw the filling put in over quite an amount of that pavement.

101. X Q. Had you been there previous to the laying of the first row?

A. I went there with the men.

102. X Q. How long were they filling up this space to the required grade?

A. I could not tell you that. That was filled before these men went there. It was filled by teams.

103. X Q. When you went there with these men then, the street was prepared for this pavement?

A. Yes, I think it was all ready for the pavement. Might have put some sand on after we went there.

104. X Q. Did you put some sand there?

A. Yes, there was sand on top of the filling.

105. X Q. Did you put any sand on the pavement, on the street before the pavement was placed there?

A. I say there was some sand placed on top of that filling.

106. X Q. Did you put any there?

A. No, sir.

107. X Q. Did you see any put there?

A. Saw it there.

108. X Q. Did you see any put there?

A. Well, I don't recollect whether I did or not.

109. X Q. Did you see any ramming done to the foundation of this street before the pavement was put on there?

A. Yes, sir; I told the men to do that.

110. X Q. Was that of your own idea?

A. Yes, sir.

111. X Q. What was that rammed with?

A. With a paving rammer.

112. X Q. Which did they ram, the earth as piled in there, or the sand?

A. They rammed right on top of it.

113. X Q. The earth or sand?

292 A. I think the earth was rammed as it was being put in—that is my recollection—by the parties there, and, of course, they would ram the earth and sand too.

114. X Q. Did you see the earth put in there?

A. Well, I could not swear to that, whether I did or not. My impression is that I did partially.

115. X Q. Can you swear that you saw ramming of the earth, after it was put in there?

A. Yes, I had the men ram it, I know.

116. X Q. You may have ordered them to ram it, but did you see it with your own eyes?

A. Yes, sir; they went over it with the rammers.

117. X Q. That you remember distinctly?

A. Yes, sir.

118. X Q. Do I understand you to say you remember that distinctly, or is that now your present impression?

A. I remember that distinctly, the ramming of the earth. I should not certainly have put the pavement down on loose earth.

119. X Q. That is philosophy; that is not fact.

A. That is a fact; I would not do it. Did not do it, at any rate.

120. X Q. Do you remember that circumstance as a distinct circumstance, or do you now reason yourself into the belief of it?

A. I remember of having that earth rammed, sir.

121. X Q. Now, was the earth rammed before the sand was placed over it?

A. That I could not tell you.

122. X Q. Whether the ramming was done before the sand was placed there or after, you do not remember?

A. No, sir.

123. X Q. Did you put the first row of blocks immediately upon the sand?

A. Yes, sir.

124. X Q. Did you put any board between the sand and the blocks?

A. No, sir.

125. X Q. Are you sure of that?

A. I am positive of that.

293 126. X. Q. Did you leave any place between the first row and the second row?

A. Yes, sir; I should think about an inch.

127. X Q. Do you know whether any space was left between the second row and the third row?

A. My recollection is there was between all the rows.

128. X Q. Your knowledge of that is derived not from seeing the pavement laid, but from seeing it after it was laid?

A. My knowledge is from instructions that I gave to have it laid, and of the ramming in between the blocks. That gravel was rammed between the blocks—between the rows of blocks, rather.

129. X Q. Did you see it rammed between every row?

A. No, sir; I could not say that I did.

130. X Q. What was the space between the first and second row filled in with?

A. Gravel. What we call paving gravel.

131. X Q. When was that filling put in?

A. Put in shortly after the blocks were set.

132. X Q. Was it as soon as the first row was complete?

A. No, sir; I think there were several rows set before we put in that filling.

133. X Q. Is your memory certain on that?

A. Well, it is not so positive that I would swear positive that such was the case, but that is my memory, that there were several rows of blocks set before there was any gravel put in at all.

134. X Q. What prevented your blocks from falling towards each other?

A. Being of a size that would naturally stand. They were just the same height as they were in width, six-inch block.

135. X Q. Was there any protection between the blocks to prevent them from falling against each other?

A. No, sir; nothing at all.

294 136. X Q. Don't you know as a matter of fact that it would be impossible to lay that pavement, three, or four, or five rows of it, without putting in some partition between the blocks to prevent them from falling against each other?

A. Not by a good deal. I know it is possible. I think I could lay a hundred squares of it without putting anything between the blocks of that size.

137. X Q. Do you remember the time of day when you commenced laying that first row of blocks?

A. I do not.

138. X Q. Do you remember whether it was in the morning or afternoon?

A. I could not tell you.

139. X Q. When this pavement was completed, did you cover it over with sand and gravel?

A. Covered it with a coat of gravel.

140. X Q. How much gravel did you put on?

A. An inch in depth perhaps.

141. X Q. Did you see that put on?

A. I saw it while it was on, after it was commenced to travel over. I saw it there.

142. X Q. After laying the first row, which you say you laid yourself, and the putting on of this gravel, had you visited the pavement at all, visited the locality to see the pavement?

A. I visited it after, certainly.

143. X Q. (Previous question read to the witness.)

A. I do not understand that question exactly. After I laid the first row, and the gravel was put on—I do not understand that.

144. X Q. I understood you the last act was covering this pavement with gravel, about an inch thick?

A. Yes, sir.

145. X Q. Now between the first act, and which was laying the first row by your own hands, and the final completion of it, the covering of the whole of this with sand, did you see the pavement?

A. Well, I could not tell you that; I do not recollect.

295 146. X Q. This pavement was completely covered over, was it, with sand?

A. Yes, covered over with a body of sand.

147. X Q. So that the blocks could not be seen?

A. The blocks could not be seen after that was put on.

148. X Q. How long did that pavement continue there?

A. I think there was some of that pavement left after the time of the fire, if I recollect right.

149. X Q. Wasn't it paved over in the year 1865?

A. Oh, no; I think there was some there at the time of the fire; shortly after it was laid it was taken up and a railroad track put through there, and put down again.

150. Ques. (By Mr. BOND.) That's the horse railroad?

A. The horse railroad.

151. X Q. Refresh your memory from the alphabetical list of improved streets in the city of Chicago, April 1, 1872 (handing it to witness), from Kinzie street to Michigan street, on State street, wooden block pavement, 1865, James Steele, and state whether or not you still think your former answer correct.

A. Yes, I think so; I think that Kinzie street at that time was paved with boulders, and this pavement Steele put down from Kinzie street north was wood; that is my recollection.

152. X Q. You think State street was paved north?

A. Kinzie street was paved with boulders down as far as Cass street, I think, but I would not be certain about it. But I know it was boulder pavement, and this pavement spoken of there commenced at the north side of Kinzie and continued north.

153. X Q. You think that State street was paved in 1865, by Steele, north of Kinzie?

A. Yes, sir.

296 154. Q. X. But not south of Kinzie?

A. Not south of Kinzie.

155. X Q. Are you sure about that?

A. My recollection is I am pretty positive about that; I know the railroad was laid in there; I don't know but 1865, and they cut through this pavement I laid; cut it, laid down their tracks, and replaced it again in some haphazard way; I know it was not put down properly;

I do not think there was anything put down in 1865, except it was done by the railroad, and ordinary repairs.

156. X Q. When did you say that pavement was taken and built over?

A. My pavement?

157. X Q. Yes, sir.

A. I think it was there at the time of the fire, parts of it.

158. X Q. Is it there to-day?

A. I could not tell you. The grade was raised.

159. X Q. When was the grade raised?

A. Raised in 'seventy-two, I think—'seventy-three. It was after the fire any way.

160. X Q. How much above your pavement is the present grade?

A. That I could not tell you; perhaps two or three feet; this was after the fire; Mr. Watson took up a block of that pavement and brought it over to the office. Had it there a long time.

161. X Q. Mr. Thompson, did you ever apply for a patent for that?

A. No, sir.

162. X Q. You have applied for a patent for wood pavement, have you not?

A. Yes, sir.

163. X Q. Is the patent No. 100339, dated March 1, 1870, for an improvement in wood pavement, a copy of which I now hand you, a copy of the pavement patent which you obtained for your improvement?

A. Yes, sir.

297 164. X Q. Introduced as Thompson's Exhibit No. 2?

A. Yes, I got a patent on that.

165. X Q. This patent which you obtained rests on a board foundation?

A. Yes, sir.

166. X Q. And consists of thick and thin blocks of wood placed together?

A. Yes, sir.

167. X Q. When did you apply for this patent, Mr. Thompson?

A. I declare I could not tell you. Could not tell the time it was issued, or anything else, nor when I made the application.

168. X Q. Did you ever put down any of the pavement described in this patent?

A. Yes, sir.

169. X Q. Where?

A. Put down at the intersection of Twenty-second and South Park avenue, and I put some down at the east approach of Kinzie street bridge.

170. X Q. At the time you put this down, were you acting as the superintendent of the city?

A. Yes, sir.

171. X Q. Did you put this down at your own, or the city's expense?

A. City's expense and gave it to them.

172. X Q. Is that all you ever laid?

A. That is all I ever laid of it; yes, sir.

173. X Q. Why didn't you lay more?

A. The city did not see proper to adopt it.

174. X Q. It was a failure, was it not?

A. I could not tell you. I guess it is there yet; it might be a very expensive mode to lay, that they did not adopt it.

175. X Q. How much timber did you use in making this pavement, marked Exhibit 27?

A. I could not tell you, sir.

176. X Q. Do you remember the application made by the com-
298 plainant in this case, to the city of Chicago, to lay his pavement under his patent of 1867?

A. I would not know by that patent. The first application that I know of, the first application being made, what they call the Stow foundation, was laid at the intersection of State and Lake, and the next was on Market street.

177. X Q. There was considerable opposition to the proposal on the part of the commissioners to his laying any pavement?

A. I think there might have been. I was not commissioner at that time. Think there was.

178. X Q. Wasn't you acting in any way as agent of the city?

A. Superintendent.

179. X Q. Superintendent of streets?

A. Yes, sir. I had no control over ordering or forbidding anything.

180. X Q. You knew he was making an application, didn't you?

A. Well, I think I heard him speak about it.

181. X Q. Didn't you converse with any of the commissioners about it?

A. Not that I recollect of; might have done so.

182. X Q. Didn't they ask your opinion on the subject?

A. They might have done so.

183. X Q. Did you state to the commissioners at that time that his patent was invalid for want of novelty, or otherwise?

A. No, sir. I never thought it so.

184. X Q. Did you state to the commissioners at that time you had already laid a pavement which was substantialiy the same thing?

A. No, sir; never had.

185. X Q. Did you ever, in any of your conversations with Mr. Stow, or either of the Stows, did you ever refer to this pavement which you had laid in 1864 prior to the year 1872?

299 A. I might have done so. I do not recollect, sir.

186. X Q. You have known of the different Stow patents—the one of sixty-seven, of sixty-eight, and sixty-nine, and the one of seventy-one, and seventy-two. You have known of these patents, have you not?

A. I do not know of any Stow patent, except what is like the model Exhibit H. I do not recollect of any of these being laid at all in that shape.

187. X Q. Do you remember of Mr. Stow applying to lay that pavement, Exhibit H?

A. I do not.

188. X Q. Do you remember of Mr. Stow applying to lay Exhibit G?

A. Yes. He applied for laying that on State street, I think. That is what I call the Stow foundation, Exhibit G. Tried to lay that at the intersection of State and some other section.

189. X Q. He has made several applications, has he not, for the laying of his pavement in the city of Chicago?

A. Well, I do not think he has, as far as the city was concerned—city proper. Mr. Stow, I presume, has worked with the individual to get this in, and has got it in in many instances; got them to favor it, and, as I recollect it, the board made no objection to it.

190. X Q. At any time when Mr. Stow applied, either to the board or to individuals of the board, or in any way, to lay his pavement in the city of Chicago, have you ever stated that you had laid a pavement in 1864 which substantially covered the same thing?

A. No, sir.

191. X Q. Do you know that the city, in October, 1871—either in September or October—had passed an ordinance to lay Clark street with the pavement Exhibit G?

A. My recollection is there was an ordinance of that kind passed.

192. X Q. Was it advertised to be laid on the 18th of October, 1871?

300 A. I could not tell you that. My recollection was that there was an ordinance passed for paving some street—I could not tell you what street—with the Stow pavement. What street it was I could not tell you, sir.

193. X Q. Do you know Mr. G. T. Pitkin?

A. No, sir.

194. X Q. Do you remember that Mr. G. T. Pitkin called at the office of the board of public works some time in February, 1874, and had a conversation with you in reference to the "Free pavement," or "Chicago pavement," during which interview Mr. Pitkin took out a letter received from one Armstrong and read it to you, a letter relating to what was termed "the Chicago Free pavement," a letter of inquiry? Did you not, then and there say to Mr. Pitkin that the pavement called the "Free" pavement, or the "Chicago" pavement, was first laid in 1864 by you?

(Objected to, for the reason that neither Mr. Pitkin nor the witness are parties to the record, and any conversation between them is immaterial and incompetent.)

A. I might have done so. I do not know Mr. Pitkin at all.

195. X Q. Did you not also say at that interview that the blocks laid by you in 1864 were laid close together on the ground?

A. No, sir; I never said that to anybody.

196. X Q. Did he not then say that at the intersection of Lake and State street the pavement laid was not like that laid by you, Thompson; to which you replied, that made no difference?

A. No; I could not say that. I always regarded that Stow foundation as a legitimate patent. I certainly could not say that. I never made any such statement as that to anybody. I am positive of that.

301 197. X Q. You had no such interview with G. T. Pitkin at any time?

A. Not that I recollect of, at any time. Never such a language passed between anybody and me.

198. X Q. Do you know J. K. Lake?

A. Yes, sir.

199. X Q. Do you remember having an interview with him in reference to the Stow pavement?

A. I do not.

200. X Q. Did not Mr. Lake call at the board of public works, on or about the twentieth of April, 1874, and see you and hand you a notice signed Henry M. Stow, patentee and owner, dated Chicago, February 23, 1874, and here shown the witness, and introduced in evidence as Complainant's Exhibit Thompson 3?

A. My recollection is that Mr. Lake did hand me one of these circulars.

201. X Q. Did you not then and there say in substance that you made no objection to the contents of that notice, except that the size of the blocks in your pavement should be stated six inches square, instead of seven or eight inches square, as stated in the notice?

A. I think likely I might have done so. I do not recollect any conversation between us on that point. It is very probable I did.

202. X Q. Do you remember an interview you had with Mr. W. H

Stow and Mr. J. D. C. Whitney, assistant secretary of the board of public works, during which interview Mr. Stow produced a model, introduced as Complainant's Exhibit Thompson 4?

A. I do not recollect anything of the kind. Mr. Stow is frequently in the office, and we have talked together on the subject.

203. X Q. Will you swear that no interview occurred between you and Mr. Stow at which he produced that model marked Exhibit Thompson 4?

A. No, sir; I would not. I presume he has.

204. X Q. Did you not at that interview, taking this model,
302 Exhibit Thompson 4, and looking at the hexagonal block, say that you had seen that pavement, meaning the hexagonal pavement, laid in New Orleans in 1836?

A. I might have done so. That conversation may have passed between us.

205. X Q. Did you not then say that a portion of the model, representing the square block pavement, was the same pavement that you laid in Chicago in 1864?

A. No, sir. I always said that my pavement was laid an inch apart, instead of close together that way.

206. X Q. Didn't you say that this pavement, referring to the four-sided block pavement, represented by the model Exhibit Thompson 4, was the same kind of pavement that you laid in Chicago in 1864?

A. Not if it was that model, I did not, with an exception of mine, I might have said, that with the exception of mine being laid apart with a space between them,

207. X Q. Didn't you say that, without making any exception then?

A. I did not, sir. I always contended with Mr. Stow that that was not a representation of mine.

208. X Q. Will you swear that you did not say that to Mr. Stow in presence of Mr. Whitney?

A. To the best of my recollection I will swear to that. My recollection would be that I never said anything of the kind, that mine was laid in that style, marked Exhibit Thompson 4.

209. X Q. Is your recollection perfect on that point?

A. I am positive, as near as a man can be, that I never said anything of the kind, would be my recollection. I do not think that anybody is perfect on any point.

210. X Q. You do recollect an interview, at which a model, now introduced as Exhibit Thompson 4, was produced, do you?

303 A. I do not simply say that if any conversation of that kind passed between us, I never stated what you say I have said there. I do not recollect any circumstance; might have been, probably was. Mr. Stow is very often there and talking about it.

211. X Q. Did not such an interview occur between Mr. Stow and yourself, in the presence of Mr. Whitney, about four or five months prior to June, 1875, or prior to his bringing suit against the board of public works?

A. I do not recollect, sir, nothing about it, about an interview together.

212. X Q. Will you swear that none such occurred?

A. No, sir; I would not. More than probably did.

213. X Q. Let me state that the interview as at Whitney's desk in the secretary's office, and that you came in that room from your own room.

A. I say that such a meeting might probably have taken place; but I do not recollect any special meeting there, under the circumstances.

214. X Q. Do you recollect any meeting at which yourself and Mr. Stow were present?

A. Not any special meeting, no, sir.

215. X Q. Did you help lay any of the pavement of 1871?

A. No, sir.

216. X Q. Do you know when the pavement at the end of the Lasalle street tunnel was laid?

A. I could not swear to the time positively.

217. X Q. When did you first see it?

A. I could not tell you; that might have been laid a month before I saw it.

218. X Q. I asked you when you first saw it?

A. I said I could not tell you, sir.

219. X Q. Was it completely laid when you first saw it?

A. I think it was.

220. X Q. Was it covered with gravel or earth?

A. I presume it was.

221. X Q. Did you say this morning in your direct examination that the pavement of 1871, the Lasalle street tunnel pavement, was the same pavement as laid by you in 1864?

304

A. No, sir.

222. X Q. You don't mean to be understood, then, as saying that?

A. I did not say it, with the exception of six by six; and that was cut from four-inch plank.

223. X Q. With that exception, do you mean to say the two pavements are identical?

A. I understand that way, yes, sir.

224. X Q. Do you know who laid that pavement?

A. No, I don't; I think MacBean—James MacBean. I am not positive.

225. X Q. Do you know any of the workmen?

A. No, sir.

226. X Q. How do you know that the pavement of 1871, with the exception you have named, was like the pavement you laid in 1864?

A. Only by information from Mr. Watson and Mr. MacBean.

227. X Q. Do you know on what streets in the city of Chicago the pavement Exhibit G was laid?

A. I think it is laid on Market street, on West Randolph street, from Halstead to the park; Warren avenue, from Ashland avenue to Leavitt; and on Washington street, I think from Ashland to Leavitt.

228. X Q. Do you know of any being laid on Twenty-third street?

A. I don't know as there is any laid there.

229. X Q. Is there any on Clark street?

A. I declare I could not tell you; I think likely there is.

230. X Q. Between Madison and Monroe?

A. Yes; I think that is laid in that way, I am not positive.

231. X Q. Do you remember, at the time Mr. Henry M. Stow was making an application to the authorities of the city of Chicago to lay any one of his pavements, that you stated as a reason—as an objection to that pavement, or to any one of his pavements—that it would be impossible to lay a pavement in the city of Chicago on a sand foundation?

305

A. No, sir; I do not think I ever said anything of the kind.

232. X Q. Did you not say to Mr. Stow, on various occasions, that

such a pavement in the city of Chicago would be impracticable without a board foundation?

A. No, sir.

233. X Q. Did you not urge that at various times to Mr. Stow, as an objection to his pavement, that it was an impracticable pavement, because the foundation was not sufficiently sure?

A. Never to my recollection, sir.

234. X Q. That it would settle uneven?

A. No, sir.

235. X Q. And the surface would become uneven thereby?

A. No, sir; I always took the ground, if you allow me to put that in the testimony, that if a stone could stand upon Chicago surface, Chicago earth, it would certainly do it where it had a greater bearing. That is my opinion about a pavement and ground.

237. X Q. You never stated such an opinion to Mr. Stow, either in substance or anywise, either directly or indirectly?

A. No, sir.

238. X Q. Did you not state it as your opinion, at the time the Stow pavement was being laid at the intersection of Lake and State streets, that it would not stand, because of the imperfect foundation?

A. No, sir; I may have stated this in regard to the Stow pavement, that I did not believe that the Stow or any other pavement would stand where the foundation gave way.

239. X Q. Did the experiments in laying the foundation in 1864 relate in any wise to the patent which you obtained March 1, 1870?

A. No, sir; nothing to do with it.

240. X Q. Did you ever call Mr. Henry M. Stow's attention to that pavement of 1864, prior to the year 1872?

306 A. I do not think I ever did.

241. X. Q. Did you ever call his attention to it any time—Mr. H. M. Stow?

A. No, sir; I do not think I ever did.

242. X Q. Do you know that this pavement, Exhibit 27, made in 1864, was ever laid in any other place, either in Chicago or elsewhere, than the place you have named?

A. No, I do not know of any other place, sir.

Redirect examination by Mr. BOND:

243. Q. Did the pavement which you laid in 1864, like the model Exhibit 27, extend clear across the street or roadway?

A. Yes, sir.

244. X Q. Had the result of the laying of this piece of pavement anything to do with the subsequent laying of pavements upon sand, by or for the city?

A. My impression is that it had, sir.

245. Q. You were asked if you ever applied for a patent for this form of pavement, and answered that you did not—why did you not?

A. For the reason that I thought there was nothing in it to obtain.

246. X Q. Does the complainant's model, Exhibit Thompson 4, correctly represent the pavement laid by you on State street near Kinzie, in 1864?

(Objected to as leading.)

A. It does, with the exception of the space between the rows of blocks.

247. Q. Part of the way then the blocks were laid in contact with spaces between the rows, as shown in model Exhibit 27?

(Objected to as leading.)

A. Yes, sir.

248. Q. How did this section of pavement stand wear, as com-
307 pared with other wood pavements then in use in the city?

A. I was very well pleased, sir, with its wear. Until the pavement was torn up for the purpose of laying the railroad, it seemed to keep its position perfectly.

249. Q. What difference does it make, if any, whether the blocks are cut from six or four inch timber?

(Objected to, because witness is not shown to be an expert.)

A. I think blocks cut from six inch timber would perhaps stand better than that cut from smaller pieces, having a greater bearing surface.

Recross-examination by Mr. BECKER:

250. X Q. How had the laying of the pavement of 1864 anything to do with the subsequent laying of pavement in Chicago?

A. I think the idea was developed that a pavement upon a sand foundation would stand, would not bend down into the earth as many supposed it would.

251. X Q. Did you state that to any member of the board of public works?

A. I think I may have done so. I am not positive.

252. X Q. Did the board of public works ever go with you to that pavement, and examine it with you?

A. On State street—that the one you allude to?

253. X Q. On the corner of State and Kinzie street?

A. I think not, sir. I do not recollect of any time of any one going with me.

254. X Q. Did you ever speak to McArthur, Letz, or Carter in reference to that pavement?

A. I may have done so. I do not recollect.

255. X Q. You may not have done so?

A. I may not have done so.

308 256. X Q. Isn't it a fact that you never did?

A. I would not say that is a fact; I think more than probable that I did after I found the blocks would stand. Of course I would not swear to that.

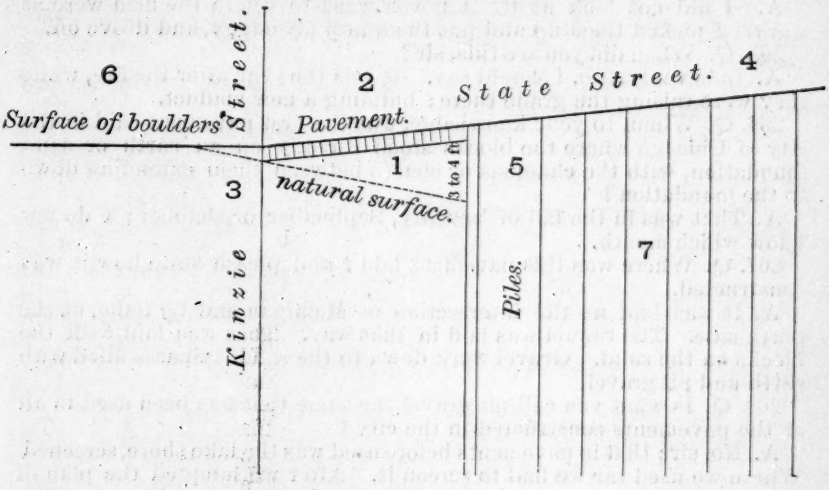
257. X Q. Wasn't the opinion of the members of the board of public works confirmed as to the solidity of a sand foundation on the pavement laid by Mr. Stow at the intersection of Lake and State streets?

A. I cannot answer that, sir. Do not know what they confirmed their opinion on.

258. X Q. Was there any pavement laid directly on a sand or earth foundation in the city of Chicago, prior to the laying of the Stow pavement on Lake street, and on Market street, except the pavement you laid in 1864, and the Lasalle street tunnel pavement, in 1871?

A. I do not know of any sir.

Exhibit Thompson 1.



309 WILLIAM H. WATSON, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows, on July 8, 1875:

Examined by Mr. L. L. BOND:

259. Q. What is your name, age, residence, and occupation?

A. My name is William H. Watson; age, fifty; residence, 155 Erie street, Chicago; business, inspector of the board of public works, and inspector of streets for the last seven or eight years. I have been with the board for the last ten years, and for the last six years inspector over all the pavements. Previous to that, I was assigned from one street to another; after that a general inspector, went around and looked after all the streets.

260. Q. What were your duties as inspector of streets?

A. To see that the work was done according to specifications, as near as possible.

261. Q. And examine them during the process of construction?

A. Yes, sir; see to the filling, and the lumber, heating of the gravel, pouring on tar, the general mechanical part of the whole of it.

262. Q. Was you present at the cross-examination of J. K. Thompson?

A. Part of it this afternoon.

263. Q. Did you ever see the pavement testified to by him as having been laid on State street, between Kinzie street and the viaduct of State street bridge?

A. All I know about that is, I think it was in the spring of seventy-one, I was driving upon Kinzie street up to State, and saw them taking up some pavement. I jumped out of my buggy, and picked up I
310 think two or three of the blocks, six inches square, six inches long, and threw them into my buggy, and took them round to the office, and gave them to Mr. Thompson, and I asked him whether they were oak, being so heavy, and he said they were pine, and he made the remark they were laid some ten years ago. That is about all I know about that; the men were throwing them out.

264. Q. Did you see enough of the pavement to know how it was laid?

A. I did not look at it. I never went to where the men were at work. I picked them up and put them into my buggy, and drove off.

265. Q. When did you see this, sir?

A. In 'seventy-two, I should say. It was the year after the fire, while they were raising the grade there; building a new viaduct.

266. Q. When, to your knowledge, was the first pavement laid in the city of Chicago where the blocks stood directly on an earth or sand foundation, with the channels or spaces between them extending down to the foundation?

A. That was in the fall of 'seventy, September or October; I do not know which month.

267. Q. Where was this pavement laid? and please state how it was constructed.

A. It was laid at the intersection of Michigan and La Salle, at the north side. The tunnel was laid in that way. That was laid with the blocks on the sand. Gravel work down to the sand. Spaces filled with earth and pit gravel.

268. Q. Is what you call pit gravel the same that has been used in all of the pavements constructed in the city?

A. No, sir; that in pavements before used was the lake shore, screened. Where we used tar we had to screen it. After we adopted the plan of paving with gravel we used pit gravel; bank or pit gravel.

269. Q. What kind of gravel is that?

311 A. Well, it comes out of the side of a hill, more or less sand; very fine gravel with it. Packs closer and harder, and sort of cements together. Lake shore gravel will not do it. Lake shore gravel is more or less of it flat on one side, more or less, and you cannot pack it; it slips; won't cement at all.

270. Q. Did you inspect either of the pavements which were laid on a sand foundation in Clark street, Water street, Peoria street, or Fifth avenue?

A. Saw them all when they were in the course of construction.

271. Q. Was the filling in the spaces in either of those pavements rammed down into the sand foundation below the bottom of the blocks? (Objected to.)

A. No, sir; cannot ram it below.

272. Q. Why not?

A. I suppose it is contrary to nature. It won't go down. You cannot get it there.

273. Q. Do you know of any pavement having been laid in this city like the pavement shown in complainant's model, Exhibit G?

A. Yes, sir; I suppose that is what is called the Stow pavement, isn't it?

274. Q. In speaking of the Stow pavement, that is the kind you refer to, is it?

A. Yes, sir; the wedges drove into the sand.

275. Q. On what streets was that laid?

A. First I ever saw of it was on the intersection of Lake and State.

276. Q. Who laid that?

A. I think Mr. Stow had the charge of it. I think the city paid for it; done by city men. Mr. Stow had the supervision of it.

277. Q. What other streets was it laid on?

312 A. I think the next street I know of was Market, if I remember right; then it was laid on West Washington and Warren avenue.

278. Q. How came that kind of a pavement to be laid on those streets?

A. I could not answer that. I don't know whether it was the request of the property holders or the order of the board of public works; I don't know.

Cross-examination by Mr. BECKER:

279. X Q. When was it you took the block from the Kinzie street pavement to Mr. Thompson?

A. In 'seventy-two.

280. X Q. What time?

A. I could not say. I think it must have been June or July when they commenced the work there, and raised that street up to grade; somewheres about that time. I would not be sure. The grade of the street was raised something like four feet over there.

281. X Q. Was it then raised for the first time since the laying of that pavement?

A. I think so; yes, sir.

282. X Q. Had that pavement been there up to that date, so far as you know?

A. I think it had. In fact I had never noticed anything being down there. I have been over the street almost every day since I have been in the city. I came in in 'sixty-five, with the board first.

283. X Q. Did you live on the north side?

A. Yes, sir.

284. X Q. You passed over that pavement on your way home, did you?

A. Most every day.

285. X Q. How many times a day?

313 A. Sometimes two, or three, or four times a day. I lived on the corner of State and Illinois street.

286. X Q. Did you ever know from anything you had seen in passing over the pavement how it was constructed?

A. I should not notice it unless my attention was called to it particularly.

287. X Q. During all the time that this pavement was laid, and you passed over it, you never had observed the quality of the pavement?

A. I noticed that it was paved with six-inch square blocks; that is all I noticed about it.

288. X Q. You never had noticed any further how the pavement was constructed?

A. No, sir.

289. X Q. Did you see the pavement laid at the Lasalle street tunnel?

A. I was inspector there, sir.

290. X Q. Was you there at the time it was laid?

A. I was inspector.

291. X Q. When was it laid?

A. It was either September or October, 'seventy; I don't know which.

292. X Q. Do you remember the month?

A. I say September or October, I could not say which. I know it was in the fall; very pleasant weather; cool.

293. X Q. Who was engaged in the laying of that pavement?

A. I think it was James or Duncan McBean had the contract for paving the tunnel; to pave that intersection there.

294. X Q. Are those the only two men that had anything to do with the laying of that pavement as far as you know?

A. When I was general inspector I saw work done by Steele, McMahan & Company.

295. X Q. I guess you don't understand the question. What men were engaged in the laying of this pavement at the entrance to
314 the Lasalle street tunnel?

A. What do you mean, the laborers' names?

296. X Q. Yes, sir.

A. I don't know.

297. X Q. Can you give any names except the McBeans, who assisted in the work?

A. I can give you the name of the engineer who laid out that work; that is Mr. Miller; he was there and saw it.

298. X Q. Miller and McBean and yourself are the only men you know of who saw it laid?

A. All that I remember.

299. X Q. Are the McBeans now in the city?

A. Yes, sir.

300. X Q. MacMahan and Steele, then, had nothing to do with the laying of this pavement?

A. Not at this place; no, sir.

301. X Q. How much pavement was then laid?

A. At this intersection?

302. X. Q. At this intersection?

A. It is a sixty-six foot street, less the sidewalk; I don't know exactly how many yards it would be; some five hundred yards; somewhere about that.

303. X Q. It only covered the intersection of these two streets?

A. Two streets, La Salle and Michigan.

304. X Q. Did you assist yourself in laying any of this pavement?

A. I used to help lay rows of it; lay the blocks down; stand them up.

305. X Q. Did you yourself assist in laying this pavement?

A. At Michigan and La Salle, I did.

306. X Q. With your own hands?

A. Yes, sir.

307. X Q. Were you there at the commencement of the work?

A. I was.

308. X Q. How much did you lay yourself?

A. I would lay a row then stop; maybe help lay another row;
315 I was there all the time; my time was taken up there.

309. X Q. What street did you commence to lay the first row on?

A. On Michigan.

310. X Q. What was the first row placed against?

A. We took and laid a strip right across the street of inch board; put our block up against it on the sand that holds it, and laid another row so, six or eight rows.

311. X Q. Did that board extend above the pavement on Michigan street?

A. What do you mean by that, sir?

312. X Q. Was Michigan street paved before it came to this intersection?

A. Yes, sir.

313. X Q. How paved?

A. Paved with the old Nicholson pavement. This De Golyer put on.

314. X Q. Did this board rest directly on the Nicholson pavement?

A. No, sir; it lay on the sand. The way I am speaking of now, it was merely a guide.

315. X Q. You say that Michigan street was paved up to the intersection?

A. Yes; up to the line of La Salle street.

316. X Q. With the Nicholson pavement?

A. Yes, sir.

317. X Q. You then put down a board and then put down this peculiar pavement?

A. Yes, sir.

318. X Q. How was that board put down?

A. Flat ways.

319. X Q. Was the block put down by the board?

A. By the edge.

320. X Q. How was the space between the block of new pavement and block of old Nicholson pavement filled up?

A. Gravel.

321. X Q. How much space was left between the two?

316 A. Well, might have been a half an inch in some places, and an inch and a half in other rows, just as the blocks comes, filled up with the gravel and made solid.

322. X Q. Who suggested the laying of that kind of pavement?

A. It was done by the order of the board of public works.

323. X Q. Did they suggest the peculiar kind of pavement to be laid?

A. I suppose so. It was ordered by the board to be laid that way. That is all I know about it.

324. X Q. How did you know what kind of a pavement?

A. Mr. Thompson, the superintendent, told me that was the way it was to be laid.

325. X Q. And you yourself laid the first row?

A. Well, I could not say whether I did or not; I don't think I did.

326. X Q. How was the second row started?

A. Well, after we laid the first row up against this board, as I was telling you, then we laid the next row an inch apart, and then we laid another row and then laid another row, and after we got several rows laid we took some gravel and got it about half full.

327. X Q. I see that is what you do. I want to know what you did on that occasion?

A. That is what I done.

328. X Q. You remember that distinctly?

A. Yes, sir; we always do that way.

329. X Q. What supported the second row, and the third row, and the fourth row?

A. They stood there alone, nothing but the sand they stood on.

330. X Q. How was the street prepared for the laying of the block?

A. The surface of the earth is covered with lake shore sand.

331. X Q. Not is, but how was it?

317 A. And then it is rammed down with the rammer; men takes the rammer and go all over it and ram it down solid, before the blocks is put on it.

332. X Q. Are you now speaking of the general custom in which pavements are laid in the city of Chicago?

A. Yes, sir.

333. X Q. That is not what I want; I want to know how that intersection was prepared at that time, if you know?

A. Just as I repeat it now.

334. X Q. Is your memory distinct on that point?
A. Yes, sir; first-rate.
335. X Q. Did you assist yourself in this ramming or only supervised it?
A. I just see that it was done properly.
336. X Q. Did you yourself see it done?
A. I did, sir.
337. X Q. Is your memory distinct on that?
A. Yes, sir.
338. X Q. Did you see the interstices between the blocks filled with gravel yourself?
A. I did, sir.
339. X Q. Were they rammed down?
A. Yes, sir.
340. X Q. What was it rammed with?
A. Iron rammer. Some I made with three-quarter bar-iron and fixed a blade to it about six inches wide; men take that in their hands and go along and ram it down, go over it twice and then fill up the interstices and go over it again.
341. X Q. Like the rammer now used by the city, as now used?
A. Yes, sir.
342. X Q. Was that the kind then used?
A. Yes, sir.
343. X Q. How many men had you employed on that work?
A. I didn't have any.
344. X Q. How many men had the city employed?
A. Not any.
345. X Q. How many men were employed there?
318 A. Mr. McBean employed the men.
346. X Q. How many men did McBean employ?
A. Probably ten or fifteen. Might not have been over ten. Could not say. What we call a gang, I know.
347. X Q. Might have been as few as six?
A. Might have been a part of the time, but in getting the street ready it takes more—grading it down.
348. X Q. What kind of blocks did you lay there?
A. We laid blocks eight inches long and three inches thick—pine.
349. X Q. Were the bottoms cut off transversly or squarely?
A. Squarely, sir.
350. X Q. Did you use any strip between the boards there in preparing the pavement or in the final pavement as laid?
A. No, sir.
351. X Q. Did the gravel, after it was rammed, extend down below the blocks?
A. No, sir.
352. X Q. How do you know? Did you examine it to see?
A. I have.
353. X Q. Did you examine this particular pavement to see?
A. Yes, sir. The blocks go below the gravel.
354. X Q. Were you there during the laying of the whole of this pavement?
A. This intersection?
355. X Q. Yes, sir.
A. Yes, sir.
356. X Q. How many days were you occupied with it?
A. Might have been—possibly been two—two and a half or so.

357. X Q. Know how many was it? Not how many might it have been, but how many was it?

A. Not to exceed three.

319 358. X Q. Can you give the exact number of days?

A. Not exactly; no, sir. Sometimes we get out of lumber; sometimes have to wait for material. I could not swear, sir, to a day.

359. X Q. Do you know that you were employed as many as two days about that intersection?

A. Yes, sir.

360. X Q. Have you examined that pavement since?

A. I have, sir.

361. X Q. Is it still there?

A. Yes, sir.

362. X Q. is it in good condition?

A. In very good condition; yes, sir.

363. X Q. How long was that end of the tunnel finished before the south end was?

A. I could not answer that. I don't know exactly. Several days. I should think it was maybe a month. Can't remember distinctly about that.

364. X Q. How soon after the laying of this pavement, at the north end of the tunnel; was the pavement laid on the south end of the tunnel?

A. I said I could not tell. Probably a month or so. Could not say.

365. X Q. Did teams commence passing through there immediately after the pavement was laid?

A. Teams commenced hauling material to pave the balance of the tunnel; yes, sir—drove down into the tunnel.

366. X Q. Was the balance of the tunnel paved immediately after?

A. It was some time after before it was finished clear through.

367. X Q. How long after?

A. As I said before, I could not say.

368. X Q. How long was it before teams commenced passing through there?

A. I could not answer that.

369. X Q. How long do you think?

320 A. Might have been a couple of weeks.

370. X Q. A couple of weeks after August or September, 1870?

A. Might have been but about a week. I could not remember.

371. X Q. Did you see the laying of the pavement—of the Stow pavement—at the intersection of Lake and State street?

A. I did.

372. X Q And also at the intersection of Clark and Monroe?

A. Yes, sir. I guess that intersection was not laid there. Only a little piece.

373. X Q. You saw the ramming process there, didn't you?

A. Yes, sir.

374. X Q. Do you remember when that was?

A. That was in seventy-two, I think, or seventy-three; seventy-three, I guess. Yes; in seventy-three.

375. X Q. Wasn't it before the fire?

A. This piece on State street might have been before; I guess it was—cross-walk put in there; put in some asphalt about the same time.

376. X Q. When was the Lake and State street intersection paved?

A. In sixty eight, probably. I do not remember definitely.

377. X Q. You say that, then, definitely?

A. Yes, sir.

378. X Q. You saw the ramming process there?

A. Yes, sir.

379. X Q. Did you ever see this ramming process used in connection with any other pavement prior to that date?

A. Yes, sir.

380. X Q. Where?

A. All the Nicholson has the same—drawing a blade along and ramming.

381. X Q. I am speaking of ramming the foundation.

A. Ramming the foundation; that is another thing. No, sir; I did not.

321 382. X Q. Did you ever see the ramming of the foundation in any other pavement, except the Stow pavement, after that event?

A. No, sir.

383. X Q. Why did you not lay more of this pavement, such as was laid at the north end of the tunnel at that time?

A. I can't answer you that. You have to go to the board of public works. I do not run that part of the machine.

384. X Q. Was any of that pavement afterward laid?

A. After what time?

385. X Q. After the time it was laid at the north end of the La Salle-street tunnel.

A. Oh, yes.

386. X Q. Before the fire?

A. I think not before the fire. No, sir. Not that I remember of before the fire.

387. X Q. Did you ever see any pavement of this nature laid at any other place, or any other time, than that laid at the La Salle street tunnel?

A. No, sir.

388. X Q. Was that pavement covered with gravel and sand after being laid?

A. Yes, sir.

389. X Q. Completely covered over?

A. Yes, sir.

390. X Q. When passing over could not see the construction, could they?

A. When it was first finished they could not. After it had been traveled over a couple of months they could see it.

391. X Q. Could they see whether there was a foundation of earth?

A. No, sir.

392. X Q. Could see only the upper surface of the pavement?

A. That is all, sir.

393. X Q. Didn't it look superficially just like the Nicholson

322 pavement?

A. Yes, sir.

394. X Q. Are you sure that that pavement was put down at the suggestion of Mr. Thompson?

A. Yes, sir; I am very sure it was. Well, I say suggestion of Mr. Thompson. I wish to be understood as the order coming from him as superintendent at that time. I cannot say where he got his orders from.

395. X Q. Is the pavement that was laid at the entrance to the La Salle street tunnel, north entrance, the same pavement as that laid on Dearborn, between Madison and Randolph?

A. No, sir.

396. X Q. How does it differ?

A. That on Dearborn, between Madison and Randolph, has a flooring to it. That is all the difference.

397. X Q. When did you see that pavement?

A. Saw that when they were laying it.

398. X Q. When was that?

A. I think it was in the spring of seventy-three, or somewhere in seventy-three.

399. X Q. You say that has a board foundation?

A. I think it has; also Lake street, laid at the same time.

400. X Q. Do you know whether it is or not?

A. I would not swear positive.

401. X Q. Who laid it?

A. De Golyer.

402. X Q. If that pavement is made of board, as you think it is—you did not examine the pavement, at the time it was made, in order to ascertain whether the gravel extended down to the sand or not, did you?

A. What street are you speaking of—Dearborn street?

403. X Q. Dearborn street.

A. I did not examine Dearborn street. No, sir; never took up any blocks on Dearborn street.

404. X Q. If it be the case that that Dearborn street pavement,
323 of which I have just spoken, is laid on the ground, instead of on a board, is it the same pavement as that laid at the north end of La Salle street tunnel?

A. Yes, sir; with the exception of being preserved wood on Dearborn street.

405. X Q. Is there any preserved wood south of Randolph on Dearborn?

A. Yes, sir; that whole block is.

406. X Q. South of Randolph?

A. It is between Randolph and Lake.

407. X Q. Then that pavement, if there is no board under it, is identical with the same pavement as that laid at the north end of La Salle street tunnel?

A. Yes, sir.

408. X Q. Is it a fact that all the pavements laid in the city of Chicago since the fire are like the pavement at the north end of La Salle street tunnel is, laid down to a sand foundation?

A. I don't know as I understand your question really.

409. X Q. Is it a fact that all the pavements laid in the city of Chicago without a board foundation is laid directly on sand?

A. Since the fire?

410. X Q. Since the fire.

A. I think that there has been one or two streets; seen portions of it laid with the Stow pavement since the fire.

411. X Q. I am speaking independent of the Stow pavement.

A. No; there has been some streets laid with a floor since.

412. X Q. Independent of pavement laid with a board foundation, and independent of the Stow pavement, are the pavements laid on a sand foundation?

A. Yes, sir.

413. X Q. Has this sand foundation been universally rammed down before the blocks were placed on it?

A. Yes, sir.

324 414. X Q. Universally?

A. Yes, sir.

415. X Q. The blocks have never been placed on loose sand?

A. Not if they work according to specification. I have not been on every street when they worked. They might pave a half a block, and not ram it, but all I have seen has always been rammed when I have seen it. It is for their interest to ram it.

416. X Q. That has been a universal condition of the contract, was it not—the ramming of the foundation since the Stow foundation pavement first was laid?

A. Yes, sir.

417. X Q. Have you ever had your attention called specially to the question whether or not the gravel in these pavements laid by the city extended below the block?

A. I have examined myself to see whether it did or not.

418. X Q. Why did you examine it?

A. Because I had heard that it did go below; examined it for my own information.

419. X Q. Have you examined it with reference to your testimony in this case?

A. Yes, sir; I have.

420. X Q. How many places have you examined?

A. Two or three.

421. X Q. Where did you examine?

A. Examined this intersection of Michigan and La Salle, and also up on La Salle; it was paved last year—a year ago last summer.

422. X Q. Is that all you examined?

A. Yes, sir.

423. X Q. How long had the pavement been down when you examined it?

A. At the intersection of Michigan and La Salle put down in seventy, and this on La Salle put down in seventy-three.

424. X Q. Did you take up parts of the pavement for the purpose o making that examination?

A. I did, sir.

325 425. X Q. How much did you take up?

A. I took up three or four blocks, enough to satisfy me.

426. X Q. How heavy a rammer does the city use for driving down the gravel between the blocks?

A. Well, these iron rammers will weigh eight, some ten and twelve pounds. Some are lighter and some heavier; ain't all alike; are using a rammer here on Fifth avenue now that will weigh from twelve to fifteen pounds, I should think.

427. X Q. Is there an iron wedge used also?

A. No, sir; not now there is not.

428. X Q. Was that tool ever used prior to the laying of the Stow foundation pavement at the corner of Lake and State street?

A. No, sir; never used with the Nicolson.

429. X Q. Just describe that rammer so the court can understand it.

A. It is a round bar of iron, about five feet long and an inch in diameter; at the bottom is a blade six inches long and about four inches deep; it would be about five eighths of an inch thick at the lower edge and taper up to the diameter of the handle. (Witness introduced a drawing of the rammer, which is attached to his deposition, marked Exhibit Watson.)

Exhibit Watson.



Tamping Rammer.

430. X Q. Do I understand you to say that it is your opinion that gravel rammed down by a rammer weighing fifteen pounds, on a sand foundation, will not go below the blocks?

A. Not at all, sir.

431. X Q. You think that is contrary to nature?

A. I do, so far as I have seen it work.

326 432. X Q. You don't pretend to say how nature works always, do you?

A. Difference in natures.

433. X Q. This gravel is thoroughly rammed, according to the specification of the city, is it not?

A. Yes, sir; should be rammed twice thoroughly.

434. X Q. Place is first only partly filled, and then fully filled and rammed?

A. They generally fill the space full even with the top of the block, and then ram it until settled down, about two inches, and then they fill the space again, and then ram it again; then throw on the top dressing, that is gravel, all over the surface.

435. X Q. Don't they sometimes put it half full and ram it, and then fill it full and ram it?

A. I think they used to start out that way, but found it would not work; wasn't gravel enough to hold the blocks.

Redirect examination by Mr. BOND:

436. Q. Was not the filling in the channels of the Nicolson pavement always rammed?

A. Yes, sir.

437. Q. Do not the pavements where the channels cross the roadways resemble the Nicolson pavement in their surface appearance?

(Objected to as leading.)

A. Yes, sir.

438. Q. Who was present, if any one, at the time you took the blocks up, to ascertain whether or not the filling did in fact extend below the bottom of the blocks, in these pavements, where the blocks are laid upon a sand foundation?

A. Mr. George Wilson was with me, the present superintend-
327 ent of the board of public works, and also this gentleman, Mr. Munday.

Recross-examination by Mr. BECKER:

439. X Q. In the Nicolson pavement, did they use sand or gravel to fill in between the blocks?

A. Gravel; screened gravel.

440. X Q. Did you use this kind of a rammer or a swedge?

A. Used a swedge.

441. X Q. Is that less or more effective than this rammer?

A. Less.

442. X Q. Did you ever have any conversation with the complainant in this case, in reference to the foundation that was laid at the north end of the La Salle street tunnel?

A. No, sir.

443. X Q. Did you ever have a conversation with his brother?

A. No, sir; with nobody.

Adjourned to Friday, July 9, 1875, at 10 o'clock a. m.

Met according to adjournment, on July 9, when JOHN W. MUNDAY, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

444. Q. What is your name, age, residence, and occupation?

A. My name is John W. Munday; age, thirty one; residence, Chicago; occupation, patent attorney and solicitor.

445. Q. What opportunities have you had for becoming familiar
328 with patents, patented improvements, and particularly of pavements, or coverings for streets, roads or highways? Please state fully your experience in patent matters.

A. I have been engaged in the business of soliciting patents since 1869, except a short time, during which I was a member of the examining corps of the United States Patent Office. My business during all this time has thrown me constantly in contact with inventors of labor-saving machines, and inventions of all kinds. I have been employed in making searches in the Patent Office upon many occasions in patent suits, and have acted as an expert in a great many patent cases. My experience with regard to pavements has been principally in preparing applications for patents for various different styles of pavements at different times, and in examining the pavement patents in this case, and in connection with this case.

446. Q. Have you examined and are you familiar with the complainant's patent, marked Complainant's Exhibit A, and the reissue thereof marked Complainant's Exhibit C?

A. Yes, sir.

447. Q. What improvements in paving do you find described in the reissue patent 3274, Complainant's Exhibit C, and claimed in the first claim hereof?

A. The thing generally described in this patent consists in a pavement of any suitable material upon a foundation of sand or loose earth, subsequently packed by means of wedge blocks driven down into the same, and forming a part or the whole of the pavement. The patent speaks about filling the spaces between the blocks with gravel, but immediately thereafter indicates that this is unnecessary, and forms no requisite of the invention.

There are a great many statements in this patent, as to what may be
329 done by a person using the invention, which are by no means necessary to the principles of the thing patented. The blocks may be of wood; they may be saturated with coal or gas tar, or they may be of dressed stone or concrete composition or brick, "any suitable material that will bear driving down into the foundation bed." The idea evidently being intended to be conveyed by the language of the specification, that the essence of the invention consisted in driving down some portion of the blocks into the foundation bed, to compact the same. In the first claim, the patentee enumerates as necessary

peculiarities that the pavement shall 'e composed of two kinds of blocks, one kind having wedge-shaped ends, and the other kinds square ends, the wedge-shaped blocks being driven into the foundation bed of sand or earth, to compact the same. And this I understand to be the invention claimed in the first claim.

448. Q. Have you examined and are you familiar with the several patent exhibits of the defendant, numbered from 1 to 16 inclusive?

A. Yes, sir.

449. Q. Please look at Defendant's Exhibit 1, being English patent to David Stead, No. 8041, and say to what extent, if any, you find the invention or improvement described in the complainant's reissued patent Complainant's Exhibit C, described or shown in said English patent, Defendant's Exhibit 1, and give your reason for any opinion you may express.

A. This patent of David Stead, for an improved mode of paving public streets and highways, exhibits a large variety of different kinds of pavement, all of which, with one or two exceptions, consist of blocks of wood laid upon a sand or earth foundation. There are twenty-five figures in the drawing, and I select from the number figures 18 and 19, which exhibit the plan and elevation of
330 a kind of pavement which, in my opinion, exactly meets the requirements of the first claim of Mr. Stow, Complainant's Exhibit C referred to. The figures named show a pavement consisting of octagon blocks, laid side by side in tiers, with the gravel between each four blocks, and which forms a square aperture, filled by a wedge-shaped block, which is driven into the foundation of sand. The description of said figures is as follows: "Figures 18 and 19 is a plan and side view of a portion of a roadway, forped by a series of octangular blocks *l l*, placed with the fibre vertical, so as to leave a square recess or interval between them, into which may be inserted a corresponding piece, *m*. When this kind of pavement is laid upon a road, formed upon a newly-made embankment or shrinking base, I should recommend a pile to be driven into the earth through the square recess or interval, of about the size and form represented by the dotted lines, figure 19, in order to support and keep the blocks firm in their position." Owing to the nature of things, when the pavement is constructed in this manner, and the wedge pieces *m* driven into the places indicated, there will be a pavement which consists of alternate square-ended and wedge-shaped blocks, resting upon a foundation bed of sand, the wedge-shaped blocks being driven into said foundation. This meets the requirements of the claim exactly.

450. Q. What other or different effect upon the foundation, if any, would the Stow wedges have as distinguished from Stead's wedges?

A. Would have no different effect.

451. Q. Please look at the defendant's Exhibit No. 2, English patent to Thomas Wood; Exhibit No. 4, English patent to Sir J. S. Lillie; Exhibit No. 7, United States patent to E. Whitehead, and say
331 to what extent, if any, you find the same, or similar invention described therein, as that described in complainant's patent, Exhibit C, and claimed in the first claim thereof, and give your reason for any opinion you may express.

A. The English patent to Thomas Wood is for a wooden pavement, composed of blocks made in the form of truncated pyramids, a portion of which are placed base upwards, and an equal portion base downwards, forming in some sense an alternate series or tiers of wedge-form blocks. The intention, however, I am led to think, was not to compact the earth

in the manner of piles, but rather to wedge the parts of the pavement itself firmly together, although undoubtedly the different form of the blocks would render such a compress of the foundation under some circumstances possible in this relation, and, to make clear my last remark, I will quote from the Stow patent, Complainant's Exhibit C, the following paragraph: "When the foundation bed is composed of sand or loose, sandy earth, it will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square-ended blocks will operate as wedges, and, on being driven down into the foundation bed, will pack the same sufficiently." Sir John Scott Lillie made a pavement consisting of alternate tiers of stone and wooden blocks, resting on a sand foundation. This pavement, if rammed, as the pavements of such nature are and have been, would compact the foundation. E. Whitehead's patent is for a peculiar style of wooden block pavement, resting directly upon an earth foundation. In this patent Mr. Whitehead speaks of driving piles into the ground in swampy places for the pavement to rest upon.

452. Q. What invention or improvement in street pavements
332 do you find described in the complainant's reissued patent, Exhibit C, and claimed in the second claim thereof?

A. The second claim appears to be limited to a pavement composed of blocks with lower ends wedge-formed, and all driven down into a bed of sand or earth. This construction of the pavement is shown in the second figure of the drawing. The inventor seems to have devised this kind of pavement especially for sidewalks and ground of celler floors. It seems to be adapted only to that purpose.

453. Q. Please look at the complainant's models, one marked G and the other marked 1-1 1 2, which are used as models representing the infringing pavements, and say whether or not you find the invention claimed in said second claim embodied in either of said models.

A. No, sir; neither of them embody the requirements of said second claim.

454. Q. What invention or improvement in street pavements do you find described in complainant's said reissued patent, Exhibit C, and claimed in the third claim thereof?

A. I find in said claim a pavement composed of any kind of material of blocks, or composed of any shape or size, resting upon a foundation bed of sand or earth, when part of the blocks, or boulders, or cobble stones, or bricks, are driven into the foundation bed.

455. Q. In which, if either, of the defendant's exhibits do you find the same, or substantially the same, pavement as that described in Complainant's Exhibit C and claimed in the third claim thereof? In your answer, please give the exhibit and your reasons for the opinion you may express.

A. I find the same pavement described in the patent of Stead,
333 Defendant's Exhibit 1, and illustrated in figures 18 and 19 of said patent. I find it also suggested in the Wood patent, Defendant's Exhibit 2, and the Stead patent shows a pavement where a portion of the blocks are driven down and all of the blocks rest upon a sand or earth foundation. This is exactly the requirement of the third claim. Now the requirements of this third claim, in my opinion, are met by any cobble-stone pavement in which the larger cobble stones would be driven into the foundation bed in a greater degree than the smaller ones and serve to compact the same. I think, however, that the Stead patent meets the requirements of this third claim more nearly and accurately.

456. Q. Have you examined and are you familiar with the patent of David L. De Golyer, marked Complainant's Exhibit D?

A. Yes, sir.

457. Q. What invention or improvement in the art of paving do you find described in said patent?

A. This is for a method of laying pavement upon a continuous foundation of wood. A board flooring is first laid upon the earth of a road bed. Upon this rows of blocks are placed, with intervals between the rows, the intervals being produced by the use of an auxiliary strip, which is afterwards removed and its place filled with gravel or other suitable material. All of this process appears by the disclaimer put into the patent to be old, except the employment of the auxiliary strip or removable board to determine the width of the channel. In the claim the patentee sets forth the process at length, enumerates the setting of the blocks in rows, filling the spaces with gravel, and so forth, and states that the method which he seeks to patent consists "in the use of an auxiliary strip or board to determine the parallelism of the rows and the width of the channels, forming no part of the completed
334 pavement." The patent is therefore for the use of a guage to determine the width of the channel between the blocks.

458. Q. Please look at the patent to McDougal, Stuart & McDougal, Defendant's Exhibit 5, and state whether or not you find the same or substantially the same invention as that shown and described in the complainant's patent, Exhibit D, in the said Defendant's Exhibit 5, and give your reason for any opinion you may express.

A. The pavement described in this patent is precisely the same as that described in the De Golyer patent; the process of making it is precisely the same; both patents make the same disclaimer, both referring in the disclaimer to the English patent of Henry Austin; both use a removable guide or guage for determining the width of the channel between the rows of blocks; the only difference between the two implements used is, that McDougal uses a guide with slots in it, and De Golyer a continuous board; the result of the pavement is the same in both cases, and there is no substantial difference between the implements, and McDougal's device performs all the functions of the implement used by De Golyer, and is in no wise, that I can see, different. I should unhesitatingly say that the employment of this device would be the use of the process embodied in De Golyer's claim.

459. Q. Have you examined, and are you familiar with the patent of Henry M. Stow, marked Complainant's Exhibit F?

A. Yes, sir.

460. Q. What invention or improvement in wood pavement do you find shown and described in said complainant's patent, Exhibit F?

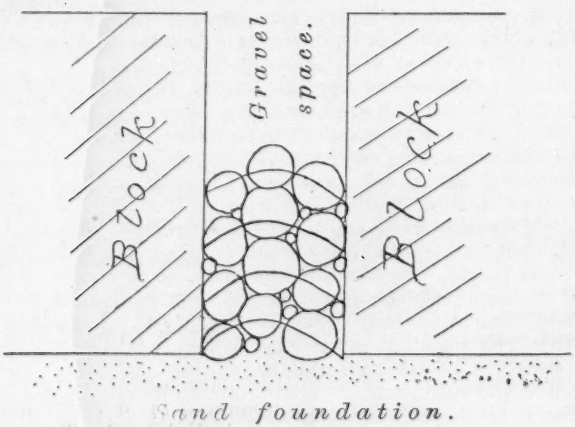
A. The pavement described in this patent consists of a series of rows of blocks, laid upon a sand foundation, with space between the blocks, filled with gravel and driven by means of a swedge and maul,
335 so that the gravel will enter the sand foundation in the manner of a pile or wedge, and serve to compact the same. The claim reads as follows: "A pavement composed of blocks laid in rows, and directly upon a sand foundation, with spaces between the rows filled with sand, or sand and gravel, which is swedged or driven into said foundation, substantially as and for the purpose specified." Mr. Stow, in this patent, substitutes for his wedges of wood, or other material, wedges of compacted gravel, which he proposes to drive down into the sand; his patent is for this. I am inclined to think that the theory of driving a wedge of this character into sand is a mistaken one, and that

it is utterly impossible to do so; if the claim did not absolutely require in terms that the gravel should be driven into the foundation, I should be inclined to the opinion that the patent was for blocks laid upon an earth or sand foundation, with the spaces between filled with gravel, but the fact is that the claim does require this impossibility to be performed.

461. Q. Why are you of the opinion that this would be impossible?

A. Because it is a well known fact in mechanics, that it is impossible to drive a column of sand by packing it through a tube, and I have had ocular demonstration that pavements laid in this city in the manner specified in this patent, in which the sand and gravel were driven down between the blocks, did not present any penetration of the gravel into the sand; I imagine the reason why it is impossible to drive a mass of gravel through between blocks, and cause it to penetrate the sand foundation, is, because the gravel will wedge out against the sides of the blocks, and form an arch or series of arches, which I will illustrate
336 by the following diagram, and introduce as Exhibit Munday 1, and attached hereto.

Exhibit Munday 1.



I went with Mr. Wilson, and Mr. Watson, the other day, and took up some pavement and examined carefully to see if the gravel did penetrate the sand. I examined in three places very carefully, and am satisfied that it did not penetrate the sand. And in theory, I am quite confident that it cannot be made to penetrate the sand. I am supported in this belief by a remark made in one of the patents that I have examined in this case. In the patent of E. P. Morong, the inventor describes a pavement almost exactly the same as the Stow pavement; the patent is dated in October, 1872. After describing the manner in which he constructs his pavement and sets his blocks, he says: "I then soften the road bed with the use of a profusion of water, conducted and directed into the channels themselves; ram the pebbles so that they wedge against the blocks, and form rude ratchets or pauls to hold and press the rows of blocks against each other, as the blocks are rammed down" This describes the action of the gravel when rammed between the blocks very

happily; they are indeed exactly rude pauls or ratchets, which engage the sides of the blocks, and form ratchets which would absolutely
337 prevent the column of gravel from being driven down into the sand. In the cases that I examined by taking up pavements I found to my surprise that not only did the gravel not enter the sand, but that, on the contrary, in many instances the sand itself was higher than the bottom of the blocks, and partially entered the channel. This is, I presume, due to the fact that the blocks were tapped with a hammer when they were set down upon the sand foundation.

462. Q. In which if either of the several patent exhibits of the defendant do you find the same, or substantially the same pavement as that shown and described in the complainant's patent, Exhibit F? In your answer please give the number of the exhibit, and give your reason for the opinion or opinions you may express.

A. I will preface by stating that nowhere in any of the exhibits is there to be found a wedge of gravel driven down into an earth or sand foundation. This I believe to be impossible. I find substantially the same pavement, so far as an alternating or series of blocks with spaces for gravel between is concerned, in the patent of Henry M. Stow, No. 74862, Complainant's Exhibit B in this case. This pavement consists of a series of blocks, set upon a sand foundation, with intervals between the rows, filled with gravel. The specification says: "the said gravel to be well packed by rammer and swedge, or instead of filling said spaces with gravel they may be filled to within about an inch and a half of the top of the block with sand well packed with rammer and swedge, and the residue of the space filled with gravel as aforesaid." This is the same pavement as that substantially patented to Stow in Exhibit F. The fact that the blocks in Exhibit B are wedge-shaped is immaterial, be-
338 cause there is no special style of block stated to be necessary in Exhibit F, and it is obvious that it is immaterial with regard to the wedge action of the gravel, if that were possible, what the shape of the block might be; the gravel in Exhibit B is wedged into the sand, if that were possible, the same *is* in Exhibit F.

AFTERNOON SESSION, *July 9th.*

463. Q. Please state in which, if any or either, of the defendant's patent exhibits, from 1 to 16 inclusive, you find a pavement laid directly upon a sand or earth foundation, and in which, if either, you find channels or openings between the blocks, extending down to the foundation, with a filling material in such channels or openings.

A. I find a pavement laid directly upon a sand or earth foundation in the patent of David Stead, Defendant's Exhibit 1; Thomas Wood, Defendant's Exhibit 2; Sir John Scott Lillie, Defendant's Exhibit 4; William H. Chappell, Defendant's Exhibit 6; Edward Whitehead, Defendant's Exhibit 7; B. F. Miller, Defendant's Exhibit 8; T. Cowing, Defendant's Exhibit 10; R. H. Willett, Defendant's Exhibit 12; S. C. Prescott, Defendant's Exhibit 13; R. C. Phillips, Defendant's Exhibit 14; G. A. May, Defendant's Exhibit 15; and E. P. Morong, Defendant's Exhibit 16. I find a pavement consisting of blocks laid upon an earth or sand foundation with intervals or spaces between the blocks, filled with a filling material, in the patent of David Stead, Defendant's Exhibit No. 1; T. Cowing, Defendant's Exhibit 10; R. H. Willett, Defendant's Exhibit 12; Prescott, Defendant's Exhibit 13; Phillips, Defendant's Exhibit 14; and Morong, Defendant's Exhibit 16; and I may remark with regard to Prescott's patent, Defendants Exhibit 13, that
339 in this pavement the filling of the blocks actually does enter the sand foundation, and penetrates the same to a considerable dis-

tance below the blocks. The pavement is made by setting the blocks in position, and driving a tool down between the blocks into the sand foundation, until a cavity is made below the blocks in the sand, which cavity, as well as the interval between the blocks, is subsequently filled with a filling material. This is done for the purpose, as the patentee states, of forming water breaks to prevent the foundation being sapped away by the underlying water. The tamping of the earth in this case to form a cavity below the blocks would of course compress the foundation. Mr. Prescott does not, however, contemplate driving the filling material into the foundation, but makes a hole for it, and places it in the hole.

Adjournment by consent to Monday, July 12, at 10 o'clock.

Parties met pursuant to adjournment on Monday morning, July 12, when the further examination of Mr. Munday was resumed.

Cross-examined by Mr. JEWETT:

464. X Q. At what place in the city were the examinations of pavement made by you, and who were present?

A. I suppose you refer to the examination of the pavements; we took up pavements at two places, at the intersection of Michigan and La Salle streets on the north side, just beyond the exit from the La Salle street tunnel, and we also took up some pavement on La Salle street between Michigan and Illinois, about half way down the block. There
340 were present a number of workmen who were engaged in repairing the street, also Mr. Watson, inspector of streets, and Mr. Wilson, Mr. Bond, and myself.

465. X Q. How much of the pavement in square feet was taken up?

A. We only took up some single blocks, perhaps a half a dozen at each place; possibly a dozen at each place. At some places the workmen took them up as we directed. I do not think there was any square yards taken up.

466. Q. Do you know anything personally in respect to the manner in which that pavement was laid, or the care which was taken in putting it down by the parties who put it down?

A. I do not, indeed; the pavement first mentioned was said to have been laid in 1870; that last mentioned in 1873. I was not present at either of those times, and know nothing of the care taken in laying the pavement, except what could have been judged of the appearance of the pavement after it was laid.

467. X Q. From what part of the street were the blocks removed?

A. The blocks were removed in the first example at the intersection of La Salle and Michigan streets, from a point perhaps fifteen feet from the centre of the intersection and to the east thereof, and at another point to the west and south of the intersection. The removals were made, I should think, within a radius of twenty feet from the centre of the intersection. In the other example, the blocks were removed from the edge of the pavement, now standing, and nearly in the centre of the street. I may remark, by way of explanation, that one side of the street is not now paved. The blocks appear to have been removed or never relaid, I don't know which, so that the examination we made between Michigan and the next street north, Illinois street, we
341 made nearly at the centre of the roadway.

468. X Q. What accurate experience or observation have you had ever in respect to the laying of wooden pavements?

A. I have had frequently observation, but no actual personal experi-

ence whatever. I have seen pavements laid; have watched them laying pavements a good deal, as I suppose a great many other people have here in Chicago.

469. X Q. Then the answers which you have given in the course of your direct examination are principally founded upon your judgment of the different patents and patented devices that have been exhibited to you, are they not?

A. Yes, sir; and upon my knowledge of things.

470. X Q. What do you include in the last part of that answer, as pertaining to your general knowledge of things?

A. What I mean by that is, that there is a certain kinship in all mechanical matters, and in some points I was guided by natural analogy suggesting itself.

471. X Q. Is there, in your judgment, anything in the several patents to which your attention was called in your direct examination, which is not fully disclosed upon the face of the several patents themselves, and of which any person understanding the language made use of may not reasonably judge?

A. I do not recall anything.

472. X Q. Are you, or have you been, a practical mechanic?

A. No, sir.

473. X Q. Or have you ever had any practical experience as a machinist?

A. Nothing. I have been a great deal about machine shops, and have done a little of a great many different kinds of mechanical work.

474. X Q. You are not, then, regularly educated as a machinist?

342 A. No, sir; I have learned no trade.

475. X Q. Apart from specimens of pavement which you have seen in Chicago and elsewhere, and which you say in your direct examination are anticipated by some of the prior patents which have been shown to you in your direct examination, have you ever seen in practical use any of the devices for wood pavement described in those several patents?

A. Do you refer to the complainant's patent?

476. X Q. I refer to the patents which you say embraced the complainant's patents. Have you ever, apart from those things which you say you have seen in Chicago, and which you say are anticipated by these devices, have you ever seen such pavements in practical use?

A. I have seen a great many different kinds of pavement, but not noticed them closely enough to identify them in any of the patented pavements, or at least identify them so that I would be willing to swear concerning it.

477. X Q. Have you ever seen in practical use, in its details, any wooden pavement such as is described in figures 18 and 19 of Stead's patent, and specifically like that?

A. No, sir; I never saw one exactly like that. Indeed, it would be impossible to tell, from the surface of the pavement itself, without a critical examination, without taking up some of the blocks, whether any pavement was made in that way or not, and as I have never made such examination of pavement in general, I of course cannot answer positively. Some pavements that I have seen may have possessed that peculiarity without my knowledge. The peculiarity I refer to is the wedge or pile driven into the ground between each alternate series of blocks to compact the sand foundation.

478. X Q. Have you ever seen any pavement laid with octagonal

343 blocks, their perpendicular sides being in contact with each other, such as is represented in figure 18 of the Stead patent?

A. No, sir.

GEORGE W. WILSON, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

479. Q. What is your name, age, residence, and occupation?

A. George W. Wilson; age, forty-three; occupation, superintendent of the board of public works; at present reside in Chicago.

Examined by Mr. BOND:

480. Q. How long have you been superintendent of the board of public works?

A. About three years.

481. Q. What connection does your position have in relation to the laying or repairing of street pavements?

A. It is done under my charge as general superintendent.

482. Q. What pavements, if any, have been laid by the city upon a sand or earth foundation, where the filling was made to project into the foundation below the bottom of the blocks?

A. Where the filling between the blocks, you mean?

483. Q. Yes, sir.

A. I cannot say that there is any.

484. Q. Was you present at any time at the taking up of any parts of pavements to ascertain this point? If so, please state when it was, where it was, and what you found.

A. I was present on Saturday last—that is the tenth—at the intersection of Michigan and La Salle street; took up some pavement there that was laid upon the ground. I could not say that any of the material between the blocks was forced into the sand or earth below the blocks.

344 485. Q. What was the actual condition of the pavement between the filling as you found that, so far as you examined that?

A. Well, it came about to the bottom of the block, or a little past the bottom; didn't see any place where it came below it.

486. Q. Who was present at the time these parts were taken up?

A. Mr. Bond and another gentleman, Mr. Munday, Mr. Watson, and there were three or four laborers there. I suppose you don't want their names; in fact, I could not give them to you. They are men that I see every day, but I do not know their names, workmen; they are repairers, work for the foreman that does that repairing for the north side.

Cross-examination by Mr. JEWETT:

487. X Q. Are you sure that that examination which you have referred to was on last Saturday, the tenth of July?

A. I am mistaken about that date, it 'as before Saturday—the same day that Mr. Bon' went there, I think it was; it must have been Wednesday or Thursday; I did not put the date down; I could not give the date.

488. X Q. You now think it was Wednesday?

A. I told Mr. Watson to put down the date. I got it into my head it was Saturday; it was the same day they were there.

489. X Q. You have made no examination of that kind excepting the parties whom you have referred to were present recently?

A. No; I have at different times, where pavement has been taken up for

repairs, I have taken notice of that matter as to the gravel being forced below the blocks.

490. X Q. At what point in the streets was the pavement which
345 you have referred to removed?

A. Well, it was about the centre of the intersection and also at one side; could not give you the exact point of it.

491. X Q. In the travelled portion of the street?

A. In the travelled portion.

492. X Q. In your position as superintendent, have you been familiar with the kind of wooden pavement which the city has required to be put down?

A. Yes, sir.

493. X Q. Been familiar with the advertisement for bids for that class of pavement which the city has authorized?

A. Yes, sir.

494. X Q. Will you examine this slip (handing it to the witness), and state whether or not this is the usual form of advertisement employed by the city in describing the wooden pavement put down in Chicago?

A. Yes, sir; there has been a number of specifications. I think there has been in some of them a little change; the most of them have that kind of pavement without a board, similar to that.

495. X Q. This without a board foundation, you mean?

A. Yes, sir; without a board foundation.

(Mr. Jewett offered the above advertisement in evidence, marked Exhibit Wilson 1.)

496. X Q. The names signed to this, in this advertisement, are the names of the commissioners of the board of public works?

A. No, sir.

497. X Q. At that time?

A. No, sir.

498. X Q. Who are they?

A. They are commissioners appointed by the court to make the assessment.

499. X Q. On the application of the city?

A. Mr. Carter went out before that.

346 500. X Q. Are they the names of commissioners appointed by the court, on the application of the city, for the purpose of making an assessment for paving the street?

A. I cannot answer that question.

501. X Q. When was this pavement which you examined, at the intersection of La Salle and Michigan streets, put down?

A. I cannot give you a decided answer as to that; my impression is, it was put down in seventy or seventy-one; my impression is that it was put down in seventy; that I would not be positive about.

502. X Q. How many blocks were removed with a view to make this examination; what extent of pavement was taken up; how many square feet or yards?

A. Well, I should not think there was to exceed a half a yard in all.

Redirect examination by Mr. BOND:

503. Q. Please state particularly where this half a yard was taken up; whether in one or more places?

A. It was taken up in more than one place; I said not to exceed a half a yard in all; taken up in several places.

504. Q. That was after we got there?

A. Oh, yes, sir.

505. Q. Was there any of it up when we got there?

A. Well, there was this trench dug across; of course, those didn't show anything; we took up in new places to examine the pavement.

(Mr. Bond, on behalf of defendant, offered in evidence, to show payment of royalty on West Randolph street and Warren avenue, five receipts, copies of which are hereto attached, marked Defendants' Exhibit 28, five receipts; the originals being produced, the copies are admitted to be correct.)

347 AFTERNOON SESSION, *July* 12.

JAMES STEELE, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

506. Q. What is your name, age, residence, and occupation?

A. James Steele; age, fourty-four; residence, Chicago; occupation, contractor.

507. Q. In your business of contracting, have you laid pavements in the streets of the city of Chicago?

A. Yes.

508. Q. Who laid the pavement on Market street, between Lake and Randolph, and on Twenty-third street, between State and Wabash avenue?

A. Steele, McMahan & Steele. I have forgotten whether the concern of Steele, McMahan & Steele did on Market street, or not.

509. Q. You was one of the parties, was you?

A. Yes.

510. Q. Please state whether on either of those parts of streets any royalty has been paid for laying the wedge pavement directly upon a sand or earth foundation?

A. We paid Mr. Stow, on Twenty-third street, one hundred and fifty-five dollars, so charged in the books.

511. Q. Which Stow?

A. William Stow; I did not give the check myself; it is charged as royalty to Mr. Stow.

512. Q. Probably it is William H?

A. Yes.

513. Q. Under what arrangement, if any, was the block on Market street, from Lake to Randolph, laid, in reference to the payment of royalty?

A. My recollection is not distinct, only as far as we were concerned; we were to pay no royalty on that.

514. Q. With whom did you make that arrangement, or have that understanding?

A. William H. Stow.

348 515. Q. Was there any reason given why you were not to pay royalty on that? If so, state what it was.

A. I do not recollect of any reasons now.

516. Q. How much, if any, of that kind of pavement has been laid in the city when this section on Market street was laid?

A. I think there was but one intersection.

517. Q. Do you know who laid that intersection?

A. Only from hearsay.

518. Q. State the conversation, as near as you are able to recollect it, in reference to the royalty on the section on Market street, between Lake and Randolph?

A. I cannot recollect any particular conversation we had, or any particular time; we had a conversation about it at the time of its coming up. All I can recollect about it is, we did not pay any royalty.

519. Q. Do you know whether any was to be paid?

A. That I don't know, if there was any agreement with any other party or not.

520. Q. You were to pay none?

A. We were to pay none.

521. Q. What has been the custom in the city as to who should pay the royalty when patented pavements have been laid?

(Objected to as immaterial.)

A. In the Nicolson pavement, I believe the city paid the royalty.

522. Q. How did you happen to pay it on Twenty-third street?

A. That was a private contract, and we agreed to pay it.

Cross-examination by Mr. BECKER:

349 523. X Q. Mr. Steele, do you know of any of the "Stow" pavement being laid at or near the intersection of Clark and Monroe street, previous to the pavement on Market street?

A. As I stated, all the place I knew was the intersection of Lake and State; that is all that I knew.

524. Q. Did you pay to Mr. Stow yourself the one hundred and fifty-five dollars for the pavement on Twenty-third street?

A. No; I did not pay it myself; it was paid out of our office; so charged.

525. X Q. Do you know, of your own knowledge, independent of your books, that it was paid?

A. My brother told me he had paid it, because I had made objections to paying for it until the money was collected for my own work; I did not see the check given.

526. X Q. You only know what you heard from your brother, and what the book indicated?

A. That is all.

527. X Q. Do you remember distinctly having any conversation with Mr. William H. Stow in reference to paying royalty on Market street?

A. I could not tell the conversation now, nor the place where the conversation took place; but I know we had a good deal of conversation about it at the time.

528. X Q. Was your conversation with William H. Stow or M. H. Stow?

A. I know them both twenty-five or thirty years.

529. X Q. With whom was the conversation?

A. Principally with William Stow.

530. X Q. Did you ever have conversations with H. M. Stow with reference to payment of royalty on Market street?

A. I do not recollect; we had conversations together about that time, but I do not recollect.

350 531. X Q. Do you recollect any distinct conversation with William H. Stow in reference to the payment of royalty by yourself?

A. I could not swear that I do recollect any now; no distinct recollection.

532. X Q. That is a general impression you have?

A. It is not only an impression, but it is a fact, because we never have been asked for royalty on it, and we always considered it so. It was so, but the time and place of the conversation I do not recollect.

533. X Q. Would you be the proper one to pay royalty; would not the city pay the royalty?

A. If we agreed to.

534. X Q. In the agreement made between the city and yourself was anything said about your paying—about the contractor paying royalty?

A. No.

535. X Q. There was nothing therefore in the contract you made with the city to make it your duty to pay royalty?

A. Not at all. Our contract was the same as for the Nicolson. We did not pay any royalty.

536. X Q. Did you take that at public letting?

A. Took that at public letting.

537. X Q. Under a public letting, the contractor is never required to pay royalty, is he?

A. Not in Chicago; we never have been required—not in those days. I don't know how it is now.

538. X Q. Can you state any time, or any place, at which you had a conversation with William H. Stow, in which any reference was made to your payment of royalty, or about non-payment of royalty?

A. No; I cannot state any place or time.

351 Redirect examination by Mr. BOND:

539. Q. Was William H. Stow acting for the patentee?

A. I so considered him.

540. Q. How came that kind of pavement to be laid on this square?

A. Which square do you have reference to?

541. Q. On Market street from Lake to Randolph.

A. It was offered at public letting for different kinds of pavement, and we bid on it. The property owners wanted this pavement; so we put it down.

542. Q. Who circulated a petition among the property holders?

A. That I don't know of my own knowledge.

543. Q. Was there not interest taken by the patentee or his agents to get that kind of pavement laid in the city?

A. I think there was.

Recross-examination by Mr. BECKER:

544. X Q. Do you know of your own knowledge that there was, or are you now speaking from hearsay?

A. No; I am speaking from my own knowledge now, that there was some interest taken to have the Stow pavement laid on that block.

545. X Q. Do you know of your own knowledge that he circulated any petition or anything of that sort?

A. No; I never saw a petition.

546. X Q. Do you know of your own knowledge that William H. Stow was the authorized agent of H. M. Stow?

A. No; I am not positive about it. Always considered him so, and talked to me as the agent.

352 547. (By Mr. BOND.) The two Stows are brothers?

A. Yes, sir.

548. X Q. You don't know that, do you, of your own knowledge? Do you know whether Mr. Lunt, a property owner on Market street, wrote to California to ascertain as to the merits of that pavement before having it put down?

A. No; not of my own knowledge I do not.

ARCHIE J. MCBEAN, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

549. Q. What is your name, age, residence, and occupation?

A. Archie J. McBean; age, about thirty-eight; occupation, contractor; residence, Chicago.

550. Q. In your business as contractor, have you laid any pavements on the streets of the city of Chicago?

A. I have.

551. Q. Did you lay any on West Washington street; if so, when and where?

A. I laid some on West Washington street in 1871, I think. I think it was the year of the fire, seventy-one, between Ashland avenue and Leavitt street. I ain't positive about Leavitt street, but it seems to me it was Leavitt street.

552. Q. Did you lay it as far as it was laid west, whatever street it might have been?

A. As far as it was laid west at that time. I do not think I have been at that point of the city but once since the fire.

553. Q. What kind of a pavement did you lay there?

A. I laid a pavement of six-inch blocks, with a wedge driven in the sand between the rows of blocks.

353 554. Q. Have you paid any royalty for the privilege of laying that kind of pavement on that street; if so, how much, and to whom?

A. I paid the full price agreed upon previous to my bidding on the work, and have the order of H. M. Stow, I think to his brother, to pay him the money. I still have the order. I was looking for it to-day, but could not find it. I know I have it. It is in the nature of a receipt, the order was.

555. Q. Have you paid it?

A. I have paid it; paid it very soon after the completion of the work.

Cross-examination by Mr. BECKER:

556. X Q. Did the contract made between the city and yourself provide for your payment of this royalty?

A. I don't know; I don't remember.

557. X Q. Don't you remember whether it was included in the royalty or not?

A. I do not remember.

558. X Q. And was it not ten cents per yard?

A. It was not; it was five cents a yard.

559. X Q. Did not the contract, too, between the city and yourself, provide for your payment of the royalty at ten cents, and was not this five cents a rebate made by Stow to you?

A. I am not certain. I have got the contract. If you let me come in any other day, and answer more fully. I cannot swear positive, because I don't remember.

Further examination of this witness postponed.

354 JAMES G. MCBEAN, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

560. Q. What is your name, age, residence, and occupation?

A. James G. McBean; age, thirty-four; occupation, contractor; reside in Chicago.

561. Q. In your business as contractor, have you laid any pavements in the streets of the city of Chicago?

A. Yes, sir.

562. Q. What portion, if any, of Clark street did you pave with wedge pavement, laid upon a sand or earth foundation?

A. I paved Clark street from the south line of Madison to the north line of Monroe with the wedge pavement.

563. Q. In what year?

A. That was in seventy-three, I think.

564. Q. What arrangement, if any, did you have with the patentee for laying this pavement?

A. Well, I hadn't no arrangement direct with the patentee. I had an arrangement with his brother, William H., whom I considered as his agent. He said he was his agent. I had a contract with William H. giving me authority to lay that pavement during the year seventy-three, at the sum of five cents a yard.

565. Q. Please state whether or not this portion of Clark street was laid under that contract or agreement?

A. Yes, it was.

566 Q. Have you paid the five cents a yard?

A. I have not paid it. I offered to pay it to William H. Stow, if he would bring me a receipt from the patentee for the money, but he would not do it; pay it to him now if he wants it; won't borrow the money either.

567. Q. Do you understand that you are personally held for that piece of pavement?

355 A. I do; I do not dispute his claim to that pavement at all, but am willing to pay him the money on it at any time.

Cross-examination by Mr. BECKER:

568. X Q. When he will produce his brother's receipt?

A. I will pay it to Henry M. Stow, any time he wants it.

569. X Q. Why won't you pay it to William H. Stow?

A. Well, I am a little afraid of him.

570. X Q. Didn't you say he represented himself as agent?

A. He did.

571. X Q. Didn't you think he was agent?

A. I don't know whether he is or not; I cannot answer the question.

572. X Q. Then when he made the representation of being agent, whether he was and is agent is a matter of opinion?

A. Well, it will require a long explanation for me to explain that matter thoroughly, but I do not think it will do you any good. I do not think it's any good at all, but if Mr. Bond will ask me to explain the whole matter, I will do so. There has been transactions between us since that made me doubtful.

573. X Q. At the time you made the contract, which you claim to have made with him, in reference to the payment of royalty, you considered his representations as agent as sufficient?

A. Yes, sir.

574. X Q. But when it came to the payment of that royalty to him directly, you had doubts as to his agency?

A. You are going to require me to make an explanation?

575. X Q. You can say yes or no to that.

A. If I say no, then the question is something else. I did consider

William H. Stow his agent and his authorized agent until Henry
356 M. Stow told me distinctly he was not. There is the explanation. And when he told me he was not, I certainly should not pay him money. Is that satisfactory? That is the only way I can put it.

576. X Q. Where was this arrangement made with Mr. William H. Stow in reference to the payment of royalty?

A. In this city somewhere.

577. X Q. Where?

A. Well, I could not tell you where the arrangement was made. In fact he came to my house several times, and I guess it was a Sunday job, I think. I think he came to my house, dogged me at my house until I got sick and tired of him. He came there on a Sunday, and I told him we would close the thing up, and for him to draw up his contract and I would meet him, but I do not remember whether it was Monday or Tuesday he was to meet me.

578. X Q. Did you draw up a contract?

A. Yes, sir.

579. X Q. There is a written contract?

A. Yes, sir.

580. X Q. What you testify to is embraced in a written contract?

A. Yes, sir; got it in my pocket, if you want to see it.

Redirect examination by Mr. BOND:

581. X Q. Will you please produce that, and let the officer copy it and make it an exhibit to your deposition?

A. I here produce it, and the officer may make a copy thereof, and annex it to my deposition as Exhibit James McBean 1.

Recross-examination by Mr. BECKER:

582. X Q. Is that the only contract you have made in reference to any pavement in the city of Chicago, either with Mr. H. M. or William H. Stow?

357 A. I do not remember of anything else. I am satisfied that is the only one.

583. X Q. When you showed that contract to Mr. H. M. Stow, he said that his brother had no authority to sign it, did he not?

A. I don't know that I ever showed it to him. I remember of offering to show it to him. As he knew what it contained—I remember I did show it to him. I read it to him.

584. X Q. Did not he state at that time that his brother had no authority to sign it?

A. He did, distinctly. That is the reason I did not pay him the royalty.

Redirect examination by Mr. BOND:

585. Q. Has any suit been brought about this contract?

A. Yes, sir; William H. Stow sues me, for the use of Henry M. Stow, for six thousand dollars under this contract.

586. Q. Was that suit commenced before or after H. M. Stow repudiated William H.'s authority?

A. After.

Recross-examination by Mr. BECKER:

587. X Q. Do you know of your own knowledge whether Mr. H. M. Stow ever authorized the bringing of that suit or not?

A. Whether H. M. did?

588. X Q. Yes.

A. It would be impossible for me to answer any such question as that. How would I know? Only I know of a notice having been served on me and they have filed their declaration, and I have answered, I believe.

Adjourned to 10 o'clock, Tuesday morning, July 13, 1875.

358 Parties met, pursuant to adjournment, on Tuesday morning, July 13, when the further examination of Archie J. McBean was resumed.

By Mr. BECKER:

589. X Q. Since refreshing your memory by an inspection of the said contract, are your answers made to me yesterday to be changed at all?

A. Well, I will say in regard to the contract with Stow, my contract with Stow covered the royalty. I was to hold the city harmless from royalty. The contract rate included the royalty.

590. X Q. What do you say in reference to the question of rebate?

A. There was no rebate spoken of then.

591. X Q. In the city contract?

A. In the city contract or in any other contract. I will say that William H. Stow came to me previous to bidding on the work, and told me I could have the use of the royalty for five cents a yard, if I wanted to bid on that work, or any other work, on this Stow foundation pavement, as he called it. He also represented he was the agent of his brother, and acting for him.

Cross-examination continued by Mr. JEWETT:

592. X Q. Do you know what the usual royalty was where the city did the work?

A. On that pavement?

593. X Q. On that pavement.

A. I don't know of my own knowledge whether the city ever paid any royalty to any person else.

594. X Q. Were there any other bidders lower than you made subject to the royalty, and didn't you get the contract in consequence of making your bid assuming to pay the royalty on that work?

A. I think I was the lowest bidder on that kind of a pavement.

359 595. X Q. You don't know of any arrangement between Mr. Stow and the city as to the amount of royalty it was to pay?

A. No, sir.

596. X Q. Didn't you state to the board of public works that your bid included royalty, whilst the other bids did not include royalty, and didn't you get the contract in consequence of that understanding?

A. My bid, I think, stated that it included royalty. Whether the others did or not I don't know. I know I got the contract in consequence of my being the lowest bidder on that kind of pavement, without any regard to royalty.

Redirect examination by Mr. BOND:

597. Q. Have you present this morning the receipt you spoke of yesterday?

A. Yes, sir.

598. Q. Will you produce it, and allow the examiner to make a copy thereof, to be used as an exhibit in this case?

A. Yes, sir; the examiner may make a copy of it and attach it to my deposition, marked Defendant's Exhibit 29, one receipt.

597. Q. Were you one of the contractors for the La Salle street tunnel?

A. I was.

598. Q. What kind of pavement was laid at the north end of the tunnel, and when was it laid?

A. There was an eight-inch block laid at the entrance to the La Salle street tunnel, on the north side, being the intersection of Michigan and La Salle street. The block was placed on end on the sand, and the space between the blocks filled with Joliet or similar gravel—similar to Joliet, screened gravel. It was laid in the fall of 1870.

360 599. Q. How long was that before the tunnel was completed?

A. That was about nine months.

600. Q. Who did the work of laying it?

A. James G. McBean superintended the work.

601. Q. How did it happen that you laid that kind of a pavement; that is, by whose order or instruction and request?

A. It was the request of J. K. Thompson, the city superintendent, I think.

Counsel for defendant here proposed to counsel for complainant that at two o'clock in the afternoon, or at such other time as may suit their convenience, he will proceed to take up sections of pavement on Clark street, between Monroe and Van Buren, and on South Peoria street, and on Fifth avenue, for the purpose of determining whether or not the filling extends below the lower line of the blocks, and notified them to be present, with such witnesses or experts as they may desire.

Adjourned to 9 o'clock in the morning of July 14.

Parties met, pursuant to adjournment, on the morning of July 14.

Mr. Bond offered in evidence re-reissue letters patent No. 2748, dated August 20, 1867, being a reissue of an original granted to Samuel Nicolson August 8, 1854, for a wooden pavement, marked Defendant's Exhibit 30, a certified copy to be produced and marked at the hearing.

THOMAS MACKIN, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

361 602. Q. What is your name, age, residence, and occupation?

A. My names is Thomas Mackin; live at 276 Indiana street, north side; about forty-six years old; occupation, contractor.

603. Q. What line of improvements have you been making as contractor?

A. Speciality principally is paving streets, walling, filling, and paving.

604. Q. How long have you been engaged in that business?

A. Twelve years, I think.

605. Q. Do you know of any pavement having been laid between the State street bridge or viaduct and Michigan street, in the city of Chicago? If so, state what kind of pavement was there laid, when, and by whom.

A. The pavement that was laid on that approach I recollect was in sixty-four; laid under the supervision of Mr. Thompson; my foreman, by the name of Warner, I think, and men, laid it down; that pavement was laid on ballast and sand or gravel, and I am not distinct in my recollection whether it was a four by six or six by six block, I cannot say which, but it was one or the other, laid down on the sand and filled be-

tween with gravel or sand ballast, some kind of gravel; I don't know whether it was Joliet or bank gravel, some kind of bank gravel; I don't know where it was got.

606. Q. What do you mean by the term ballasting sand or gravel?

A. The designation of gravel is, what is called Lake Shore gravel, that is a little stone that is free of sand; that is one kind; there is another known as bank gravel or pit, that is got in a bank of ground; there is another kind of gravel we used to use that was taken off the lake shore, washed and screened; that was called Nicolson Pavement
362 gravel; that is what we used for that, but my recollection of this gravel used there was bank gravel.

607. Q. Then, what you mean by ballast sand or gravel?

A. Is a mixture of gravel and sand, got from the beach for the bed foundation.

608. Q. Was the filling between the rows laid there rammed in any way?

A. My recollection is that it was filled in and rammed; first tamping-iron that I ever saw used was at this place; they tamped this gravel down between the rows.

609. Q. By tamping iron, do you mean an iron like the one shown in Exhibit Watson 1?

A. Yes, sir, that is the diagram; that is the first one I ever saw used in that way; the one we had before that was a blade laid down between the blocks and pounded with a pounder, and this one was the first I ever remember of seeing used in that way.

610. Q. Did you see that pavement while it was in course of construction and have any conversation with Mr. Thompson in reference thereto? If so, please state what was said.

A. Yes, sir; I was on the work there and Mr. Thompson and I were sitting on the rail; he says, Mr. Mackin——

(Objected to conversation with Mr. Thompson.)

——he says, "Why won't that be the future pavement of Chicago?" he says, "I have a great mind to get a patent on it," and I said I thought it was first rate; thought it would be a first rate pavement.

611. Q. Have you, as contractor, within the last two or three years laid any pavement in the city of Chicago on sand or ballast sand foundation, with the filling between the rows of blocks extending down to the foundation?

A. I have.

363 612. Q. Have you laid any where the filling was laid or rammed into the foundation below the bottom of the blocks?

A. Not that I know of; I have tried that; I have heard it claimed that the gravel would go below the block, and for my own edification I have tried that; I also saw it tried yesterday, the same thing, on Clark street.

613. Q. When you tri'd it was you laying pavement for the city?

A. Well, I was laying private pavement; I tried it on my own street, over there, on the street I am doing.

614. Q. What was the result of your trial?

A. Well, it does not go within a quarter and half an inch; the gravel don't go down to the bottom of the block in some places from one-quarter to one half an inch.

615. Q. Were you with any persons yesterday afternoon examining pavements on Clark street and Fifth avenue to ascertain whether or not the filling in those streets passed into the foundation below the blocks? If so, please state who was present, and the result of those examinations.

A. I was at the trial on Clark street yesterday; I did not go over to Fifth avenue; I saw a trial made on Clark street; I think it's south of Adams where we had taken up some blocks there, and the first block was taken up, I think it was, the gravel did not go within a half an inch of the bottom; the second block taken up, I think it was a quarter of an inch, if I recollect right; Mr. Thompson was at the trial, Mr. Clybourne was there, and myself, Mr. Bond was there, and Mr. McBean was there.

616. Q. Which McBean?

A. James, I think; isn't it? James McBean. There was another gentleman, I don't know what his name was, was present there.

617. Q. How far apart were the blocks taken up in Clark street?

364 A. I think it was thirty feet.

Cross-examination by Mr. JEWETT:

618. X Q. Are you engaged in the paving business?

A. Yes, sir.

619. X Q. Are you interested in this litigation in any way?

A. Well, I suppose it is claimed I am laying down this pavement.

620. X Q. Haven't you given bonds from time to time to the city, to protect them against royalty under patents covering the pavements which you put down?

A. I don't remember that I have.

621. X Q. Isn't it a fact that you have?

A. I don't know. I can't say whether I have or not. It may be that I have.

622. X Q. Don't your contracts with the city bind you to protect the city against royalties of pavements which you put down, or hav'n't you in some cases?

A. I think in some cases such a thing——

623. X Q. Were you laying the pavements in 1864?

A. Was I laying pavement?

624. X Q. Yes.

A. Well, I don't mind. I think I was. I do not remember the date that Mr. Greeley and me was partners. The first block that I laid on my own account was opposite the old custom house on Dearborn street from Madison to Monroe. That was the first that I done on my own account.

625. X Q. Do you remember when that was?

A. I do not remember the date exactly.

626. X Q. Was it before or subsequent to 1864?

A. I could not state—some time about that time—best of my recollection.

627. X Q. Prior to the laying of that pavement, whenever that was, you were laying pavements as partner with Mr. Greeley?

365 A. Called the Nicholson pavement.

628. X Q. Was that the Nicolson pavement you put on?

A. On Dearborn?

629. X Q. In front of the custom house.

A. Yes, sir.

630. X Q. When did you first begin to lay the pavement upon a sand or gravel, or earth foundation, with the blocks resting directly upon such foundation?

A. First job I done of that character, I think, was Kinzie street.

631. X Q. Give the date of that.

A. I think it is two years now that I laid that street.

632. X Q. Didn't you, in that case, guarantee either the city or the

property owners against royalties upon patents covering the pavement which you put down?

A. Being a gentleman by the name of Stow being around circulating circulars, stating to the property owners that he would hold them responsible for a royalty upon his so called patents, and give some little annoyance to the contractors, some of the people on the streets thought that there might be something growing out of it that would not be all right, and they required an indemnifying bond; I think in that there was two that required it of me, and I told them I would most cheerfully give it, which I did.

633. X Q. So you finally gave the bond?

A. I think in two cases; all that asked me; I cheerfully acquiesced.

634. X Q. You have done the same thing since then when they have asked you to?

A. Hav'n't anybody asked me of late at all. There is a great many began to make up their mind that there was a good deal of humbuggery about this. I was notified myself. I have quite a little piece laid
366 down of pavement of that kind, and I was notified myself.

635. X Q. Are you certain about the time of laying down of this Thompson pavement on the approach to State street bridge?

A. Well, sir; my recollection is pretty clear upon that point. There was a contract for the filling of those approaches, and also for the filling of the centre pier of the bridge, when they constructed that new bridge there, and I was a bidder upon that contract. A young man by the name of John Anderson beat me on filling the south side approach, but I got the work on the centre pier, so that I was engaged at the same time on that work, and Thompson on the north side, and Thompson and Warner superintended it, and Anderson done the filling on the south side, and I done the centre pier pillar, and I was on the work every day.

636. X Q. You do not remember the size of the blocks definite' used on that pavement?

A. Well, it was four by six, or six by six, but I cannot tell which. It was that was the character of the block.

637. X Q. Square blocks; square edges?

A. Square blocks; that is my recollection.

638. X Q. How did they preserve the space between the blocks whilst they laid it down?

A. They laid the blocks down with the hand and eye. I suppose I did not see any effort——

639. X Q. No guide?

A. No guide or *guage* of any kind. Just laid it right down.

640. X Q. Laid the blocks straight across the street or diagonally?

A. Well my recollection is that they laid straight. That is, formed an arch, and laid them across from curb to curb.

641. X Q. The rows of blocks went straight across the street?
367 A. I think it. I could not swear positively, but my recollection is they were put down straight.

642. X Q. Where did they begin to lay down that pavement; next to the bridge, or further north?

A. There is considerable of an ascent. They were coming down that time. There was a new railroad laid down there, and my recollection is that they commenced from the ——. That I cannot state positive', but my recollection is they commenced on the north end—on the south line of Kinzie.

643. X Q. You worked toward the bridge?

A. That is my recollection; I passed there every day, because I was working on the bridge at the same time myself.

644. X Q. How much of that pavement, according to your recollection, was laid down in length; along what street? State street?

A. Well, there was not a very great deal of it laid down. The railroad cars run under the approach, and there was a large stone abutment built near the river; a large stone pier built there; that supported the work of the bridge, a viaduct, and then there was, I think, another one; I think another stone wall. I won't be certain, but I think there was another stone wall north of that, so that the place where they laid down this pavement would not be over, I think, one hundred and eighty feet—probably not that much.

645. X Q. The place between these two stone abutments?

A. No; between Kinzie street and the abutment—the south abutment. I remember very well I used to store goods in under them. I remember about the construction of that bridge approach. It could not be over one hundred and eighty feet.

646. X Q. Was that abutment to support the viaduct that was constructed over me railway, or was it the abutment of the bridge?

368 A. No, sir; it was the trestle work of the bridge. The cars run east and west, and there was a large space that was devoted to the railroad, and a large one outside of that; that was supported by timbers.

647. X Q Then this pavement was laid, as I understand you, from the north abutment, which supported the viaduct over the railway, towards Kinzie street; was it?

A. Yes, sir.

648. X Q. It didn't come down, then, to State-street bridge?

A. Come down to the bridge?

649. X Q. Yes.

A. The pavement; I don't think it did. I don't think it came all the way down.

650. X Q. Did it reach as far as Kinzie street, that same kind of pavement?

A. I think it did.

651. X Q. Now, the abutment of the viaduct, up to which this pavement was laid, as you say, was constructed of what?

A. The viaduct, you mean?

652. X Q. The abutment upon which the viaduct rested; what was it constructed of?

A. Well, it was timbers, my opinion. It was strong timbers that constructed the support of the viaduct over the railroad.

653. X Q. The north end of the viaduct then rested on wooden abutments supports?

A. That is, a portion of it. My recollection is, as I stated before, it was about one hundred and eighty feet of this pavement that was laid from Kinzie street, going south. The support of the viaduct, I think, was timbers and its two walls. I think there was two supporting walls, one immediately at the river, and the other north of that.

654. X Q. Where was this north stone abutment that you re-

369 ferred to?

A. I am not positive; I think there was. I am not positive it was there, but I think it was there. A stone abutment there.

655. X Q. At the north end of the approach to the viaduct?

A. There was one at the north end of the approach; there was a large

one there, and I cannot be positive whether there was another one where they commenced with the dirt filling, still north.

656. X Q. The dirt filling commenced at the north end of the approach from the railroad?

A. Well, yes; quite a little space there. Mr. Wright kept wagons and one thing or another, and I had some storage in there myself. It was quite a little ways north that was timbered.

657. X Q. You mean to say that the viaduct re'ted upon timbers, for a portion of the way, at the north end?

A. Yes; from the bridge. [Illustrating:] Here is the draw and bridge; there was a stone wall.

658. X Q. Next to the river?

A. That is my recollection; and timbers and trestle-work I could not tell how many feet, but quite a good distance; and then, as the incline came down, as it became low, it was filled with dirt, coming down towards Kinzie street.

659. X Q. Filled from the bottom, from the railroad track up?

A. Yes, sir.

660. X Q. That was filled all with dirt?

A. No, it was not all filled; because there was heavy timbers thrown in the bottom, and dovetailed. These supported piles that was drove down each side very heavy timber.

661. X Q. The dirt road bed went to the bottom?

A. A part of the way it did, with those timbers intermixed—parallel timbers—I could not tell how many feet apart, but I think about
370 one hundred and eighty feet of that filling was done between the parallel timbers, and from the ground up.

662. X Q. Did you ever have more conversations with Mr. Thompson, whilst that pavement was being put down?

A. Not that I remember, upon the merits of that pavement. Might have talked about other matters connected with the bridge.

663. X Q. I mean about the pavement specifically?

A. Nothing that I remember but that conversation, and that was there.

664. X Q. Where were you when that conversation occurred?

A. We were on the bridge, I think; on the railing, coming down; sitting there.

665. X Q. Was that manner of laying a pavement new to you at that time?

A. Yes, sir.

666. X Q. First you had ever seen of it?

A. It was the first that I ever seen or heard of those pavements, laid down in that way.

667. X Q. I was not asking you what you heard, but what you had seen. How long was that conversation that you had with Mr. Thompson about that pavement?

A. Well, I don't know; it was not very long, I don't think. I have asked him afterwards——

668. X Q. He suggested it would be a good pavement for the city to adopt, did he?

A. Why it would not be the future pavement of Chicago.

669. X Q. He was then acting in some official capacity, was he, for the city?

A. He was. I think he was the superintendent of the board at that time.

670. X Q. And had, in general, charge the repairs and improvements of the streets, did he, for the board?

371 A. Yes; I think it was under his supervision under the board. I think he was the head man.

671. X Q. (Handing witness a paper.) Does that rough sketch represent, in a general way, the situation of the piers and the abutments, and piece of piling and paving to which you have referred?

A. Yes, sir; that is what I call the intersection of Kinzie street, and the approach to the bridge. It started on the end, on a general raise, probably in that proportion.

672. X Q. In that way?

A. In that way.

673. X Q. Now, this between Kinzie street and this first pier was filled in with earth, as I understand you, or partially so?

A. Partially so.

674. X Q. Was there an opening underneath?

A. There was an opening underneath, as you came south, because Mr. Wright stowed away his wagons. I stored there myself.

675. X Q. The filling did not go to the ground where the railroad track was?

A. Not quite. I told you my recollection, about one hundred and eighty feet; may be mistaken, more or less; I judge about that much; and there was timbers thrown across in the bottom here, and dirt was thrown over them; because I have travelled over it every day myself.

676. X Q. But there was a timber foundation?

A. It was a kind of heavy timbers thrown across on the bottom, and they rested, I think, on piles. I think there was piles drove down there.

677. X Q. And they supported the earth and gravel and the superstructure?

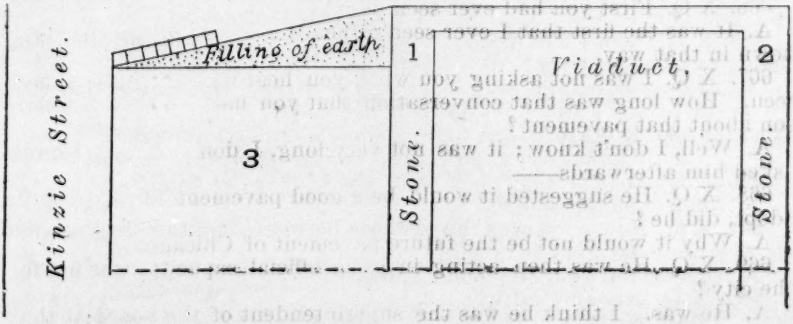
A. A portion out here, and the balance was the viaduct proper; there was a road run under; there was an open road maintained under the bridge, that was maintained.

372 678. X Q. The railroad tracks were south of this part, and between this and the river?

A. Yes, sir; that was open underneath.

679. X Q. Was this pier constructed which is marked 1 on this little plat, Exhibit Mackin 1?

Exhibit Mackin 1.



A. It is a difficult thing to place the construction. I give you an outline as near as I have any idea of the construction.

680. X Q. Simply the material of which it was made—was it made of stone?

A. There was a great many piles. I think the principal part of the structure was where the piles stopped. Here was piles, piles drove down to the timbers. I think Mr. Hess would give a full account of that, because he was the engineer, and had charge of it.

681. X Q. Between Kinzie street and this support here marked 1 was all open, was it, underneath?

A. Well, there was heavy timbers thrown across.

682. X Q. I mean underneath; I don't mean all open, because there is a roadway on top, but there was a roadway between Kinzie street and that support?

A. From the approach of Kinzie street, going south, I estimated one hundred and eighty feet that timbers were thrown across and filled in between. There was, I think, one hundred and eighty feet.

683. X Q. Filled clear to the bottom, that one hundred and
373 eighty feet?

A. It might not be as much as that. I could not say how much it may be was filled with dirt or timbers.

684. X Q. But how much of it was open piles and timbers, according to your recollection, with the open roadway or hallway underneath, between this earth filling and abutment or support?

A. How much of it was what?

685. X Q. How much space was there between this point where the earth filling went to the bottom, which is marked upon here with the figure 3, and the piers south of it? The first part of the approach south of it marked Figure 1?

A. Which abutment do you mean? Do you mean the abutment that was right alongside of the river?

686. X Q. No, no; from the north side of the railroad track.

A. I told you I could not swear positively whether there was a retaining wall of stone there or not. I cannot say, but it was of heavy timbers all along on both sides with a place between, where the wagons would go through, and where the railroad went through, supported by heavy timbers.

Mr. BECKER continued the cross-examination:

687. X Q. Just answer as particularly as possible, was there or was there not a stone abutment 1?

A. There was a stone abutment 1 in my opinion over the river, and a stone abutment number 2. I could not say whether there was a retaining wall here or not. That would make two abutments.

688. X Q. Was there a stone abutment 2, as shown in this diagram, being next to the river? Say yes or no.

A. There was a stone abutment at the river. My recollection was, there was a stone abutment at the river.

374 689. X Q. Now was there a stone abutment number 1?

A. I cannot swear positively whether there was or not.

690. X Q. Was there a wood abutment between or a pile at 1?

A. There was many piles.

691. X Q. Now what was the distance between 3 on this diagram and 1, whether it be stone or wood?

A. Cannot tell you, sir; don't know.

692. X Q. About what was it?

A. I don't know.

693. X Q. Was it forty feet?

A. I never measured it; I cannot tell you.

694. X Q. I mean what was the distance between the pavement laid by Thompson and the first abutment, at the end of the viaduct, nearly the end of the viaduct?

A. I stated to the best of my recollection it might be one hundred and eighty feet that there was from the intersection here.

695. X Q. You do not understand my question.

A. I do, sir.

696. X Q. From the end of Thompson's pavement up to the abutment of the viaduct marked 1 what is the distance?

A. I could not tell you where the pavement stopped.

697. X Q. You don't know, then?

A. I don't know where the pavement stopped.

698. X Q. Do you know what proportion of this pavement laid by Mr. Thompson was on timbers, and what proportion on solid dirt?

A. I do not.

699. X Q. How much of this pavement did you see laid?

A. I saw the whole of it laid.

700. X Q. Where was you standing?

375 A. I told you I went across there every day. I was working on the centre pier. I was working on the same work myself, on the bridge.

701. X Q. You saw the whole thing laid; did you lay any of it with your own hands?

A. I did not.

702. X Q. Did you give any orders for the laying of it?

A. I did not.

703. X Q. Were you present at the time the whole thing was laid?

A. While it was constructing I told you I was going back and forth.

704. X Q. Were you present at this particular spot?

A. I was, sir. I saw that particular pavement laid.

705. X Q. You saw it not by standing, but by passing over it?

A. Standing, sitting, and walking. I sat sometimes on the edge of the rail.

706. X Q. How many days were they occupied laying that pavement?

A. I cannot tell. I was not keeping time.

707. X Q. Yet you are sure you were there all the time it was laid?

A. Yes, sir; before and after.

X Q. How many men were employed in laying it?

A. I don't know.

709. X Q. Yet you was there all the time it was being laid?

A. You don't understand, I guess, my answer.

710. X Q. Were you or were you not there?

A. I was passing there.

711. X Q. Then you were not there all the time it was being laid?

A. Occasionally passing back and forth.

712. X Q. You occasionally passed over it; didn't you say a little while ago you were there all the time it was being laid?

A. Around the works there. I was working on the same job,

376 on the other side; that is, the construction of the bridge there. Other side.

713. X Q. Then you were not at the pavement there all the time the pavement was being laid?

A. You mean standing there, and waiting, and watching, and looking at it all the time; is that it?

714. X Q. You were not at the pavement all the time it was being laid?

A. I told you I was there when they commenced that, and getting through, and while it was in construction; will that answer?

715. X Q. No, it won't answer. Were you at the pavement during the time it was being laid? Please answer yes or no.

A. I don't understand anything about the question at all.

716. X Q. You can understand that question. Now according to your best recollection, Mr. Mackin, how many days were consumed in laying that pavement?

A. Wasn't keeping time, sir. Don't know.

717. X Q. Did you see the first row laid?

A. I don't think I did.

718. X Q. Did you see the last row laid?

A. I don't think I did. I know when it was finished.

719. X Q. Did you see it any time between the laying of the first row and the last row?

A. Yes, sir.

720. X Q. Did you see it at all before it was completed?

A. I did.

721. X Q. How many rows had been laid at the time you saw it?

A. Don't know. Didn't count it.

722. X Q. Was it about half the pavement?

A. I saw them soon after they started. Was there when it was finished.

723. X Q. When it was finished it was covered with sand, wasn't it?

A. I did not mean whether it was covered with sand or not. I think it was; I don't know; cannot say whether it was or not.

377 724. X Q. Did the surface of the blocks appear?

A. My recollection is, it did.

725. X Q. Surface of the blocks appeared after it was finished? Did it remain long in that condition, the surface of the blocks appearing?

A. I have not taken any particular notice.

726. X Q. How many weeks or how many months did it remain in that condition?

A. I don't know.

727. X Q. Didn't you pass over it after it was finished?

A. I did, sir.

728. X Q. Pass over it every day?

A. Might be every day, might be three times a day.

728. X Q. You can't tell whether it was covered with sand or not?

A. No; I can't.

730. X Q. Was there any coal tar or pitch on it?

A. Not to my recollection.

731. X Q. How does it happen you are so distinct in your memory of the fact that this pavement was put down on a sand foundation, and yet you cannot tell whether it was covered with sand or not; can you explain that?

A. I don't know whether my eyes were shut when I went over there or not. My eyes were open and I saw the sand foundation.

732. X Q. Wasn't your eyes open when you passed over it after it was completed? Yet you cannot say whether it was covered with sand. With whom have you conversed in reference to the laying of that pavement lately?

A. I have been talking a good deal about pavements generally of different kinds lately.

733. X Q. What do you mean by that?

378 A. Talked with contractors and property owners. Had a long talk with one this morning in reference——

734. X Q. Have you talked with Mr. Thompson with reference to the quality of that pavement?

A. I have talked with Mr. Thompson on several occasions about that pavement.

735. X Q. Have you talked with Mr. Thompson or the solicitor about that pavement of sixty-four?

A. I think I had a talk with Mr. Bond once about it. I am not certain of that either, whether I did or not.

736. X Q. With what other parties have you conversed with reference to the sixty-four pavement?

A. I could not tell how many.

737. X Q. When was your last conversation with Mr. Thompson in reference to that sixty-four pavement?

A. I cannot remember when.

738. X Q. Was it a week ago?

A. In reference to that pavement? I don't know when I had anything to say to him about it.

739. X Q. You never conversed with Mr. Thompson in reference to that sixty-four pavement?

A. I never said any such thing. I did at the time it was laid.

740. X Q. Hav'n't you since then conversed with him?

A. I may have.

741. X Q. Have you?

A. I don't know whether I have or not. I say I may have.

742. X Q. Didn't you yesterday converse with him with reference to it?

A. I don't think more with him about this pavement than others.

743. X Q. Didn't he describe to you the manner in which he laid that sixty-four pavement?

A. Not much.

744. X Q. Did he any?

A. Not to my knowledge.

745. X Q. Had he to your knowledge?

A. No, sir.

379 746. X Q. Did he have a conversatian with you in reference to the manner in which he laid that sixty-four pavement?

A. We talked about it on the bridge that day, about the quality of that pavement.

747. X Q. Did he on any other occasion?

A. Might have.

748. X Q. Did anybody else ever converse with you in reference to the manner in which that sixty-four pavement was laid, except Mr. Thompson?

A. I cannot remember any. Might be a hundred; might be; I don't mind.

749. X Q. Was it possible to discern the manner in which that pavement was constructed after it was finished?

A. Yes, I suppose if you examined it.

750. X Q. I mean looking at it from the surface.

A. No; I don't know as you wouldn't probably know what it was without you went in careful to examine it.

751. X Q. Could you examine it from the surface?

A. Give it your attention you might understood anything about it.

752. X Q. Could you tell whether it was on a sand foundation by looking at it from the surface after it was completed?

A. I think not.

753. X Q. Then you could not tell by looking at it from the surface what kind of a pavement it was?

A. Tell it was a wooden block pavement.

754. X Q. That is all you could tell about it?

A. If you were expert and examined it minutely, you would be able to tell.

755. X Q. If the top was all covered over with dirt, you could not tell it was a wooden block pavement?

A. Yes, sir; you could tell that with your eyes shut.

756. X Q. If it was covered half an inch with sand or gravel?

380 A. Yes, sir; you could feel of it with your feet. I could.

757. X Q. Suppose it was covered an inch and a half?

A. Suppose it was.

758. X Q. Suppose it was covered a foot, could you feel it then?

A. Then you would have to dig down a little.

759. X Q. How much of this pavement lay directly on a sand foundation, and how much of it on a dirt foundation?

A. This pavement in question here?

760. X. Q. Yes, sir.

A. Cannot answer you that. I stated before there that I did not know where it ended—where Mr. Thompson ended. Could not put my hand down and tell the distance—the length on sand. I could not tell where he stopped.

761. X Q. What portion of it was sand foundation and what portion of it was on dirt?

A. I don't know anything about a dirt foundation; I don't know anything about it. I told you there were timbers down and filled with dirt.

762. X Q. Do I understand you to say a portion of the pavement was laid directly on a sand foundation, and a portion of it on a pile foundation, covered with sand?

A. I answered that question about three times, I think.

763. X Q. What is your answer? Answer it again, it is not very distinct.

A. Just let him read the evidence (referring to the reporter) and see whether it is or not.

764. X Q. Do you refuse to answer that question?

A. I say I have answered that question three times.

765. X Q. Won't you answer it again?

A. Yes, sir; as long as I am not thoroughly understood.

766. X Q. The 762 question read to the witness.

381 A. What was my answer to that? This portion down here, I told you before, was timbers thrown across here, filled with dirt between and over; that is down here to the intersection—intersection of Kinzie street, and where it was vacant underneath, or where the passage ran under.

767. X Q. Call it No. 3 (on Exhibit Mackin I.)

A. There was timbers thrown across, I suppose, to keep the structure together; piles driven down both sides.

768. X Q. After No. 3 what then?

A. I don't know how far. I cannot say whether he laid any blocks over that; I suppose and beyond. I cannot tell; I don't know how far he went.

769. X Q. Mr. Mackin, can you state when was the first time you saw this tamping-iron used?

A. The first of these tamping-irons ever saw was with Warner on that occasion. It was afterwards objected to using that, though Mr. Thompson made it very feasible to the board that it was a better mode of ramming the pavement, striking it down that way (illustrating). The former went with a blade between the blocks, striking it down with a heavy maul. That was called a pavior's tool, I suppose. You have got an exhibit there.

770. X Q. Called a swedge?

A. Yes. It ran along with a man holding it and another man striking it down. The first I ever saw of that kind was with Mr. Warner, about that work. That is this exhibit shown here, Watson 1. That is it. It was a new tool altogether in the construction of pavements, so far as we knew anything about it here in this city.

771. X Q. Was the tamping-iron you have described similar to this Exhibit Watson 1?

A. Something similar to that.

382 772. X Q. Where were you standing at the time Mr. Thompson made his remarks about it?

A. We were sitting on the rail on the approach of the viaduct.

773. X Q. Was it on the approach of the viaduct?

A. Yes.

774. X Q. Which side of the approach was it?

A. (Referring to Exhibit Mackin 1.) Call the viaduct this here. That is the approach to the viaduct that I have reference to there, from the bridge down to Kinzie street—to the river abutment.

775. X Q. You were between Kinzie street and 3?

A. Between 3 and the line of Kinzie street.

776. X Q. It was between Kinzie street and 3 on this diagram, wasn't it?

A. Yes, sir.

777. X Q. He sitting or standing up, which?

A. I cannot tell.

778. X Q. Were you sitting or standing?

A. Sitting on the rail. Rail lay in a position like this (illustrating).

779. X Q. There was a rail?

A. I don't mind whether there was; I don't know whether it was a rail to the sidewalk or not.

780. X Q. Was there any railing to the sidewalk?

A. I think there was.

791. X Q. Was there any sidewalk there?

A. I think there was.

792. X Q. Were you sitting on the sidewalk or railing of the sidewalk?

A. Standing and partly sitting; leaning against it.

783. X Q. Which side of the road was it?

A. Do not swear positive which one.

784. X Q. Was there a sidewalk on both sides of the road?

A. I think there was.

785. X Q. With a railing?

A. I think so.

383 786. X Q. Had there been any passage across that way previous to this for people?

A. I think not. I don't know whether there was a passage before they got through or not. I could not say.

787. X Q. Isn't it a fact that the street had never been used previous to that time?

A. It was a new mode of going across.

788. X Q. Where did the sidewalk go to?

A. They had to build it on the timbers along the support of this dirt that was inside.

789. X Q. What was the object of a sidewalk if people did not go over?

A. To allow people to go across.

790. X Q. Was it a new sidewalk?

A. I think so.

791. X Q. Don't you know?

A. Yes; new pavement and new sidewalk.

792. X Q. That was built at the same time this pavement was put down?

A. I cannot say whether it was built; may probably be built before.

793. X Q. Now it was on that sidewalk that you stood when Mr. Thompson uttered those memorable words?

A. Right there.

794. X Q. Do you remember whether it was in the morning or evening? Do you remember the day of the week? Do you remember the day of the month?

A. I do not.

795. X Q. Do you remember the year?

A. My recollection it was in sixty-four.

796. X Q. Do you remember whether it was summer or winter?

A. I don't know but coming on in the fall; I think it was.

797. X Q. Was it warm or cold?

A. That I cannot tell you exactly; don't remember whether the sun shone on that day or not.

798. X Q. Did you have an overcoat on, or were you in shirt sleeves?

A. I think I did not have an overcoat on.

799. X Q. How was it with Mr. Thompson, did he have an
384 overcoat on, or shirt sleeves?

A. I don't know. Didn't view so close as that.

800. X Q. Are you sure whether it was the spring or fall of the year?

A. My impression was it was in the latter part of summer, or coming on in the fall. I think it was in the fall; I am not certain; could not swe'r positive; ten or eight years. Long time to have a recollection of this kind that you have no interest in.

801. X Q. How does it happen you remember with such detail the exact words Mr. Thompson used on that occasion, if you have not conversed with him since, or anybody else since that time?

A. Novel idea of a man going to have a patent right on a piece of wood and a piece of dirt, to be patented after Mr. Stow has a patent on it, as I understand it. That is a memorable event.

802. Q. How many blocks were taken up on Clark street in the examination yesterday?

A. I saw two.

803. X Q. Both taken up in the same place?

A. Thirty feet apart.

804. X Q. You see the block taken out of the first cavity?

A. The place between the block was taken out with a pick, and gentlemen there 'ith picks they went to work and opened the cavity and got it down as low as they could, then they put a pick in each side of the block and raised it by leverage.

805. X Q. Was the same thing done in the second hole?

A. I think the mode was the same of taking that up; I did not stand looking at it.

806. X Q. How was the measurement made?

A. Mr. McBean had a rule, two foot rule, and after it was cleaned carefull', very carefully——

809. X Q. What cleaned?

A. On the taking up the block there was a little of the gravel that might have laid each side and dropped down, and it was taken up
385 very carefully and showed the dent of the sand.

808. X Q. Cleaned how; with his fingers?

A. Yes, with the end of the fingers, and then it showed visibly to the whole of us, and this gentleman here was there. He saw the thing too.

809. X Q. Mr. Jaicks?

A. This Mr. Stow and Mr. Jaicks and Mr. McBean were there, and Bond was there, and I was there. Five or six persons there, and by measurement I think the first block was half an inch; I think that was the report, that was the examination of the first block.

810. X Q. What do you mean, the impression of the gravel on the block?

A. The block showed its full size in the sand, and when it was all cleaned out it was measured. Down where this gravel was rammed it didn't go to within half an inch of the bottom when the first block was taken up.

811. X Q. I want to know how you obtained the measurement?

A. Mr. McBean measured it with a rule.

812. X Q. How did he measure it? What did he measure it with? You say "measured it;" what did he measure?

A. He measured the gravel that fills the place; wasn't within half an inch of the bottom of the block.

813. X Q. How did he ascertain that?

A. I don't know whether I have language enough to explain to your satisfaction.

814. X Q. You don't know what he measured then?

A. He measured the sand (illustrating). Say that is the block there, say that is the bottom of it, say that is the foundation, to illustrate by by the surface of the table, calling the table the bottom of the block, and the filling did not go down. This stuff we ram down between
386 the blocks, this gravel, did not go within half an inch of the bottom of the block.

815. X Q. Now you have stated that half a dozen times without answering my question. Now I want to know what you measured?

A. I mean what gravel that was rammed down did not go within half an inch.

816. X Q. Measured the gravel?

A. Measured the sand up to the gravel.

817. X Q. Measured the sand up to the gravel?

A. Yes, and the gravel did not go within half an inch of the bottom of the block. I don't know but that is plain enough for the rest of you. Don't you understand it?

818. X Q. Have you united with any contractors in paying the expense of this suit?

A. I understand of a party here that this suit is against the contractors as well as the city.

819. X Q. (Question 818 read to the witness.)

A. I have.

Redirect examination by Mr. BOND:

820. Q. Did you make the diagram Exhibit Mackin 1?
A. I did not.
821. Q. Do you know who made it?
A. I saw Mr. Stow present it here. I don't know who made .

HENRY L. BRISTOL, a witness introduced on behalf of the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

822. Q. What is your name, age, residence, and occupation?
387 A. Henry L. Bristol; age, fifty-five; civil engineer; residence, 1149 Michigan avenue.
823. Q. What business was you engaged in during the years 1863, '4, and '5, or along at that time?
A. I was in the employ of the North Chicago City Railway.
824. Q. Did you lay any tracks for that company across State street bridge and its approaches? If so, when?
A. I laid tracks on the approaches, on the wooden approach and viaduct along the approach in the year sixty-four.
825. Q. While laying the track did you have occasion to take up any pavement at the north approach of State street bridge?
A. Yes, sir.
826. Q. How did you find that pavement constructed? Please answer fully as to the construction.
A. It was constructed of blocks six inches square, cubes, and laid upon the filling, timbers taken and sawn them up into pieces six inches long, which would make them a cube. That is my impression of the form of the block.
827. Q. How were the blocks laid in relation to each other?
A. A space between them.
828. Q. What was in the space?
A. Sand or gravel. It was fine gravel I should think. It would not take very coarse gravel for the spaces. My memory of it was something like three-quarters of an inch.
829. Q. How were those spaces; between all the blocks or between the rows of blocks?
(Objected to as leading.)
A. I think they were between the rows.
388 830. Q. How much of it did you take up in laying the track?
A. Probably about sixteen feet in width.
831. Q. How did you relay it?
A. Our track was about fourteen feet from outside to outside, and had to take up more than that width in order to fit in.
832. Q. How did you relay it?
A. Same as I found it, as near as I could.

Cross-examination by Mr. BECKER:

833. X Q. How did you relay it? Just state the modus operandi.
A. The same as I found it.
834. X Q. Just state how you relaid it, if you remember; if you don't remember, please say so.
A. I remember how I did it, if I can only succeed in stating it. I did not disturb the foundation. I laid my stringers of the roadway

across on the foundation where the blocks were taken up, and when the track was completed brought to guage, and then I repaved in the manner as I found it.

835. X Q. I want to know what manner that was. Just state how you repaved it, giving us the modus operandi.

A. I put the blocks in the same rows corresponding with those I had taken out, and filled in the spaces; and where we came up against the rail I had, of course, to fit the blocks to fit my rail both sides; then when I got them placed as near in the same position that they was with the old work I didn't disturb, I rammed it in with sand.

836. X Q. Is your memory distinct as to that?

A. Yes, sir.

837. X Q. That is not the modus operandi of constructing pavement latterly, is it?

389 A. No; that has made an impression, sir, on my mind; it's the first piece I saw put in in that way; I did not know there was such a piece in the city until I ran acrossed it in this track; I never had seen anything like it, or heard of anything like it.

838. X Q. Did you make use of a tamping iron?

A. No, sir; I did not have them.

839. X Q. Had you ever seen a tamping iron prior to that time?

A. No, sir.

840. X Q. Did you ram the place at all?

A. Yes, sir.

841. X Q. What with?

A. Our shovels.

842. X Q. Did you put in sand or gravel?

A. Well, it was gravel; not coase, but still it would not come under the head of sand.

843. X Q. Do you remember what the foundation was at the time you took up the blocks?

A. My impression, that of gravel; I did not disturb it; had no occasion to; did not dig into it.

844. X Q. Can you swear positively whether it was gravel, sand, or wood?

A. I can swear positively it was not wood.

845. X Q. No wood there?

A. No, sir; not under the portion that I disturbed or took up.

846. X Q. Where did you commence taking up, at Kinzie street?

A. No; it was at the end of the bridge—this piece of pavement—end of the wooden approach.

847. X Q. Did you work towards Kinzie, north?

A. We laid our track from Michigan street up.

848. X Q. I don't know where Michigan street is; can't you answer my question? If you worked north, from the bridge to Kinzie street, or from Kinzie to the bridge, which way?

390 A. Well, in 'sixty-four we commenced laying our track on the bridge, and laid it to the north end of the north approach, which was not a great ways from Michigan.

849. X Q. That was in 'sixty-four?

A. Yes.

850. X Q. What did you do in 'sixty-five?

A. In 'sixty-five we laid the track in Michigan street, and connected with the track we put on the bridge—on the approach to the bridge at the time it was built, the year before.

851. X Q. I am talking about the track on which this pavement extended, from Kinzie street south; did it, or did it not?

A. No, sir.

852. X Q. Did it extend on State street from Kinzie street south?

A. No, sir; it did not come to Kinzie street, my memory is.

853. X Q. Where was *at*?

A. It was between Kinzie and Michigan—this piece of pavement, I should think you might call it—this piece you are questioning about. I should think, in round numbers—say about the middle of the block.

854. X Q. Between Kinzie and Michigan?

A. Yes, sir; between the north line of Kinzie and the south line of Michigan.

855. X Q. How much pavement was there, half a block?

A. No, sir; not but very little of it.

856. X Q. How many feet?

A. Perhaps thirty feet.

857. X Q. Your memory is very good as to the facts you have generally stated here, is it?

A. I think so.

858. As to the length as *as* to the time?

A. Yes, sir.

859. X Q. Have you had any conversation with any one in reference to that pavement lately?

A. I did, this morning.

860. X Q. With whom?

A. Mr. Thompson.

391 861. X Q. Will you state what he said to you?

A. He asked me if I had tore up that pavement and put a track on it. I told him I did. He asked me then how I found it—what I done with it. I stated to him then what I have stated to you in substance.

862. X Q. Did he make any suggestion to you?

A. No, sir.

863. X Q. Was your memory aided in any way by any suggestion from Mr. Thompson?

A. No, sir.

864. X Q. Not at all?

A. No, sir.

865. X Q. Have you conversed with any one in reference to that pavement since that time?

A. No, sir.

866. X Q. And yet your memory, after a spell of eleven years, without any suggestion from any one, from any outside source, seems to be fresh as to recollect the time and modus operandi of laying that pavement?

A. Yes, sir.

867. X Q. Had you ever seen—I think you stated you had never—any of that kind of pavement?

A. I never did.

868. X Q. Did you ever see any afterward laid, prior to the year 1871?

A. No; I never saw any of it laid until they were laying it here by the blocks here, half a mile in a place, a few years ago.

869. X Q. Is it now your impression that the pavement laid in 'sixty-four was the same as has been laid by the city since?

A. I do not think this pavement was laid in 'sixty-four; that I cannot tell. I do not know when it was laid.

870. X Q. When do you think it was laid?

A. That I don't know; all I had to do with it——

871. X Q. Never mind that; do you think the pavement that we refer to between Kinzie and Michigan street was the same pavement as the pavement which has been, which is now being laid, and has been
392 laid for some time?

A. I should think it was the same, with the exception of the shape of the block.

872. X Q. Did you see that pavement constructed?

A. No, sir.

JAMES G. MCBEAN, being recalled, testified as follows:

Examined by Mr. BOND:

873. Q. You have already been sworn and testified in this case?

A. Yes, sir.

874. Q. Do you know anything about the pavement laid at the north end of the La Salle street tunnel; if so, what do you know about it?

A. The intersection of Michigan and North La Salle I laid. That was what I had reference to is all outside of the tunnel, right there where the walls of the tunnel start. Inside, in the tunnel, was a different kind of pavement. But this outside of the tunnel, the whole intersection, I took up, the whole pavement there, and graded it up, and laid the sand foundation pavement. It was three by eight inch blocks on the sand. I prepared my sand foundation as we do now, and set my blocks on the sand in courses, leaving spaces of seven-eighths of an inch apart, and filled the interstices with gravel—fine gravel. I done that work in November, 1870. On the fifteenth day of November I was working there; paving there. I cannot say positively whether I finished the work on the fifteenth or not, but I think I did; that is my impression.

875. Q. What, if anything, did you do to compact the filling in the places between the rows?

393 A. I rammed it with what we called a churn drill rammer; same as one of these churn drills, when the end is made large, to pack the gravel in.

876. Q. Was it like the figure in Exhibit Watson 1 now shown you?

A. Something similar to that; yes. Mine was better shaped than that.

877. Q. How did it occur that such a pavement was laid at that intersection?

A. If I rightly remember, the contract was to take up the old pavement and relay it. The old pavement was on a board foundation; and after working there some time I was requested by Mr. Thompson to stop work, as they wanted to change the mode of the pavement; and I then got orders to go on and lay this sand foundation pavement and throw the old blocks away entirely, as they did not consider them fit to put down again. The work was done at J. K. Thompson's request.

878. Q. Was you present yesterday at the taking up of any portions of the pavement of Clark street and Fifth avenue? If so, state what was taken up, the purpose for which they were taken up, and generally what you found in reference to the relative depth in the foundation of the blocks in the filling.

A. I was present yesterday afternoon with a number of parties taking up some pavement. We took up two places on Clark street between Adams and Jackson, and two places on Fifth avenue between Washington and Madison. Where we took up was about eight feet from the

gutter, or from the curb wall. The places were about thirty feet apart; on either street the same. I understood the object in taking up these blocks was to ascertain if the gravel that was drove in the interstices between the blocks went beneath the bottom of the block and formed a wedge. I found instead of the gravel going beneath the bottom
394 of the block, that the sand around the block was higher than the bottom of the block by from a quarter to half an inch. Some places it was a quarter of an inch, and some places it was a half an inch. In no case did I find the gravel beneath the bottom of the block. I did not see any place where the gravel was as low as the bottom of the block.

879. Q. Have you made any experiments to determine whether the filling between the rows can be forced below the bottom of the blocks by ramming? If so, state what they were and what result you had.

A. I never made any experiments on that. I have tried places two years ago to ram my pavement thoroughly, as good as it could be rammed, and then took up the pavement to see if the gravel was below the bottom of the block, and I never found it yet. I do not think as a practical man it is possible to drive it down if you ram your sand foundation and settle it properly.

Cross-examination by Mr. BECKER:

880. X Q. Mr. McBean, you are interested in this suit?

A. No, sir; I am not; not in the way you ask me the question.

881. X Q. Hain't you directly or indirectly interested?

A. Not in this suit; no, sir.

882. X Q. Are not you one of a number of contractors that joined together to pay the expenses of this suit?

A. No, sir; as specially myself, I am one of a number—— I answer that question no.

883. X Q. What were you going to say?

A. Well, I say I am not interested in this suit. I am not one of a number of parties who have joined together to defray the expenses of this suit.

884. X Q. You were adding something else, "I am one of a
395 number," and stopped there. What were you going to say?

A. I don't know.

885. X Q. Have you agreed, directly or indirectly, in any way to meet any of the expenses of this suit?

A. I don't know just how you term that. We certainly do not pay any court expenses, and we certainly do not pay any of this royalty if Stow beats the city.

886. X Q. What do you pay?

A. What do we pay? We pay Mr. Bond for his services.

887. X Q. Anything else?

A. Nothing else, sir.

888. X Q. You assist in that, do you?

A. I do. I am a heavy stockholder, and good stock too; better than gold.

ANDREW JAICKS, a witness introduced by the defendant, being first duly sworn, testified as follows:

Examined by Mr. BOND:

889. Q. What is your name, age, residence, and occupation?

A. Andrew Jaicks; age, twenty-seven; occupation, collector and so-

licitor for James McBean; residence, 138 West Indiana street, in Chicago.

890. Q. Was you present yesterday at the taking up of any portion of the pavement on Clark street and Fifth avenue?

A. Yes, sir.

891. Q. Please state what was done, what the taking up of parts of the pavement was for, and in what relation you found the blocks and the filling between the blocks in reference to the foundation upon which the pavement was laid.

A. I was present at the taking up of one block; that is, one square block on Clark street, opposite the custom-house, and found gravel
396 between the blocks, with a sand foundation, and the sand projecting upwards from the bottom of the blocks on the sides. Measured with a rule by Mr. McBean, and I think on Clark street it was a quarter of an inch, sand projecting upwards; and on Fifth avenue, between Madison and Washington, the blocks were taken up in the same way with two pick-axes, and the foundation was found to be sand with gravel between the blocks, with sand projecting up between the blocks upwards, half an inch.

Cross-examination by Mr. BECKER:

892. X Q. You say you took up one block in each place?

A. Two blocks in Fifth avenue.

893. X Q. Only one at each place?

A. Just one square block, probably eight or nine inches in length and four inches in width.

894. X Q. You refer to the paving blocks in each case?

A. To the blocks.

895. X Q. Wooden blocks?

A. Wooden blocks.

896. X Q. The experiment on Fifth avenue was done in the same way as on Clark street?

A. Yes, sir; the same way.

897. X Q. Done specifically as described by Mr. Mackin?

A. Yes, sir.

397 In the circuit court of the United States for the northern district of Illinois.

HERNY M. STOW
against
THE CITY OF CHICAGO.

Deposition of A. H. Burley, taken on behalf of the defendant, in pursuance of the annexed notice, before Charles L. Driesslein, a United States commissioner for said district, at the office of Messrs. West & Bond, in the city of Chicago, on April 5, 1877.

Present: Mr. Becker, of the firm of Becker & Dale, of counsel for complainant; also, the complainant, and Mr. L. L. Bond, of the firm of West & Bond, counsel for defendant.

Said witness, A. H. BURLEY, being first duly sworn, testified as follows:

Examined by Mr. BOND:

Q. What is your name, age, residence, and occupation?

A. A. H. Burley; age, fifty-eight; residence, Chicago; occupation, I am at present receiver of the Cook County National Bank.

Q. Were you at any time connected with the board of public works of this city; and, if so, when did you become a member of such board?

A. I was a member of the board of public works of Chicago, appointed by John B. Rice, in the spring of 1867, and continued a member of it until the first of January, 1870.

Q. During the time you was connected with said board, or at any time previous thereto, did you know or have occasion to ex-
398 amine the construction of the approaches to the State-street bridge on the north side?

A. I did.

Q. Please state how that approach was constructed between Kinzie street and the viaduct.

A. As I remember, a large proportion of that approach was planked, and a portion—how much I cannot say—was paved with wooden pavement.

Q. How was the pavement of such portion as was paved constructed?

A. The portion that was paved was paved with blocks resting upon a sand foundation without any boards beneath.

Q. How were the blocks as to size?

A. That I cannot definitely remember of my own knowledge. They may have been, so far as my own remembrance is concerned—may have been four-inch blocks by six. I am not certain about it. I do not remember of ever having measured them.

Q. How did they compare in that respect; larger or uniform with the ordinary paving block?

A. Well, to an ordinary observer they would perceive no material difference between it and the ordinary Nicholson pavement.

Q. Please look at the sketch now shown you, and marked Exhibit C. F. Smith 2, and say whether or not that is a correct, or substantially correct, representation of the surface appearance of the pavement.

A. It is, as I remember it.

Q. During the time that you was a member of the board, were there any discussions in reference to this pavement and the manner of laying it? Is so, please state by whom the discussions were had, to the points they referred to, and the time or times, as near as you recollect, when they occurred.

399 (Objected to as not in rebuttal of new testimony taken pursuant to the last order in this case, and as being outside of the scope of the order.)

A. I cannot state the time or times, but the question of different kinds of pavement was frequently discussed by members of the board, and by myself with the board, and without the board with Mr. Thompson, the then superintendent, Mr. Thompson insisting that laying the block pavement, which we were then laying under the Nicholson plan, would be just as good laid without the foundation of boards as with it. I always took the position that upon our uncertain ground and newly-filled streets that it would not stand, but admitted that with a solid gravel bottom or an old foundation it might stand. Mr. Thompson, in such conversations and discussions, referred frequently to the fact that he had laid this piece of pavement before referred to in that manner, and that it was standing perfectly.

Q. In reference to the time or times, were any of these conversations or discussions had during the early part of your connection with the board, or about the time of your leaving it?

A. They were had mainly in the early part of my connection with the board. I can only fix that fact from this, that we were then having a contest with regard to the royalty claimed on the Nicholson pavement which the city was then fighting.

Cross-examination by Mr. BECKER:

C. Q. Did you see the pavement in question laid?

A. I may have done so, but I do not remember having seen it laid, sir.

C. Q. Did you see any of it taken up?

400 A. I think it probable, but I cannot swear that I did.

C. Q. How do you then know it was directly on a sand foundation?

A. Principally by the report of the officers of the board.

C. Q. When did you last see that pavement?

A. That I cannot tell, sir. I really do not remember with regard to that.

C. Q. When did you first see it?

A. Well, as I moved onto the north side of the river; that was my most direct route to the office. I moved there in the spring of 1867 again. I must have seen it very soon after the spring of 1867; may have been before. I noticed it so some months.

C. Q. Where was your office at that time?

A. Office was on Wells street—board of public works office.

C. Q. Was there no bridge over Wells street at that time?

A. Yes, sir.

C. Q. You only went by State street?

A. I used to frequently go by State street; sometimes by Clark; sometimes Rush. I lived on the corner of Cass and Huron, which was east of State street.

C. Q. When did you first discover there was any difference between the pavement of a portion of that bridge and the balance?

A. I must have discovered it very soon, because there is such a marked difference between the planks and the pavement. I cannot say when I first discovered it.

C. Q. Do you remember now distinctly that you noticed any marked difference?

A. I do, distinctly.

C. Q. Can you remember when your attention was first called to the fact that there was any difference in the pavements on that approach?

A. I cannot remember exactly what time.

401 C. Q. You think your attention was called to it the first time you passed over that approach?

A. I do not know that it was; most likely not.

C. Q. You think you passed over the approach several months before you noticed any difference in the pavement?

A. Hardly think I could have done so; but I cannot say.

C. Q. Was your attention called to the fact by some third party, some outside party, prior to your observation?

A. I think my attention was called to the fact, the method of its being laid, by Mr. Thompson, the superintendent.

C. Q. That was the first that you noticed any difference between the two pavements?

A. I would notice a difference between the two pavements and not know what was under.

C. Q. The question is not what you could have done, or possibly did do, as a mere guess; but what, as a matter of fact, did you notice?

A. As a matter of fact, I could not have noticed without seeing that there was a difference between the plank and the pavement.

C. Q. That is a hypothesis, not a fact.

A. I state it as a fact. I could not have done so.

C. Q. Which end of the approach—north or south end—was the block pavement on?

A. The block pavement was next south of Kinzie street, which would be the north end of the approach.

C. Q. How far did it extend?

A. I cannot give you the dimensions, for I do not remember.

C. Q. You have conversed with Mr. H. M. Stow with reference to the practicability of laying pavement on a sand foundation, have you not?

A. Not that I remember, sir.

402 C. Q. Are you distinct in your remembrance now that the conversation with reference to the foundation of the pavement to which you have referred was made with Mr. Thompson or with Mr. Stow?

A. The conversations which I have testified to were with Mr. Thompson.

C. Q. You are quite sure of that?

A. I am quite sure of such conversations with Mr. Thompson.

C. Q. Well, before those did you ever have a conversation with Mr. Thompson concerning the Stow foundation pavement?

A. I do not remember of any, sir, but very likely I did. I cannot recall any.

C. Q. Have you had any conversations lately?

A. No, sir. I have not had any conversations with Mr. Thompson on the subject that I am aware of, not in two or three, if I have in five years.

Signature waived.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Chas. L. Driesslein, a United States commissioner in and for said district, do hereby certify that A. H. Burley, the witness mentioned in the foregoing deposition, appeared before me in the office of Messrs. Bond & West, in the city of Chicago, on April 5, 1877, to give his testimony in the case of Henry M. Stow against The City of Chicago, now pending in the circuit court of said district; that previous to the examination of said A. H. Burley as a witness in said cause, he was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in relation to the matters in controversy in said cause; that said de-

403 position was taken upon oral interrogatories; that I reduced to writing the interrogatories propounded to the said witness, and his answers thereto in the order in which the same were proposed and answered; and that counsel for the respective parties to said suit waived the signing of the said foregoing deposition by said A. H. Burley.

In testimony whereof I have hereunto subscribed my hand this sixth day of April, A. D. 1877, in the city of Chicago.

CHAS. L. DRIESSLEIN,
U. S. Commissioner Northern District of Illinois.

404 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Henry M. Stow is the complainant and The City of Chicago is the defendant, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 8th day of October, A. D. 1877, and of our Independence the 102nd year.

[SEAL.] WILLIAM H. BRADLEY,
Clerk.

405 U. S. circuit court N. D. Illinois.

HENRY M. STOW
v.
THE CITY OF CHICAGO. } In equity.

BLODGETT, J.:

This is a bill in equity charging the defendant with an infringement of four patents, issued by the United States, and praying an account for damages, and an injunction.

The patents described in the bill are:

First. A patent dated December 10th, 1867, and number 72110, issued to the complainant, and reissued January 10th, 1869, reissue number 3274, for an improved pavement.

Second. Patent dated February 25th, 1868, number 74862, issued to the complainant for an improved street pavement.

Third. Patent dated April 6th, 1869, number 88765, issued to D. L. De Golyer, for an improvement in laying down block pavements, and of which complainant claims to be assignee.

Fourth. Patent dated December 31st, 1872, number 134404, issued to the complainant, for an improvement in wood pavements. The defendant denies any infringement, and also denies the novelty of the alleged improvements claimed in the patents.

The patent issued December 10th, 1867, and reissued January 19th, 1869, is for a pavement composed of alternate tiers of square-ended and wedge-shaped blocks, the latter, that is the wedges, being driven down into the foundation bed of sand or earth; also a pavement composed of blocks, with the lower ends all wedge-shaped, and all driven or rammed down into a foundation of sand or earth.

From the proofs in this case it appears that the complainant has been paid for all the pavement in which this device has been used, except a block on Market street, between Randolph and Lake and the intersection of Lake and State streets, which were laid as samples under the direction of the complainant and his brother, W. H. Stow. There were some of these pavements put down on Clark street, but Mr. McBean testifies that he did this under a license from the complainant, and the defendant was not to be liable therefor. He states that he has not yet paid Stow, but that does not make the city liable. It, therefore, hardly seems necessary to consider this patent, but if deemed material to do so, I would be of the opinion that this patent was anticipated, in part, by an

English patent issued to Stead in 1839. In 1839, David Stead received a patent in England, which is a matter of public record in that country, and also in this country, by patent, for a wooden pavement made of octagonal blocks set together, and as the blocks go together they leave a square opening through which he drove a pile or wedge down into the earth or gravel, for the purpose, as he says, of laying his pavement firmly upon the earth in newly made embankments. The reason which the patentee gives for the operation or use of his device is not conclusive. A man may, in other words, invent an improvement producing results beyond what he knows or dreams of, and a better reason may be given by a skilled person than the one assigned for the use of the device which is used or adopted. So, in this case, these wedges could be driven just the same under the Stead patent and the Stead device as they could be under the Stow device, although Stead does not allude to the driving of the wedge for the purpose of compacting the earth, yet it produces that result. His failure to state that as one of the reasons or results does not necessarily change the fact that there is no longer anything novel in the Stow device, from the fact that Stead anticipated him by a great many years.

The second patent is for a pavement composed of tiers or rows of wedge shaped wood blocks driven into a foundation of sand or earth, as there shown. It is claimed that by such means the earth would be compacted. The spaces between the rows are then filled in with gravel.

It is sufficient in regard to this patent to say that there is no proof that the city has ever used it; but if it had been used, it may well be doubted whether the patent can be sustained, as his wedged blocks do not, it seems to me, differ in principle from the old cobble-stone pavement, made of cobble stones with their sharp or pointed ends, or smaller ends, set downwards, and the whole rammed or driven into the sand or gravel on which it was laid. We all know, of our own knowledge, that is, every person who has seen a cobble-stone pavement knows that the process of making it was to set the cobble stones with their small end downward upon the ballast or gravel, to fill the spaces between them with sand or gravel and then ram the whole structure down solid. Now here is simply this difference: A man, instead of using the sharp ends of the cobble stones, sharpens wooden blocks, and sets them together, and drives them down so as to make a solid foundation; it being conceded that the cobble-stone pavements are so laid, and that the substitution of a new material is not patentable. This patent is also obviously anticipated in the second form of the original patent of Dec. 10th, 1867. Mr. Stow states that he claims a wooden pavement composed of blocks with the lower ends wedge-formed, and all driven down into a foundation bed of sand or earth. Now, here in 1867, the year before this patent, in his first patent, where he claims the alternate wedge-shape and square-ended blocks, he also describes and claims a series of wedge-shaped blocks, all driven down into the sand or gravel; so it seems to me that he has here, by the second patent, attempted to prolong the life of his first patent, or first device, by taking a patent afterwards upon the wedge-shaped blocks, shown and claimed with the wedge-shape and alternate square-ended blocks.

The De Golyer patent (the 3d) is one for a method of spacing distances between the blocks, by the use of a removable strip or board of the thickness of the required spaces. That is to say, the blocks were set up against each other, and a board set between them while they were being set, and after they were set the board was removed so as to leave a space the required distance between the rows or tiers of blocks.

This is fairly anticipated, in my estimation, by the patent of McDougal, where he had a spacing apparatus like this that set between the blocks, and was removable. But in point of fact, as the evidence shows in this case, the skillful workmen who lay these wooden pavements no longer depend upon the spacing apparatus at all, but use their fingers and their eyes; and they become so expert that they can readily make the spaces of a uniform width by the application of their fingers as they lay their blocks, as well as by a spacing board, or any other device of that kind. And the case is fairly illustrated by the improvement in telegraphing. Formerly, we all know, the process of telegraphing by the Morse telegraph was by a reel upon which a paper was wound, and the action of the machine made a dot, or dots and lines. It was necessary to write out the words by this operation. But in course of time the operators became so skillful that the ear took the place of the paper and reels, and now no person is considered skillful enough to act as a telegraph operator unless the ear is sufficiently trained to enable him to dispense with the reel and paper. So here in the actual operation of the laying these wooden pavements, the eyes and the fingers of the workmen dispense with the spacing apparatus. There is also no evidence in the record, that I can find, and I have looked carefully through it, of any use by the city of this special device. I find no proof that the city has ever adopted this removable spacing board as a matter of practice. But even if they had, such a mere mechanical device, such as is used by joiners in fitting floors together, or in fitting lattice work, or pickets on a picket fence, or any other place where uniform spacing is required, would seem to anticipate this device. In setting an ordinary picket fence, the joiner who sets the picket uses another picket or spacing board for the purpose of securing uniformity in the spacings.

This brings us to the consideration of the last patent issued to the complainant in December, 1872, and it is mainly upon this patent that the controversy in this case turns. The device covered by this patent is described by the patentee as follows: "The nature of my invention consists in putting down a pavement of wood, or other suitable material, upon a foundation bed of sand or loose earth, and packing the sand or earth by means of wedge blocks driven down into the same, and forming a part or the whole of the pavement." He also says, in reference to these wedge blocks, "It will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square-ended blocks will act as wedges." Also that the blocks No. 2 may be of dressed stone, brick or wood, or of any suitable material that will bear driving down into the foundation bed.

His last specification is as follows: "In constructing my pavement I first grade the street, and cover it to a depth of not less than three inches with sand or loam, which I wet and pack with a maul or rammer until the whole is of sufficient compactness. I then strike the surface to a proper grade, and lay the blocks, A, in rows transversely across the street, placing between the rows a removable strip of wood, B, of sufficient thickness to form the necessary space between the blocks, as shown. After a sufficient number of rows have been laid in this manner, I remove the strips and partially fill the spaces with sand or gravel. I then drive the gravel or sand in said spaces into the sand foundation below by means of a swage maul or other suitable instrument, until the foundation under the blocks is sufficiently compressed. I then fill the spaces with gravel or sand, and cover with coal tar or other cement, or with gravel or sand alone, and go over the whole with a smooth iron instrument to finish the surface. What I claim is a pavement composed

of blocks laid in rows directly upon a sand foundation, with spaces between the rows filled with sand or gravel, which is swaged or driven into the said foundation substantially as and for the purpose specified."

We have a sample, or model rather, of the pavement as the complainant claims to make it; that is, square-ended blocks set upon sand, the spaces between them filled with gravel, and that packed or swaged down until it comes somewhat below the ends of the blocks. It will be noticed that while the patentee in his patent title names wooden blocks as the main material used in his pavement, yet he has described and claimed broadly a pavement composed of blocks laid in rows directly upon a sand foundation, with spaces between the rows filled with sand or gravel swaged or driven down into the sand. He names wooden blocks in his title, yet he does not, in his specification or claim, limit himself to the use of wooden blocks, but can use any kind of blocks. And it may well be suggested, I think, in view of the state of the art, whether this claim is not too broad, because the use of other material as well as wood is so old in the art that it is at least questionable in my mind whether there is any novelty in making a pavement of blocks of any material set in sand or gravel foundation, with the spaces filled with gravel or sand. That, however, is a point not made in the trial, and I do not attach much importance to it. The question is, was this device new at the time this patent was applied for? It seems to contain the following, as some of its elements: The street or roadway is to be brought to a suitable grade and shape, and covered to a depth of not less than three inches with sand or loam; second, the whole is then rammed until it is of sufficient compactness; third, upon the grade so formed the blocks are laid in rows transversely or across the street, leaving sufficient spaces between the rows; fourth, these spaces are partially filled with sand or gravel, which is swaged or rammed until the foundation is sufficiently compact; fifth, the spaces are then wholly filled up with sand or gravel, or with sand and gravel and coal tar, so as to make the surface even with the top of the blocks.

There is nothing in the patent which makes it necessary for the constructor to use wooden blocks. He might, for aught that appears, use stone, concrete, or any other kind of blocks. And it is a matter of general knowledge that pavements have, for many years before this patent was asked for, been laid with stone blocks, set upon a road bed prepared with sand or gravel, and I must insist that I can see nothing patentable in the idea of substituting wooden blocks for stone, which had heretofore been used. But even if he confined himself to the use of wood, the proof shows that Stead, in 1839, proposed to make a pavement of wooden blocks set on sand or earth foundation. In 1854, Nicolson took out his patent for a wood pavement, which he constructed by bringing the road bed to the proper grade, upon which he laid a covering of boards; on these boards he set rows of wooden blocks; against each row he set a shorter row of thinner blocks, or a strip of boards about half the height of the first row, and so he continued to set alternate rows of long and short blocks, or rows of blocks with an intervening strip of board between; and in the spaces between the rows of longer blocks he applied gravel and coal tar, or other cementing matter, which was rammed or swaged so as to make the whole firm and solid. The pavement in question is the Nicolson device, or combination, with the board floor left out, and the spaces between the rows of main blocks filled with gravel, instead of partly filling the spaces with a strip of board or short blocks.

This Nicholson patent was before his honor Justice Field, of the Su-

preme Court, in 1868. He there referred to the state of the art at the time of the granting of the Nicolson patent in these words: "This pavement," that is the Nicolson pavement, "is not the entire invention of Nicolson. Wooden pavements were invented and in use in different parts of the world many years before his attention was directed to the subject. He makes no claim of novelty in the use of blocks, or of the gravel and tar between or over them, nor of any of the separate parts that go to make up the structure. What he claims as his invention is the combination of the foundation of the pavement with the blocks or the long blocks, and strips of board, these being bounded so as to form cells or channels, with wooden bottoms, for the reception of brick, stone, or gravel and tar, as already described."

Now, here is the judicial finding of his honor Justice Field on the state of the art at that time. Nicolson entered the field as an inventor in 1854, so that wooden blocks with the spaces or channels between them, filled with gravel and tar, was then old, and had been used and adopted long before Nicolson's patent in 1854, and he only sustained Nicolson's patent upon the ground that it was a combination of the road bed, ballasted and packed, with boards on top, the blocks set on the boards, and then the pavement filled in with coal tar and gravel, as described in the Nicolson patent. That is, he sustained it as a combination, and such a combination as no person before Nicolson had ever made.

406 In view of the state of the art, the question arises in reference to this patent that is now before us, can any person, after Nicolson has gone over the field and made and described his invention, dismember Nicolson's combination and get patents for a part of it? That is to say, can a party make an invention by omitting from a combination an element which performed a distinct office therein and leaving the remaining ones to perform the same offices or functions without the omitted element that they did with it? Nicolson's improvements were found to consist of an improved foundation consisting of a board covering, laid on the old sand or earth foundation, and in his best form of a superstructure of alternate rows of vertical blocks, and compacted filling, laid transversely or across the roadway. Is it invention to take the boards from under Nicolson's superstructure and remit it back to the common foundation? Is it not rather a mere matter of judgment with the constructor, whether he will use the improved or the common foundation? It seemes to me that it cannot be that he has made an invention when he decides to leave out the improved foundation. Suppose a man to have invented a harness with a breeching, can it be invention for another man to take the breeching off and leave the remaining parts to perform the identical functions that they performed before? A reconstruction of a machine so that a less number of parts will perform all of the functions of the greater may be invention of a high order, but the omission of a part, with a corresponding omission in function, so that the retained parts do just what they did before in the combination, cannot be other than a mere matter of judgment, depending upon whether it is desirable to have the machine do all or less than it did before.

Does this inventor do anything more than others have done before, or that any lazy operative that Nicolson might set to construct his pavement might do—that is, leave the boards out, and set the blocks directly on the ground, and run the spaces full of gravel? It seems to me that it does not rise to the dignity of an invention. Leaving out a member of this Nicolson combination cannot be the proper subject-matter of a patent.

Stead, in 1839, laid his wooden blocks upon a road bed of gravel or earth, and provided that in certain cases the spaces between the blocks should be filled or partly filled up. In 1864, Chappell procured a patent in which the condition of the art is thus described by him: "Wooden pavements have been constructed on the continent of Europe and in the United States by laying wood blocks endwise of the grain, in parallel rows, with openings or channels between, into which gravel or gas tar were placed." Now this is a description found upon the public records of the Patent Office years before this patent was used or applied for, in which the state of the art was described at that time (in 1864), by saying that pavements were well known on the continent of Europe, and in the United States, made of wooden blocks set endwise on the earth, and in parallel rows, with openings or channels between them, into which gravel and coal tar were placed. Again, the only thing that can be claimed as different in the Stow combination from what is described here by Chappell is that he claims to ram his filling harder down into the sub grade, so as to compact the earth underneath. Now is it a subject-matter for a patent to strike a blow of ten pounds instead of a blow of four pounds weight; a blow which shall drive this filling down into the ballast underneath, instead of leaving it at the top? Is it the subject-matter of a patent to drive a nail home into the wood, so that it is below the surface, or to leave it sticking up or even? Much stress is laid by the complainant in the testimony upon the preparation of the road bed, by ramming or packing until the whole is of a sufficient compactness, before the blocks are set thereon. But Cowing, whose invention dates back to November, 1865, makes express provision for preparing the road bed by grading to the proper form and ramming the same solid, so that the idea of ramming the road bed solid, making it compact before setting the blocks upon it, is an old idea, described by Cowing in 1865.

The setting the blocks and then filling and ramming the crevices with earth or gravel was a provision also made by Cowing. The only difference is that the Cowing blocks were not set in line so that channels extended across the street in continuous lines. Cowing does not expressly direct us to ram or swage the gravel down into the sand or gravel ballast underneath, but he provides for ramming the filling, which would, of necessity, drive it down to some degree into the ballast, and the degree of ramming can hardly be made the subject-matter of a patent. We must assume that Cowing intended to have his filling sufficiently rammed to make a firm and solid pavement, and that is all Mr. Stow proposes. How much swaging or ramming would be needed to make the filling penetrate the foundation must depend entirely upon the degree of compactness to which the road bed was brought before the blocks were set. That is to say, if he pounds or rams, or in any other way or method compacts the road bed underneath, or if the road bed upon which the blocks are set is solid enough so that it needs no compacting, then he need not, in order to make a solid pavement, ram his filling below the blocks at all. At all events, the only difference between Stow and Cowing, in the matter of swaging or ramming, is one of degree. So, also, the patent of Van Camp and Hodgman provides for ramming the filling between the blocks until the same is thoroughly compacted. Now, where is the difference, except in degree, when in the Van Camp and Hodgman patent they provide for ramming the filling between the blocks until the whole is thoroughly compacted? Mr. Stow certainly would not do any more than that. All he wants to do is to ram the filling until he makes a solid roadway, and Van Camp and Hodgman pro-

pose to do that. I might go through in detail with all the various patents, antedating the complainant's patent, which are in evidence by the defendant, but for want of time I must content myself with the remark that several patents besides these I have specially described seem to have anticipated the complainant both in the idea of setting the blocks directly upon an earth or sand foundation, and also of filling the spaces between the blocks with gravel or sand, packing or ramming them firmly in such spaces. Aside from these patents we have the Nicolson patent of 1854, which only sustained because it was a new combination of useful elements; but after Nicolson instructed the public how to make a pavement of his construction, it does not seem that another man could have a patent for using a part of the same as he used it. It seems to be obvious that the degree of packing to which the filling between the Stow blocks is to be subjected depends largely upon the foundation upon which the blocks are set. The sand or loam dressing, which he provides for, is to be first compacted as hard as possible before the blocks are set, and if sufficiently compact to sustain the blocks, then no ramming down below the ends of the blocks is necessary or possible, and the invention would therefore practically be inoperative.

Among the defendant's exhibits is the Prescott patent of the issue June 20th, 1871, which is almost identical with complainant's patent issued in December, 1872, eighteen months afterwards. It is almost identical in description with the Stow specification. Prescott says his pavement is composed of a series of blocks having their intermediate spaces filled with concrete, the concrete being caused to extend down below the lower line of the blocks into the road bed, for the purpose of forming the gravel spacing as described. He specifies that the concrete is placed or driven down into the interstices between the blocks, and extends three or four inches below the surface of the road bed or street bed, so as to effectually prevent water from going under the blocks, and also prevent water from accumulating and running under the pavement. Then he describes the mode of laying it, as precisely the Stow method, by setting blocks endwise. But I find in the proofs a more insuperable answer to this patent than any which I have named. It is abundantly substantiated by the evidence that this precise form of wooden pavement was used in this city as early as 1864. Mr. J. K. Thompson, and other witnesses, whose testimony is in the record, have all testified that in 1864 the city of Chicago laid a pavement at the end of the viaduct on N. State street, where it forms a junction with Kinzie street, in which the precise combination of blocks filled in the spaces between with gravel, and the whole rammed, was used. This was in 1864, and the patent in question was not issued until 1872. In 1871 or 1870, the witness seems to be a little in doubt, when the La Salle street tunnel was built, a portion of the road bed in that tunnel was laid with the same kind of pavement that was used at the junction of Kinzie and State streets, by a combination of blocks and gravel filling, without the boards, as now claimed by Stow. Now here is the proof of the state of the art by other inventors; here is the proof of the use of precisely this Stow invention in the city of Chicago as early as 1864, nearly eight years prior to this patent, and it seems to me there is no ground of novelty for this patent to stand on. The patentee must be considered as anticipated in every feature of his patent by those who had, in fact, taken out patents, or those who had used a pavement similar in character before he entered the field.

In this view the bill will be dismissed for want of equity.

407 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete copy of the opinion of Hon. Henry W. Blodgett rendered in the cause wherein Henry M. Stow is the complainant and the city of Chicago is the defendant, as the same was exhibited to, and pronounced by, said judge to be correct.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this ninth day of October, A. D. 1877, and of our Independence the one hundred and second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 329. Henry W. Stow, appellant, vs. The City of Chicago. N. Illinois C. C. U. S. Filed 23rd October, 1877.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70.

HENRY M. STOW, *Appellant*,

vs.

THE CITY OF CHICAGO, *Appellee*,

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR APPELLANT.

L. HILL and F. W. BECKER,
Of Counsel.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET
1880.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 70.

HENRY M. STOW, *Appellant*,

vs.

THE CITY OF CHICAGO, *Appellee*,

Appeal from the Circuit Court of the United States, for the Northern Dis.rict of Illinois.

STATEMENT.

This is a suit in equity, in which the appellee is charged with the infringement of four patents, for improvements in Street Pavements, and the prayer of the bill is for an account, damages, and an injunction.

The patents sued upon are,

First, a patent dated December 10th, 1867, No. 72,110, granted to Henry M. Stow, and reissued January 19th, 1869, No. 3274.

Second, a patent granted February 25th, 1868, No. 74,862, and issued to Henry M. Stow.

Third, a patent granted April 6th, 1869, No. 88,765, issued to D. L. De Golyer, and assigned to Henry M. Stow.

Fourth, a patent dated December 31st, 1872, No. 134,404, issued to Henry M. Stow.

The defendant denies infringement; denies the novelty

of the alleged pavements claimed in said patents, and alleges payments and licenses.

The court below held, that the appellant has been paid for all the pavements laid under the first mentioned patent, except a block on Market street, between Randolph and Lake streets, and the intersection of Lake and State streets; that the pavements so laid on Market street, and at the intersection of Lake and State streets, were laid as samples, and the city was not liable for them; and that the pavement put down on Clark street under this patent was laid under a license from the appellant, and the appellee was not liable therefor; and further, that this patent was *in part* anticipated by an English patent to Stead in 1839, meaning, probably, that the third claim was anticipated by Stead's said English patent.

Second, that the patent dated Feby. 25th, 1868, No. 74,862, was anticipated by the old cobble stone pavement, in use from time immemorial, and also was anticipated by the former pavement claimed in a second claim of the appellant's patent of December 10th, 1867, reissue No. 3274.

Thirdly, that the De Golyer patent was anticipated by the prior patent of Mac Dougal, March 24th, 1868.

Fourthly, that the patent of December 31st, 1872, No. 134,404, involved a mere change in the Nicholson pavement, without invention, and was anticipated by Stead, Chappell, Cowing, Van Camp and Hodgeman and others and more fully by Prescott's patent of June 20th, 1871, and by pavements assumed to have been laid in the City of Chicago in the year 1864, and in the years 1870 or 1871. The bill was therefore dismissed for want of equity.

The opinion of the Court was delivered by Judge BLODGETT, and is printed in the transcript of the record, pages 241 to 248.

H. M Stow Feb 25 1868

Fig 1

No 74862

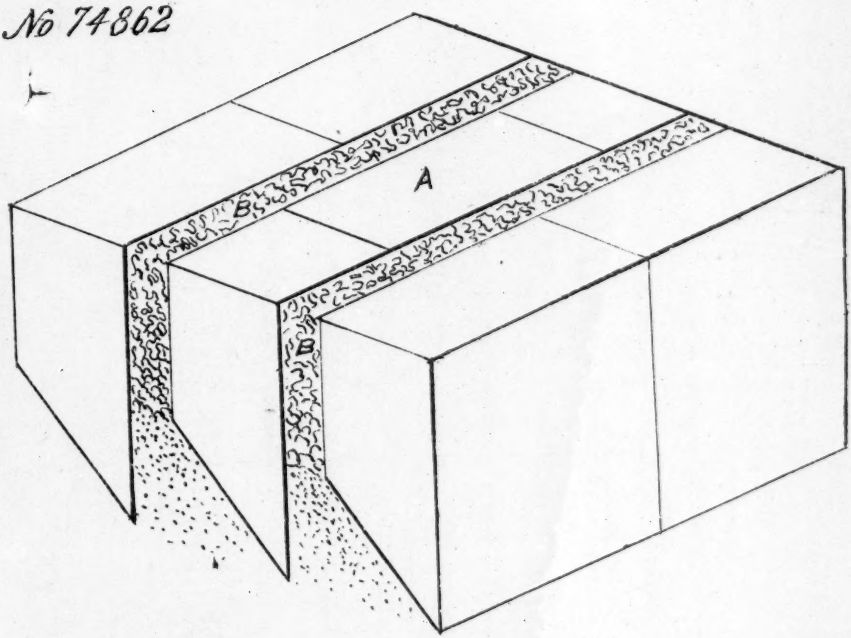
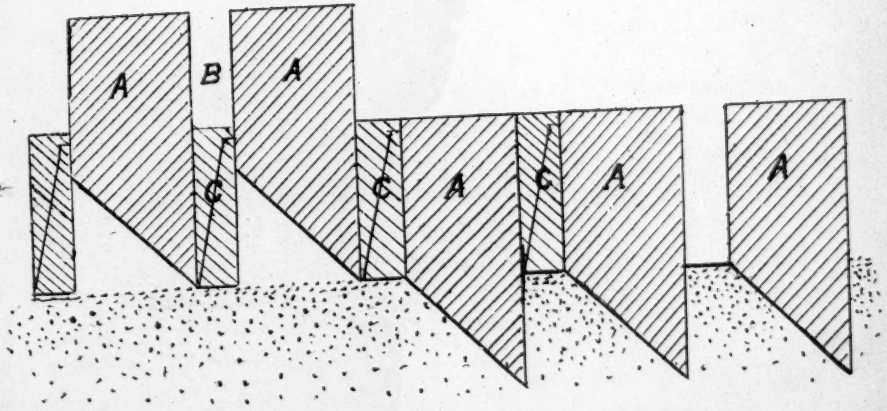


Fig 2



D. L. De Golyer. APR. 6, 1869.

No. 88765

Fig. 1

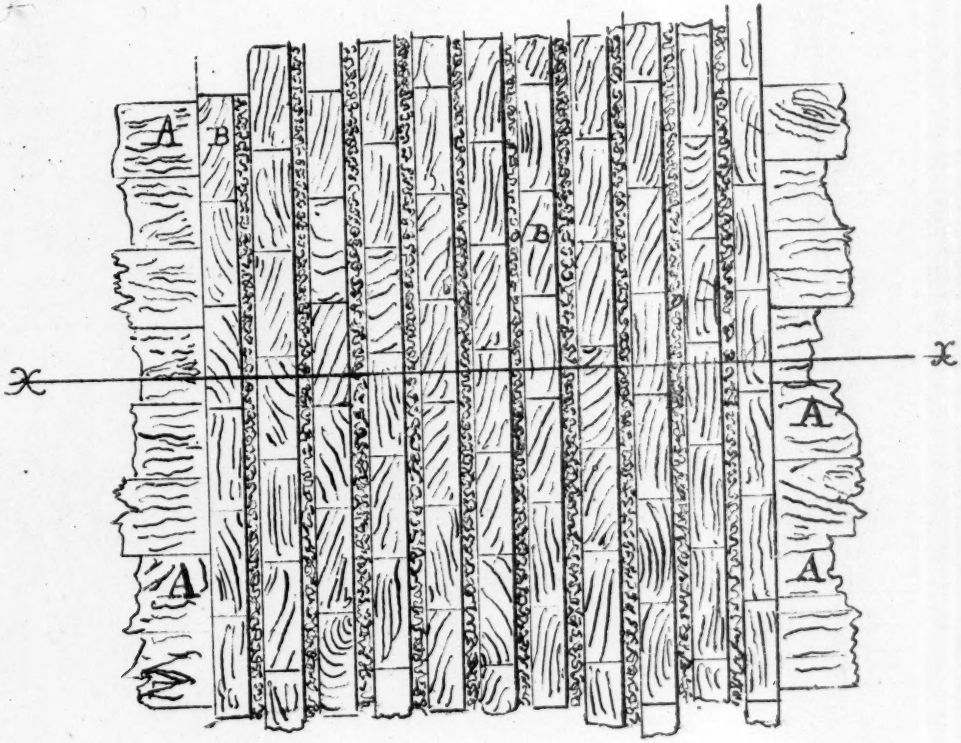
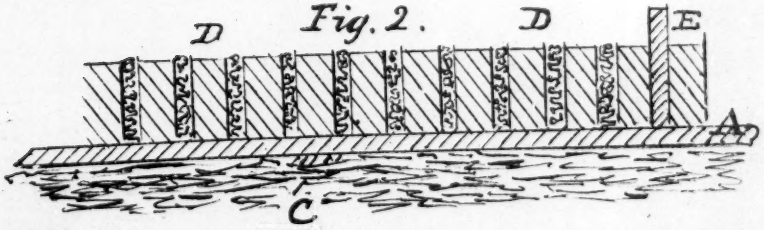


Fig. 2.



H. Mc Dougall Mar. 24 1868

Fig. 1

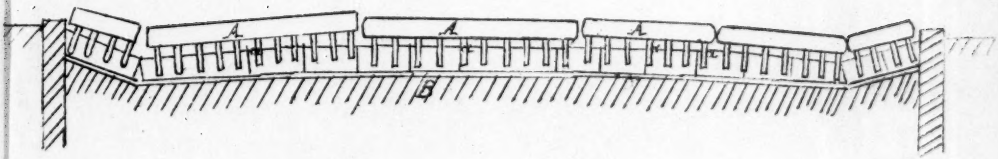
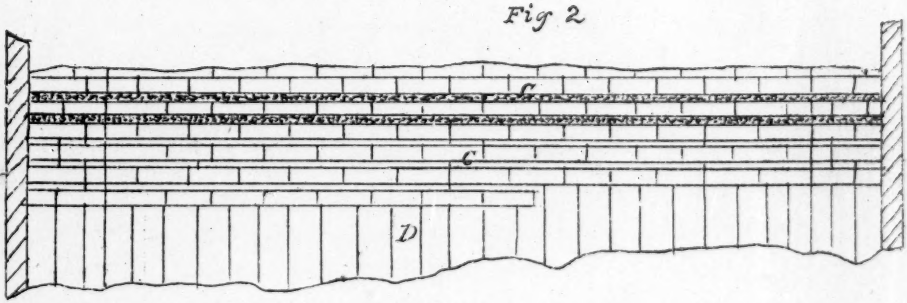


Fig 2



Appellant's Points.

First, the court below erred in holding that the appellee was not liable for the pavement laid on Market street, between Randolph and Lake, and the intersection of Lake and State streets.

Second, in holding that the appellee was not liable for the pavement put down on Clark street by Mr. Mac Bean.

Thirdly, in holding that all the other pavements laid under the reissued patent No. 3274 had been paid for.

Fourthly, in not holding the City liable under the first claim of said reissued patent 3274, for the several pieces of pavement proved to have been laid under that patent.

Fifthly, in not holding that the first claim of said reissued patent 3274 is good and valid, and is not anticipated by any prior invention.

Sixthly, in not properly construing the patent dated December 31st, 1872, No. 134,404.

Seventhly, in holding that said last named patent involved a simple change of the Nicholson pavement without invention.

Eighthly, in holding that said last mentioned patent 134,404 was anticipated by any of the prior patents mentioned in the opinion of the Court.

Ninthly, in holding that the evidence established the laying of an anticipating pavement in the City of Chicago in 1864.

Tenthly, in holding that the evidence established the laying of anticipating pavements in the City of Chicago in the year 1870 or 1871.

Eleventh, in not holding the said last mentioned patent 134,404 to be a good and valid patent.

Twelfth, in not holding that the said last mentioned patent was infringed by the appellee.

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First, the court below erred in holding that the appellee was not liable for the pavement laid on Market street, between Randolph and Lake, and the intersection of Lake and State streets.

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Tenthly, in holding that the evidence established the laying of anticipating pavements in the City of Chicago in the year 1870 or 1871.

Eleventh, in not holding the said last mentioned patent 134,404 to be a good and valid patent.

Twelfth, in not holding that the said last mentioned patent was infringed by the appellee.

It is insisted on this appeal that the first claim in Re-issue No. 3274 and the claim of Patent 134,404, are both valid, and have both been infringed by the appellee, and that the appellee has not paid Henry M. Stow, nor any one proved to have been authorized by him, for its said use of his invention, but is liable therefor, in this suit.

Re-issued Patent, No. 3274.

The pavement described in this Re-issued Patent No. 3274, consists essentially of blocks set upon end in rows across the street, with spaces between the rows, in which spaces are driven narrow and preferably wedge-shaped blocks, which, when driven, extend to a considerable distance below the under surface of the blocks first named into the foundation-bed of sand on which said blocks rest.

The first claim in said patent is as follows: "A pave-"ment composed of alternate tiers of square-ended and "wedge-shaped blocks, the wedge-shaped ends of the lat-"ter being driven into a sand foundation-bed or earth, sub-"stantially as and for the purpose described."

It is not insisted that the second claim has been infringed.

The third claim is as follows:

"A pavement composed of wood, or in whole or in part "of other suitable material, laid on a foundation-bed of "sand or loose earth, as described, and a portion of the "blocks driven down into said foundation-bed to pack the "same, substantially as and for the purpose specified."

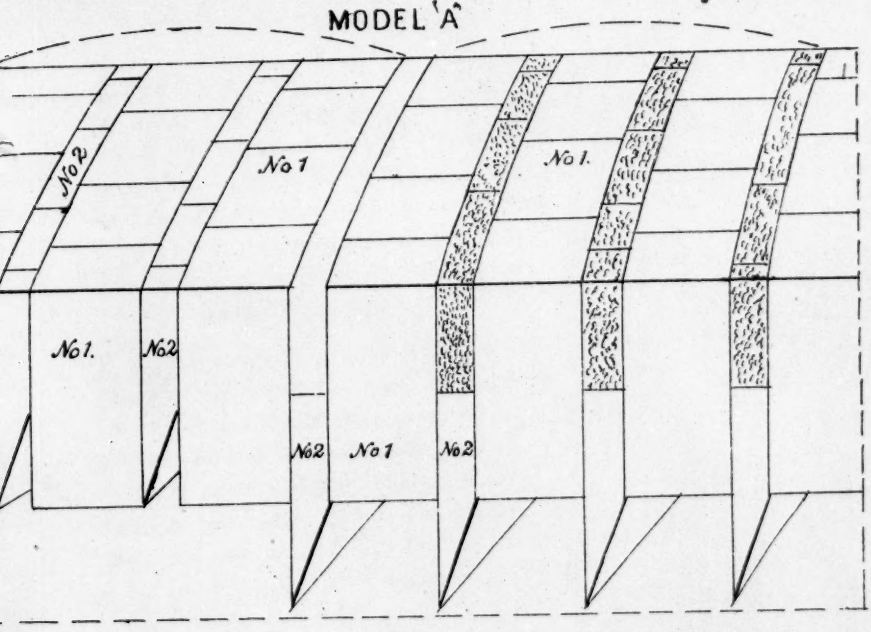
The third claim includes a kind of pavement which differs in some quite material respects from that specified in the first, though like the first in general principle.

The law permits an inventor who has made an invention, for which such claims are appropriate, to make both a

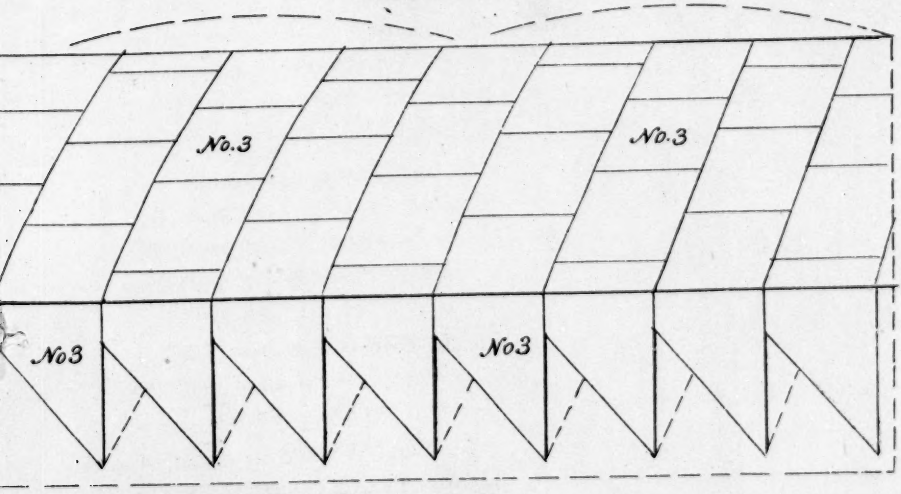
H. M. Stow. Jan. 19, 1869.

No. 3,274

MODEL 'A'



MODEL 'B'



broad and specific claim, and he may either take out two patents—one for each invention, or may make the two claims in one and the same patent. (*Hogg* v. *Emerson*, 6th How., 483.) Nor if one claim were void in the patent in which both were claimed, would the void claim vitiate the entire patent, provided it were made by mistake or inadvertance, without any intent to defraud or mislead the public. (*Carlton* v. *Bokee*, 17 Wall., 463.)

It will appear plainly from the specification of Stow, that he had made two such inventions—one a broad invention, consisting of a pavement composed of wood or other materials, laid upon a foundation-bed of sand or loose earth, with a portion of the blocks driven into the foundation-bed to pack the same. In his specification he gives a broad description to furnish foundation for this third claim, that is to say, he describes how a pavement may be made up of irregular blocks, part of which are driven to accomplish the desired result. But the specific and preferred invention consists of square-ended blocks laid in regular rows or tiers, with wedge-shaped blocks in the spaces between the rows, or alternating, the wedge-shaped blocks being driven into the foundation-bed. The specification particularly and fully describes this form of the pavement, and furnishes the basis for the first claim.

It would appear, therefore, that the court below, in holding that the patent was anticipated "in part" by the English patent of Stead of 1839, meant the third claim, and the broad description which referred to that part of the invention alone.

The first claim describes precisely the form of pavement laid and used by the appellee. It is represented by model "Exhibit G" (page 77 of the printed transcript of record.) It is insisted by the appellant, that the Stead patent not only fails to show the pavement of Stow's first claim, but

that on a fair construction, it fails to show that of the third.

This patent of Stead describes various forms of paving, all of which constitute a substantially solid wooden surface from curb to curb. The form specially referred to is shown in figures 18 and 19 of Stead's patent. These represent a pavement made up of octagonal blocks, which, when set together, leave holes at the truncated corners, into which Stead proposes to drive piles. The purpose of the piles, as described in this patent, was to support the blocks, and to keep them in position, when this kind of pavement was made upon a newly made embankment or shrinking base.

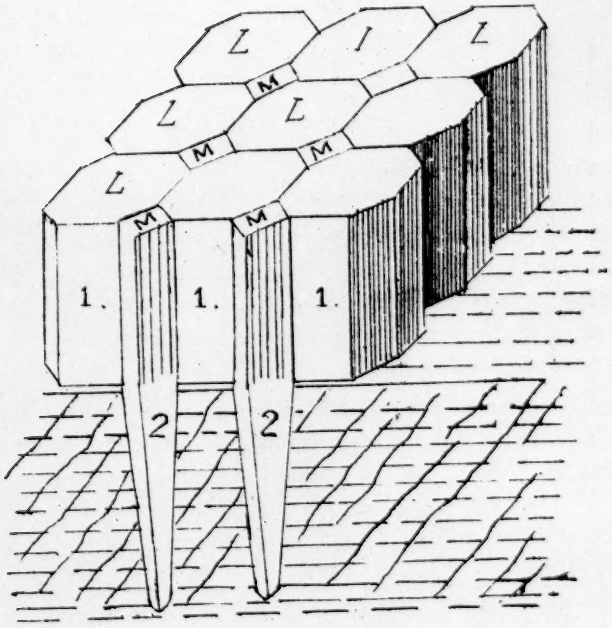
It is apparent that in the form of pavement shown in the figures, condensation of the foundation by the driving of these piles, would not be of any material effect. It does not appear from the description given that any such effect was contemplated, nor could it be obtained without an essential reorganization of the whole structure. Undoubtedly, if Stead had described a construction by which the packing of the earth beneath the blocks could be practically accomplished, that description would defeat Stow's patent, even if Stead had not apparently the object of Stow in view. But the accidental result is not practically Stow's result.

But, even if the patent of Stead be admitted to show the general form of pavement covered by the third claim, and included in the enlarged description in the specification of Stow's reissued patent, it does not show either in identical form or substantial equivalent the pavement covered by the first claim.

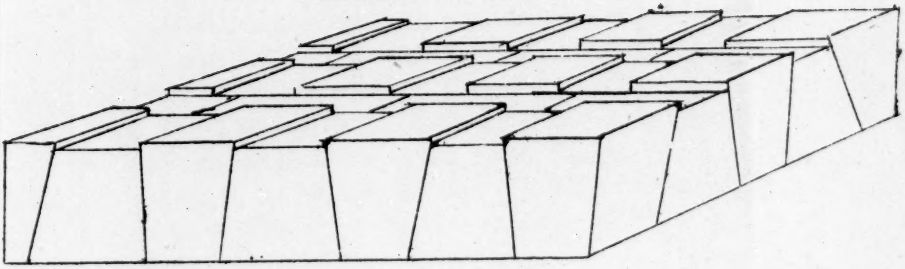
This is the principal form described in the patent of Stow, and is the form used by the appellee.

The distinction between this specific form and that shown in figures 18 and 19 of Stead's patent is obvious and material. The wedging blocks of Stow fill the

Stead's 18 & 19, 1839



WOOD 1840



spaces between the rows. When driven, they leave grooves above for gravel filling and foot-hold for the horses, and pack the earth beneath uniformly throughout the whole pavement. The first claim of Stow in the reissued patent is specific and is not met by the patent of Stead, or by any other references.

INFRINGEMENT.

Pavement was laid in accordance with the patent of Stow, No. 3274, and exactly as specified in the first claim thereof, in the city of Chicago, in the years 1871 and 1872 or 1873, by the appellee, on Market street between Randolph and Lake; on West Randolph street, between Halsted and Union Park; on Washington street, between Ashland Avenue and Leavitt street, and on Warren Avenue, between Ashland Avenue and Leavitt street; also on Clark street, between Madison and Monroe, and a block on Twenty-third street, between State and Wabash. (Printed record, page 77.)

The defendant denied liability for the use of this pavement as laid upon the streets above specified, and alleged payments and licenses therefor. Receipts were produced as proof of payment for the pavements laid on Warren Avenue and on West Randolph street. Of these, it is sufficient to say that they appear to be receipts to another party, and are not connected with the complainant in this case. (Transcript, page 73.)

It was also alleged by defendants that the pavement laid on Clark street, in accordance with the reissued patent No. 3274, was laid by a contractor, under a license from the complainant, for which the city is not liable. Attempt was made to sustain this allegation by the testimony of James G. MacBean. MacBean admits (page 214, printed transcript of record,) in answer to question 562, that he paved Clark street with the wedge pavement,

which is the pavement covered by the reissued patent; he admits (question 564), that he had no arrangement with the patentee of that patent. He admits also that the contract which he made in relation to this pavement as to the payment of royalties was to another party, who does not appear to be an assignee, licensee or agent; and that the patentee repudiated the contract (question 564, page 214, and cross-question 584, page 215 of the printed transcript of record.) The fact appears to be, that the pavement was laid by the contractor, without authority or license from the owner of the patent.

As to Market street, the testimony of Steele, the contractor, on this point, on page 210 of the record, is as follows:

" 513 Q. Under what arrangement, if any, was the " block on Market street, from Lake to Randolph, laid, in " reference to the payment of royalty?

" A. My recollection is not distinct, only as far as we " were concerned; we were to pay no royalty on that.

" 514 Q. With whom did you make that arrangement, " or have that understanding?

" A. William H. Stow.

" 515 Q. Was there any reason given why you were " not to pay royalty on that? If so state what it was.

" A. I do not recollect of any reasons now.

" 516 Q. How much, if any, of that kind of pavement " had been laid in the city, when this section on Market " street was laid?

" A. I think there was but one intersection.

" 517 Q. Do you know who laid that intersection?

" A. Only from hearsay.

" 518 Q. State the conversation, as near as you are " able to recollect it, in reference to the royalty on the sec- " tion on Market street, between Lake and Randolph?

" A. I cannot recollect any particular conversation we

" had, or any particular time; we had a conversation about " it at the time of its coming up. All I can recollect about " it is, we did not pay any royalty.

" 519 Q. Do you know whether any was to be paid?

" A. That I don't know, if there was any agreement " with any other party or not?

" 520 Q. You were to pay none?

" A. We were to pay none.

" 521 Q. What has been the custom in the city as to " who should pay the royalty, when patented pavements " have been laid?

(Objected to as immaterial.)

" A. In the Nicholson pavement, I believe the city paid " the royalty."

As to this, therefore, there was no contract with the patentee. The party contracting with the city to lay the pavement, recollects that he was to pay no royalty, and admits that the custom was, that the city should pay royalties. The inference was therefore a very reasonable one, that the city should pay in this case. Indeed, he says, in answer to cross-question 535, page 212, that the contract was the same as for the Nicholson, and in answer to cross-question 537, he says, that in Chicago, under a public letting, under which he took this contract, the contractor was never required to pay the royalty.

As to Twenty-third street, there is no evidence that the patentee received any royalty or made any agreement in relation to the matter. The only testimony upon this point is that of Steele, pages 210, 211 and 212, of the printed transcript of record. As one of the contractors he paid one hundred and fifty dollars ($150) to someone, probably to Wm. H. Stow; nothing to the complainant or to anyone proved to be connected with him.

It appears clear, therefore, that the court below erred in

holding that the complainant had been paid for all the pavement in which the device covered by the first claim of the reissued patent 3274 had been used, when the evidence only tended to show, at best, that somebody had been paid, not the complainant nor anyone proved to have been connected with him; and in holding that the block on Market street was laid as a sample, under the direction of the complainant, and that the pavement on Clark street was laid under a license from the complainant; the testimony of MacBean, showing only that the license or contract, if any were made as to these pavements, was made with another party and not with the complainant or any person connected with him.

PATENT OF DECEMBER 31ST, 1872, NO. 134404.

Infringement of this patent was denied, and also the novelty of the improvements claimed in the patent.

The claim in this patent describes the invention specifically. It is as follows:

"A pavement composed of blocks laid in rows directly "upon the sand foundation, with spaces between the rows "filled with sand or gravel, which is swaged or driven "into said foundation, substantially as and for the purpose "specified."

The manner of laying is clearly and distinctly set forth in the specification. The street is graded, covered to a depth of not less than three inches with sand or loam, which is wet, and packed with a maul or rammer. The surface is then formed to the proper grade, and the blocks laid transversly across the street, with a removable strip between the rows, of sufficient thickness to form the necessary spaces between the blocks. After a sufficient number of rows have been laid in this manner, the strips are removed and the spaces partially filled with sand or gravel.

H. M. Stow Dec 31st 1872

No 134.404

Fig 1

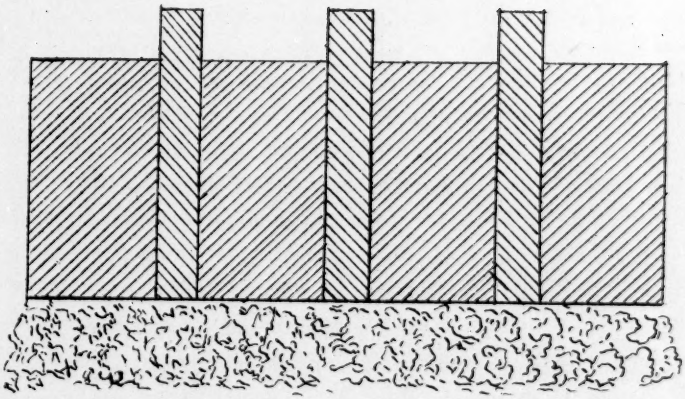
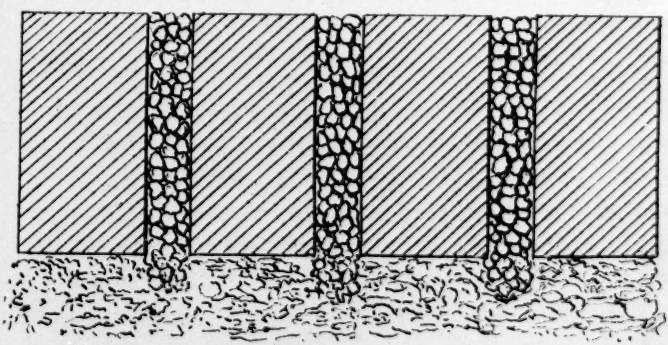


Fig 2



This sand or gravel is then driven in said spaces into the sand foundation below, until the foundation under the blocks is sufficiently compressed, and the compression of the sand under the blocks is stated to be for the purpose of sustaining the weight of heavy vehicles passing over the pavement. The invention is distinctly stated as relating to that class of pavement, in which the blocks are laid directly upon a sand foundation, and the laying of blocks directly upon sand foundation is not claimed, but is admitted to be old.

The distinctive feature of the invention is the filling of the spaces with gravel and ramming the gravel into the foundation of sand beneath the blocks, whereby it is compacted and compressed.

It is submitted that the Court below erred in the construction of this patent.

In the opinion of the Court, devices included in the reissue patent heretofore considered, are stated in connection with the devices of the patent of 1872 now under consideration, as if they formed a part of the invention claimed in the latter patent; and further, the element of driving the gravel in the spaces between the rows into the sand foundation, does not appear to have been considered as an element of the patent.

STATE OF THE ART AS TO THE PATENT OF 1872, No. 134,404.

Many patents were set up by the defendant as anticipating the invention of Stow, described in his patent of 1872, some of which were particularly referred to by the Court below, and others in general terms.

It is submitted that the state of the art set forth by his Honor, Justice Field, in 1868, in relation to the Nicholson patent (found on page 23 of the transcript), which

was relied upon by the Court below as anticipating the complainant's invention, does not disclose that invention, for the reason that it appears plainly from the decision quoted, that that pavement was laid upon a board foundation, in which the gravel filling could not possibly be rammed into the sand or earth beneath. The invention of Stow does not consist in the simple omission of parts, but in an entire change in organization. Besides the omission of the boards from under the Nicholson superstructure, and the omission of the strips of board between, Stow provides the gravel filling and drives it into the foundation.

The English patent of Stead, also found by the Court below to anticipate this patent, either in whole or in part, has been heretofore referred to in connection with the reissued patent, 3,274, and it has been shown that that patent had no gravel filling whatever in the spaces.

The same defect exists in the patent of Chappel, of 1864. A clause of that patent quoted by the Court below as showing Stow's invention is as follows : " Wooden pave- " ments have been constructed on the continent of Europe " and in the United States, by laying wooden blocks end- " wise of the grain in parallel rows, with openings or " channels between, into which gravel or gas tar are " placed."

There is not a word in this as to an essential element of Stow's patent (the driving of the gravel), nor is there a word as to what the blocks were laid upon, whether stone or boards or sand, thus omitting another essential element of the patent.

The other patents referred to generally or especially by the Court below, and held apparently as anticipating in whole or part the complainant's invention, are discussed briefly in the order in which they were introduced.

The English patent of Lillie, of 1860, consists of concrete blocks combined with alternate rows of wooden blocks to form a pavement. It also appears from the specification, that the inventor contemplated making a pavement of alternate rows of wooden blocks and solid stone blocks. The whole description in this patent is brief, and is as follows: "My invention consists in having small "stones cemented together by any suitable cement, and "casting them in molds of a convenient size, and of an equi-"lateral or quadrilateral shape, so as to admit (when formed "into such blocks), of their being laid on streets, and hav-"ing three additional surfaces to be presented to the traffic "when repairs are necessary; also in introducing between "such blocks, alternate rows of wooden blocks, as well as "between solid stone blocks, for the purpose of diminish-"ing the noise arising from the traffic.

"This combination of wood and stone may be carried "into effect on roads or streets, without rendering it ne-"cessary to have the above material cast into blocks. I "render the wood thus employed impervious to water by "impregnating it with bituminous, oleaginous, or other "such like fluids. I form the foundation on which such "materials are to be laid into inclined planes, gently rising "from the sides of the street or road, towards the center, "instead of being of a convex form as heretofore."

The only clause in this description which could be tortured into a description of Stow's invention, is that which states that the combination of wood and stone may be carried into effect without the use of material cast into blocks, that is to say, that the pavement may be made of solid stone and wood, without the concrete blocks. What defendant would have inferred from the description is, that the pavement described by Lillie was to be made of wooden blocks with concrete placed between them. But this is not the necessary or even obvious inference from

the language. At best it is but a doubtful inference, and not the most obvious one. Besides, there is not a word as to the condensation of the foundation.

The English patent of Austin (defendant's "Exhibit 3,") is quite as unlike the Stow pavement. It is a pavement composed of blocks glued to a board foundation, with spaces between filled with liquid cement poured in. There is no ramming described, and if there were, it could not drive the filling under the blocks or into the foundation.

The United States patent of Cowing (defendant's "Exhibit, 10 and 20,") is equally impertinent, as will appear from the illustration. This pavement is made of truncated wedges, set with the broader ends downward, so as to leave wedge-shaped interstices between the rows.

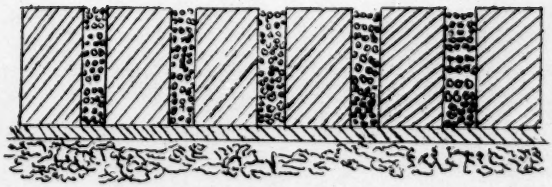
The blocks are set close together, and the gravel, even if rammed into them, could not reach the sand foundation below. It, therefore, lacks, like the description in Chappell's patent, essential elements of the Stow patent. The only condensation of the foundation in Cowing's patent takes place before the blocks are laid.

The only similarity between Whitehead's pavement (defendant's Exhibit 7,) and that of Stow's patent of 1872, is that both are composed of wooden blocks set on end, and there is no other resemblance whatever. The cut shows this plainly.

The same is true of Miller's patent, (defendant's "Exhibit 8"). Like the Whitehead patent, it has no spaces between the blocks, and no gravel filling, which are essentially elements of the patent under consideration.

The patent of Van Camp and Hodgeman, (defendant's "Exhibit 9,") has no sand foundation, no gravel filling in the interstices, and does not describe the process of ramming the filling so as to condense the foundation. Indeed con-

Austin 1843



T. Cowing's Apr. 5th 1870

No. 101590

Fig 1

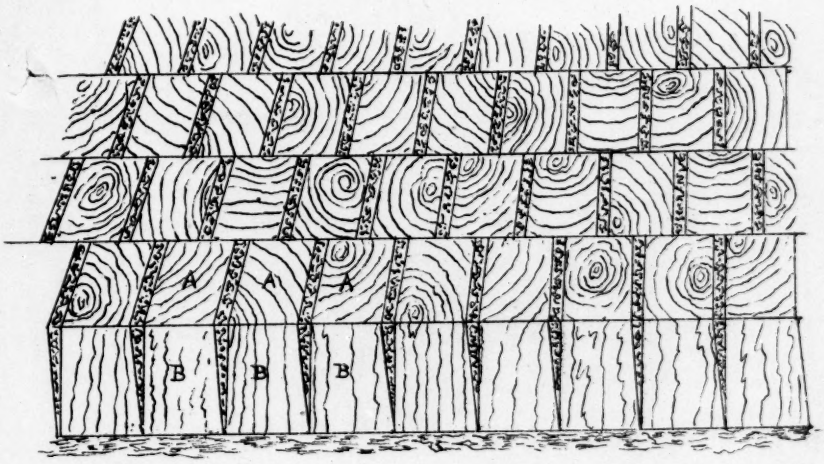


Fig 2

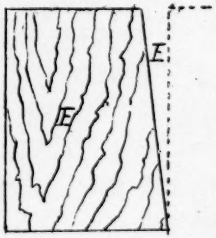


Fig 3

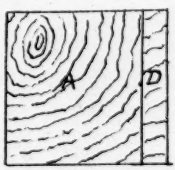


Fig 4

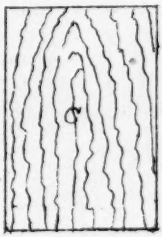


Fig 5

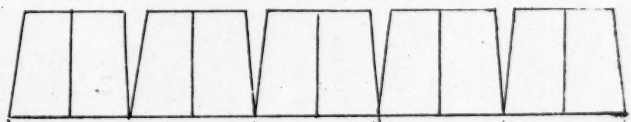
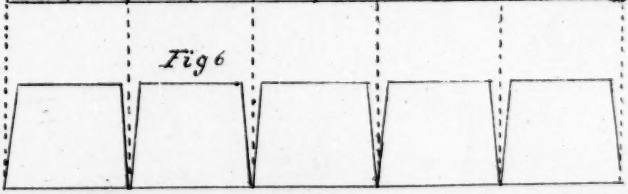


Fig 6



E. Whitehead. Jul. 10, 1866.

No 56,303.

Fig 1

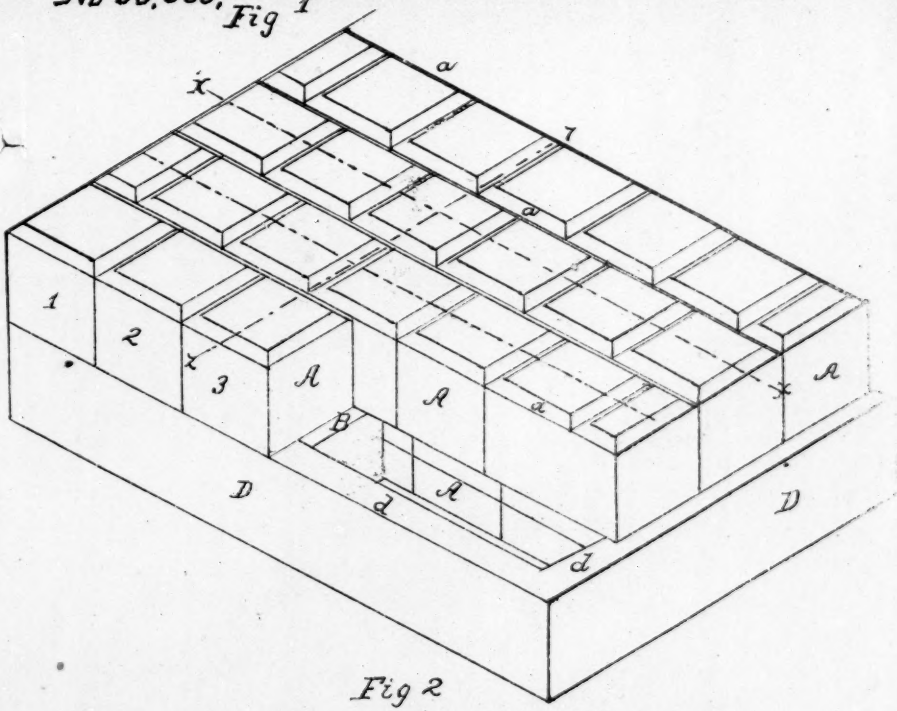


Fig 2

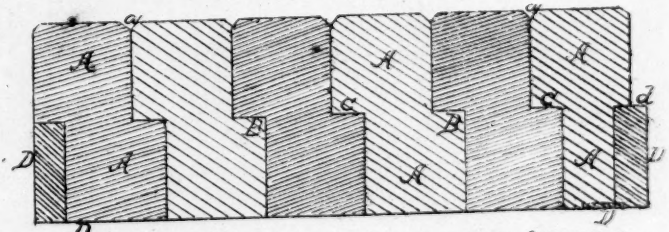
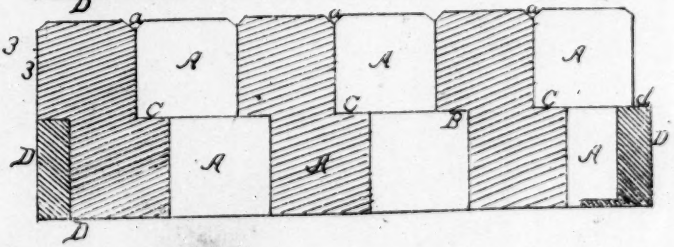


Fig 3



B. F. Miller Apr. 23rd 1867.

No. 64.126

Fig 1

Fig 2

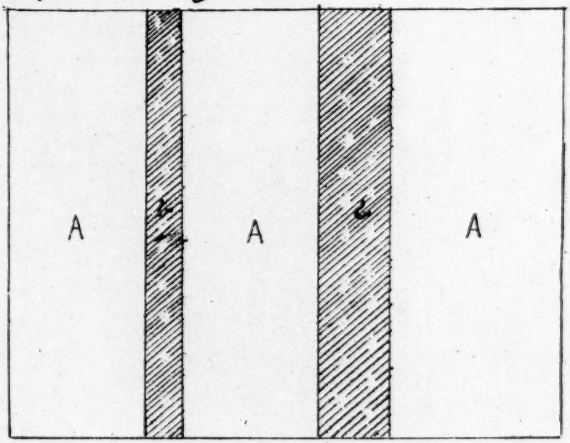
Fig 3

Fig 4

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Van Camp & Hodgman Nov. 16 1869

FIG: 1.



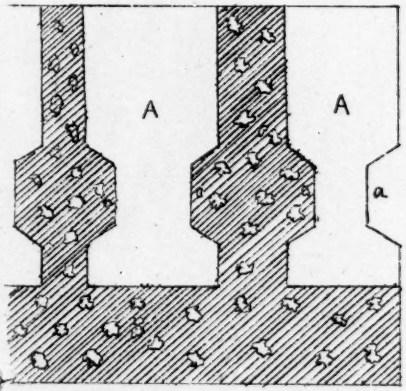


FIG: 2.

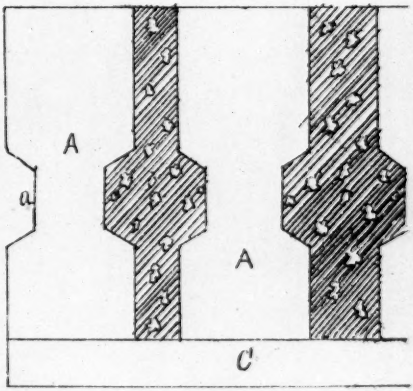


FIG: 3.

C. Gaytes Oct. 25th 1870.

No. 108,582

Fig. 1.

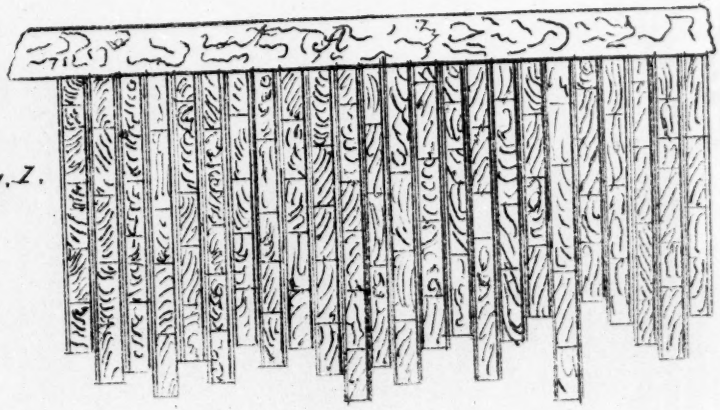


Fig. 2.

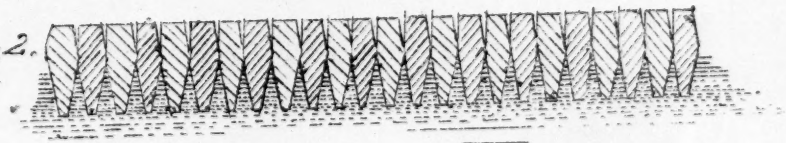


Fig. 3.

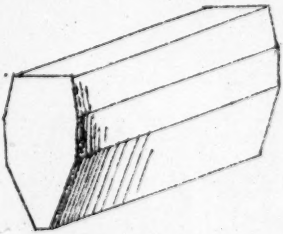
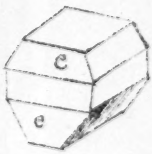


Fig. 4.



R. H Willet, May 16th 1871

No. 114,895

Fig. 1.

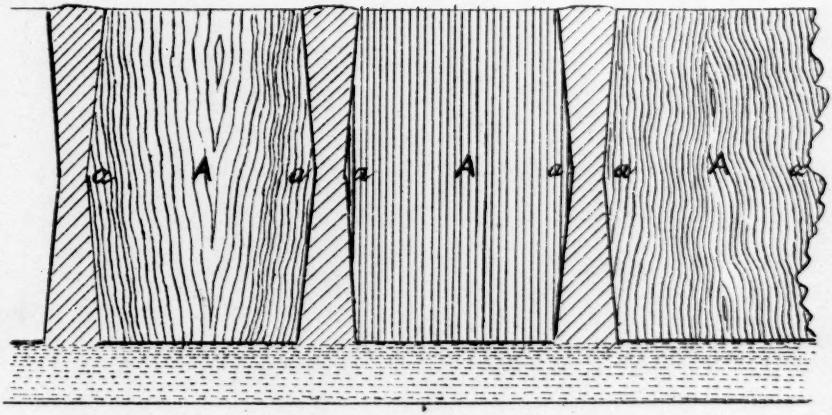
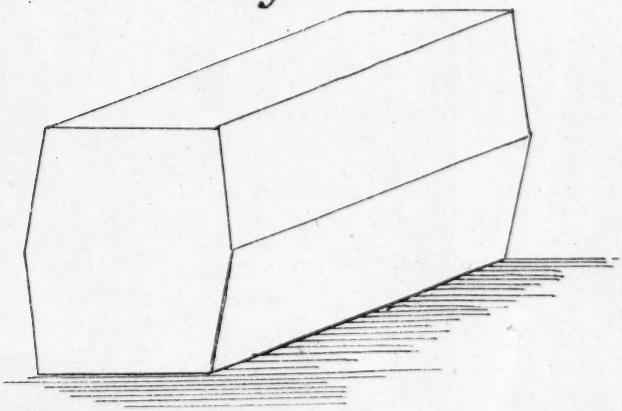


Fig. 2.



densation of the foundation would be impracticable and unnecessary.

There is simply a concrete foundation, on which the blocks are set, and then a hot concrete is poured into the interstices between the rows, so as to unite with the foundation, and form a homogeneous mass. The concrete, when hardened, forms a solid basis for the pavement. It is a combination of concrete and wood. No matter, therefore, what kind of a tamp should be used, or how forcibly the filling may be driven, there was no intention made apparent on the part of the inventors to drive the filling beneath the foundation, and manifestly no need of such a step.

The patent of Gaytes, (defendant's "Exhibit 11,") which was granted in 1870, would have had some show of pertinency, had it been set up in answer to complaint's patent of 1868, No. 74,862, but this was forbidden by its subsequent date. As will appear plainly from the illustration, it has no spaces between the rows of blocks, and no gravel filling, essential elements of Stow's patent of 1872.

Like error appears to have been made in introducing the patent of Willet (defendant's "Exhibit 12.") There is, it is true, a sand foundation in this pavement, but it lacks the essential elements of the gravel filling, and the ramming to compact the sand. Instead of gravel filling, the interstices between the rows of blocks are filled with a hot concrete, which is poured in. The blocks are of a double wedge shape—largest in the middle—so that the channels between the blocks are narrowest half way down, and widest at the top and bottom. Gravel could not, therefore, be rammed into such spaces, and the patentee nowhere described the filling of concrete as being so rammed. There is no common resemblance, excepting the blocks and the sand foundation.

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A glance at the drawing of May (defendant's "Exhibit "15"), would appear to be sufficient to show a total lack of similarity to Stow's patent. There are short pockets, having gravel filling going down to the sand, but it does not appear to have been rammed, and there was no occasion for it, since the blocks were provided with other support in the long strips on which the rabbeted blocks were made to rest. The patent (Fig. 2) shows the device claimed in Stow's patent of 1867, to which it would have been a better answer, had the date permitted.

This is also true of Prescott's patent of 1871, specially mentioned by the court below (defendant's "Exhibit 13.") Instead of resembling complainant's patent of 1872, which it antedates, it resembles the Stow re-issued patent No. 3,274, which it follows.

It is true that the pavement of Prescott is composed of blocks set on end in rows, running across the street, and that the foundation is of sand; but it lacks the gravel filling in the spaces, and the ramming to condense the sand underneath. Instead of this, Prescott formed grooves in the sand at the bottom of the spaces, and then poured in melted tar and gravel concrete, or any suitable composite material. The object was not at all to condense the foundation, but to form water stops. The inventor says: "After laying the blocks in the manner aforesaid" (that is to say, directly upon the sand, with spaces between the rows), "a swage is driven down between the several rows "of blocks, two, three, or more inches below the surface "of the road or street bed, and the entire space thus made "between the blocks is filled with melted tar, and gravel, "concrete, or any similar suitable composite material, "forming a series of break water or water stops across "the street, preventing the water from accumulating so as "to displace the sand under the blocks, thus making a

No. 112,945

G. A. May, Mar. 21st 1871.

Fig 1

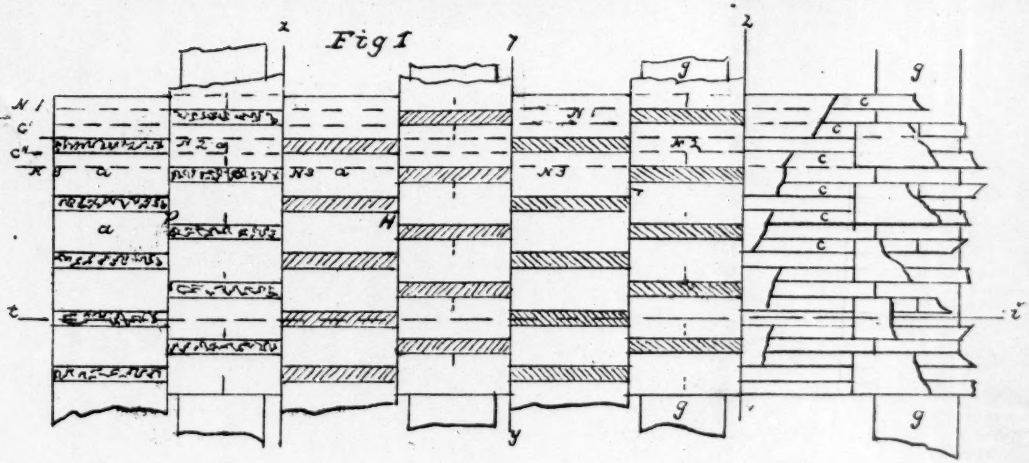


Fig 2

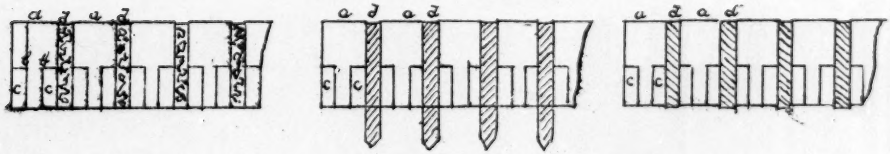
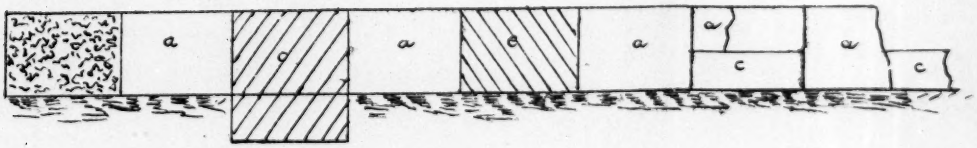


Fig. 3.



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S.C.Prescott JUNE 20, 1871.

No. 116,217

Fig 1.

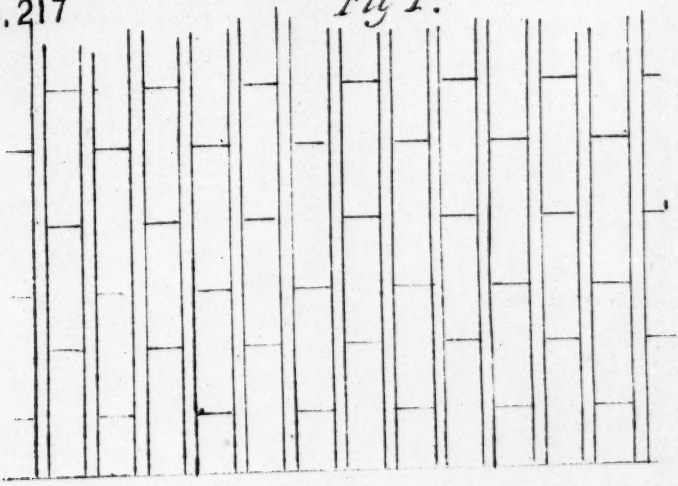


Fig 2.

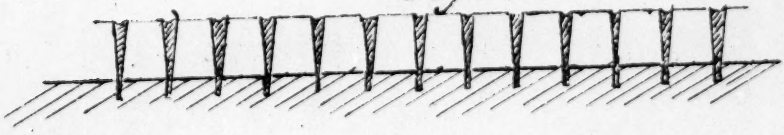


Fig 3.

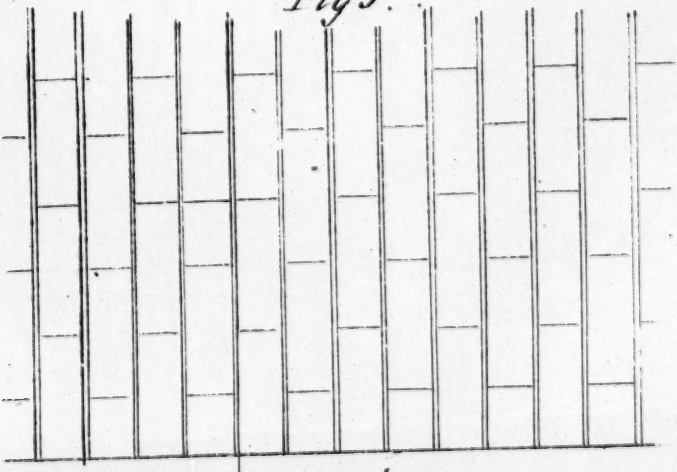
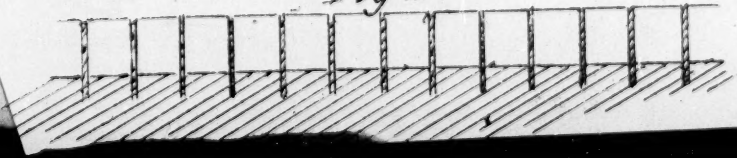


Fig 4.



" pavement equally stable upon any degree of inclination as " upon the level." (Prescott's specification, page 62, transcript of record).

Not only was there no condensation of the sand contemplated, but it does not appear how such condensation could be practically effected. No provision is made for sustaining the rows of blocks, while the groove is formed in the sand, at the bottom of the spaces. It does not appear why the blocks, as well as the adjoining sand, would not be displaced and lifted, if the grooves were formed by swaging. But, even if it does condense the foundation, and the interstitial fillings of composite material be admitted to have been driven down, the condensation is accomplished in a different manner, and the pavement is a different pavement from that of Stow's patent of 1872. If the composite material forms, as the inventor says, a series of water stops across the street, then it consists of solid plates of composite material, like the driven wedges of Stow's earlier patent, No. 3274, and not like Stow's patent of 1872, in which simply loose gravel is driven.

It will be observed, too, that in making Stow's pavement under the patent of 1872, the process is very simple. The blocks are laid in tiers across the street, with the spaces between, the spaces are all filled with gravel, which keeps the blocks all in place, and then the gravel is rammed into the foundation.

If the filling of Prescott is loose gravel, it is not a water stop; if it is a water stop, then it is a solid coherent substance like the wedge of Stow's, in his much earlier patent of 1867.

But, further than this, the patent of Prescott was granted June 20th, 1871, on an application filed April 17, 1871, (defendant's " Exhibit 23,") but Stow, having re-

ceived a patent, may go back of the date of his patent, to the date of his invention, and that was as early as 1869. His application was on file in the patent office, on the 10th day of January, 1871, (question 1,021, page 90, and answer to questions 1,625, page 142, printed transcript of record,) three months before Prescott's application was filed. His earlier date is established by undisputed testimony. A model of the invention was made in the winter of 1869–70, (question 999, page 88, testimony of Stow.) This is corroborated by the testimony of Fallis, (page 100) by that of W. H. Stow, (page 125) and by that of Robertson, (page 164 of the transcript.) These witnesses clearly and firmly establish the earlier invention of Stow, and carry his dates to 1869, more than a year back of the earliest date of Prescott.

It is submitted, therefore, that the court below erred in holding that the invention in the Prescott patent was identical with the patent of complainant of 1872, or that if it were like it, the invention of Prescott anticipated the invention of Stow.

The patent of Morong (defendant's "Exhibit 16,") is among the various patents generally referred to by the court below as antedating the complainant's patent, but the application ot Morong, as appears from defendant's "Exhibit 25," (page 72 of the transcript,) was not filed in the patent office until September 5th, 1872, more than a year after the filing of the application, on which Stow's 1872 patent was issued, and it is manifest, from the record, that Marong's invention is later, whatever it may have been, and it was not the Stow invention. It did not compact the foundation below, put puddled it.

Indeed appellee's expert, Munday, after an exhaustive examination of the various patents introduced by the defense, is forced to admit (Transcript, p. 205), "that no-

E. P. MORONG Oct. 29, 1872

Fig. 1.

No 132.682

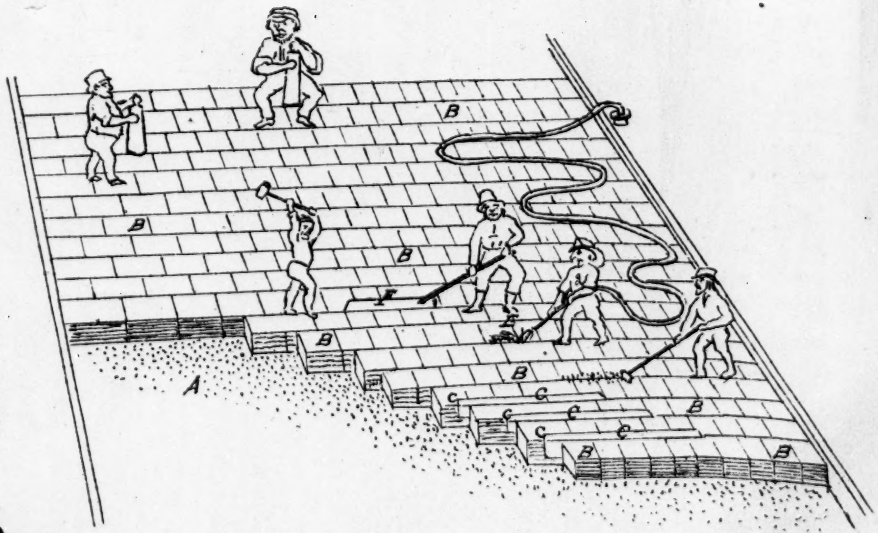
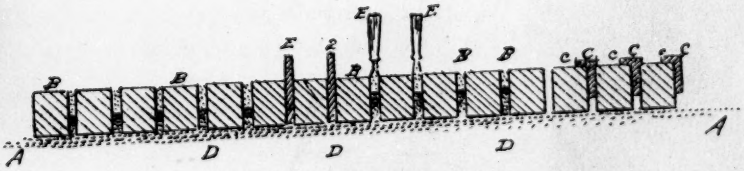


Fig 2



R. C. Phillips Dec. 5. 1871

No. 121,544.



Fig. 3.

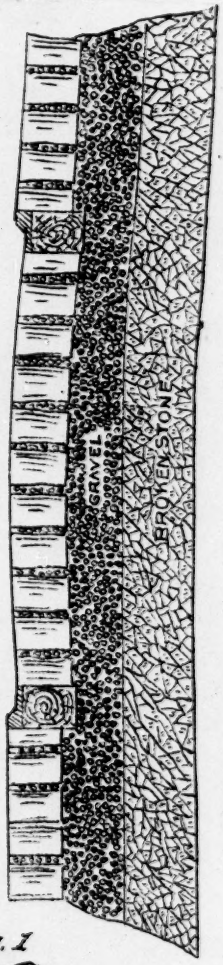
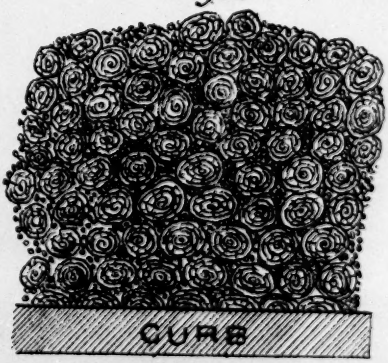


Fig. 2.

Fig. 1



" where in any of the exhibits is there to be found a wedge " of gravel driven down into an earth or sand foundation," —which is the essential characteristic of the patent of 1872.

In reference to dates, it may further be remarked that the following patents set up by the appellee as anticipating appellant's patent 134,404, were in fact applied for and issued subsequently to his invention; that of May, issued March 21, 1871, on an application filed August 17, 1880 (Transcript, p. 69); that of Willet, issued May 16, 1871, on an application filed Feb'y 8, 1871 (p. 72); that of Gaytes, issued October 25, 1870, on an application filed March 3, 1870, (p. 68); and that of Phillips, issued December 5, 1871, on an application filed January 3, 1871, (p. 73.) (See answers to question 1625, p. 142, and question 1636, p. 144.)

Thompson's Pavement.

But, the court below, appeared to regard as of special importance an invention of Mr. J. K. Thompson of 1864, as an anticipation of the Stow patent.

The pavement (of 1864) alleged to have been laid by Thompson is earlier than the Stow invention; but it is submitted, that the evidence does not show the pavement to have been the same as that of Stow. To show similarity between this pavement and that of Stow, under said patent, Thompson himself is introduced as a witnesss, (page 173 of transcript of record.) It appears from his own testimony, that the pavement laid in 1864, was only a piece of about twenty or thirty feet in length; (page 175, cross-question 51,) that the workmen were not over a day in laying it; (page 176, cross-question 52,) that he was there only to get the men started, and tell them what he wanted, and then went away. He thinks he did not lay more than one or two rows, (cross-question 82, page 178.)

He did not see any of the ramming done, (cross-question 109, page 179.) Now, it is evident from his own statement, that he does not know, of his own knowledge, whether the gravel filling in the spaces between the blocks of this pavement of 1864 was rammed or not. Plainly, gravel could not be rammed between two rows. The first stroke would throw down the unsupported blocks on one side. No part of it could be rammed in so small a piece as this until the whole was laid, and the blocks secured against spreading.

Thompson does not know, therefore, of his own knowledge, whether the pavement was laid on the principle explained in the Stow patent or not. But further than this, Smith, one of complainant's witnesses, (transcript of record, page 165,) says that he was one of the workmen who laid this pavement of 1864; that Thompson was not present when it was laid; and that the pavement was laid with gravel between the blocks, but the gravel was not rammed. He is fully corroborated by Geggle, (page 166 of the transcript of record,) who was another of the workmen engaged in laying down this pavement. He says that the spaces were filled by shovel and broom, and that the gravel was not rammed. He also says that Mr. Thompson was not present when the pavement was laid.

This testimony is direct and explicit, by witnesses entirely competent and disinterested, and is not contradicted by any testimony of equal consideration.

Mackin's testimony as to this (pages 224–225) is inconsistent in itself. He was merely passing, and could not know as well as the workmen engaged upon the pavement how it was laid. He took up some in laying street railway, and in replacing the blocks, tamped the gravel with a shovel, the inadequacy of which, (of driving gravel into the ground with a shovel,) needs no illustration or proof.

In the next place, suppose the Thompson pavement was essentially like the pavement covered by the Stow patent of 1872, it would not invalidate this patent, because,

First, it was an experiment, and none like it was laid afterwards by him, as Thompson himself admits, (p. 177.)

Second, it was abandoned. Thompson not only never laid any like it afterwards, but never applied for a patent of that pavement (p. 182), although, in March, 1870, he did apply for a patent on a wooden pavement, which he obtained; and made two further applications in August and November, 1870, both of which were rejected, and all of which applications embraced a pavement upon a wood foundation. (pp. 13, 37, 38.)

Third, it was not used so as to become accessible to the public, since from the surface it could not be distinguished from the Nicholson pavement, or from ordinary planking. Watson says, (p. 191) that he had passed over that pavement two, three and four times a day since 1865, and had never noticed anything being down there. Whitney says, (p. 86) that he had occasion to pass over the approach to State street bridge, near Kinzie, often since 1864, and that he did not observe the kind of pavement that was laid there. H. M. Stow says, (p. 90) that he never heard of the pavement put down by Thompson, at the north end of State street bridge, before January, 1871. While Mr. Thompson admits (p. 183) that he never stated to Stow that he had laid a pavement substantially like the Stow pavement, although Mr. Stow had made frequent application to lay his pavement. Pitkin says, (p. 98) that he frequently crossed State street bridge, for four or five years prior to the year 1871; that he supposed the pavement there was an ordinary plank pavement; that he never noticed anything about it tending to show that it differed from ordinary planking; that he passed over the

street daily, sometimes from two to six times a day. William H. Stow says, (p. 123) that prior to the fire of 1871, he resided on the north side, and passed over State street bridge for four years, on an average twice a day, sometimes four times; that previous to the Spring of 1871, he never saw anything between Kinzie street and State street bridge that looked like a pavement.

An experiment of this nature, crude in design and execution, which signally failed, since, in 1867 or 1868, the blocks were all rotted and had to be taken up, (Zeep, p. 169) abandoned by its inventor, and so laid as to be inaccessible to the public gaze, cannot be invoked to defeat an invention brought to perfection, patented, and introduced into general use. *Gaylor* v. *Wilder*, 10 Howard, 477.

La Salle St. Tunnel Pavement.

As to the pavement alleged to have been laid at the end of LaSalle street tunnel in 1870 or 1871, it is sufficient to say that it is later than the invention of Stow, as has been shown by the testimony. But further than this, there is no satisfactory evidence that it involved all the essential principles and elements of the Stow invention. Bristol, one of the complainant's witnesses as to this (page 232 of the transcript of record) does not allege that the gravel went below the blocks, and in re-paving it after the blocks were taken up for laying railway stringers, he re-placed the gravel with a shovel, which is not tamping at all.

Watson, witness for defendant, in testifying as to the pavement laid in 1870 or 1871, (he fixes the date as September or October of 1870) does not say that the gravel was rammed into the foundation. (Page 190 of transcript.) Indeed, he asserts (page 199, question 430–431) that the gravel will not go below the pavement.

None of the evidence as to the Thompson pavement of either 1864, or 1870, or 1871, establishes the fact of the ramming of the gravel into the foundation, or that such an element was then known in laying pavements.

In the pavement of 1864 there was clearly no ramming at all, and the pavement of 1870 or 1871, was later than Stow's invention.

Infringement of the Patent of 1872.

Infringement of this patent was denied on the ground, that in the pavements laid by the defendant, the gravel filling in the spaces between the rows of blocks was not driven down below the lower end of the blocks, so as to enter into and compress the sand of the foundation.

The use of this particular element of the claim was denied, though it was admitted that pavements were laid by the defendant with the blocks resting directly upon the sand foundation with gravel filling between the rows. Pavements were laid in accordance with this patent in the city of Chicago, on Clark street, Water street, Peoria street, Fifth avenue, and other streets, (printed transcript of record, page 77) but the court below appeared to hold that under certain circumstances no ramming down below the end of the blocks is necessary or possible, and the invention would therefore practically be inoperative.

It is insisted upon this point, both as to the practicability or operativeness of the invention, and the fact of infringement, the weight of evidence was clearly in favor of complainant.

The testimony of Robinson, witness for the complainant, is explicit. He says (question 905, page 80 of the printed transcript of record) that he has laid large quantities of the Stow pavement under both patents, reissue 3274 and patent of 1872, No. 134,404 (question 906). He testifies

(page 81, question 914) that in laying pavement in accordance with the patent of 1872, the ramming of the gravel will drive it through the space between the blocks into the sand below. This is a matter of his own observation and experiment in laying the pavement elsewhere, and this, if there were no other testimony, disposes of the theories of the experts, and the statement as to the impossibility of driving sand through a tube, which is quite another matter. Indeed, it would not seem to require any evidence to show that gravel could be driven through a space an inch wide (see testimony of Stow, page 77, printed transcript of record) through the depth of six or eight inches, which is the ordinary height of the blocks of wooden pavement.

The complainant's witness, Pitkin, says that he examined the pavement on Dearborn street (laid in accordance with complainant's patent of 1872) and that the gravel filling in the spaces between the blocks had been driven from three-quarters of an inch to an inch into the sand below the blocks (answering to questions 1088-89 and 1090, pages 88 and 89, printed transcript of record).

This was a matter absolutely of observation, and is the testimony of a disinterested witness.

Pitkin is corroborated fully by Cox (page 107, printed transcript of record), by Stirling, (p. 116) foreman of the City Water Department, who had charge of the laying of water pipe, and who is, like the others, a disinterested witness. This is also corroborated by Rue (page 118 of the printed transcript of record); by Stow (p 126); and by Cowles (p. 146). The testimony of Hanson, (pages 121 and 122 of printed transcript of record) is to the same effect, and from these witnesses it appears that not only the gravel filling in the spaces between the rows of blocks could be driven into the sand foundation beneath,

but actually was driven, and compacted the said foundation.

As opposed to this testimony, and to show that the patent of 1872 had not been infringed by the defendant, a number of witnesses were called.

It was not denied, however, that pavement had been laid by the defendant, consisting of angular blocks placed in rows across the street, upon a sand foundation, with the channels between them filled with gravel the full length of the blocks.

What was denied was, that the filling was rammed below the blocks, so as to compact, or have any special effect upon, the foundation.

Of the witnesses called to show this, Wilson, Superintendent of the Board of Public Works, says, (in answer to question 482, page 208,) that he cannot say there is any pavement in which the filling was made to project into the foundation below the bottom of the blocks. It appears on the same page that he took up pavement to the extent of half a yard only, and the result was simply that he could not see that any of the material between the blocks was forced into the sand or below the blocks. Whether he could see it or not, would depend, of course, upon the care exercised in taking up the blocks.

Another witness on this point is Mackin, admittedly interested in this litigation, who testifies as to the impossibility of driving the gravel through the space. He gives also the negative testimony, on page 219, that he examined the city pavements, and did not find the gravel extending quite to the bottom.

MacBean is another witness interested in this litigation, and was present at the examinations made by Mackin, and testifies to the same effect, on page 235, as does also Jaicks, MacBean's collector, (page 236), who was present

with Mackin, and to the same effect. But, he admits on cross-examination (page 237), that only two blocks were taken up, one in each place; meaning simple paving blocks.

Of course it might easily happen that, in taking up a single block, contiguous blocks, as well as the sand and gravel, would be so disturbed as not to show the pavement as it was laid. It certainly would not be as satisfactorily shown, when only two or three single blocks were taken up, as when the pavement was torn up continuously for laying water pipe, which was the case in the examination made by some of complainant's witnesses, heretofore referred to, who all saw the gravel extending below the blocks.

It might also easily happen that, owing to some slighting of work, or the accidental omission to ram thoroughly in a particular place, that in some places the gravel might be left at, or above the lower end of the block, and this without affecting the general characteristics of the work, or rendering it any the less a genuine Stow pavement, made in accordance with his patent.

It might also happen, as stated by complainant's witness, Cowles, (page 147 of the printed transcript of record,) that the pressure upon the blocks in use might cause the blocks, even if laid with the gravel extending below them, to settle past the gravel, so as to make it appear as not below the blocks; so that in soft ground a pavement might be laid according to Stow's patent, and yet after use, it might not clearly appear that the gravel was below the blocks; and this might happen, although the gravel when originally rammed had operated in accordance with the theory of the invention to compact the sand to some extent.

Testimony of this witness Cowles (Transcript, p. 145), is also clear as to the possibility of driving gravel in the space between the blocks, and as to the fact of the laying of

pavement in accordance with the Stow patent in the City of Chicago. He is a disinterested witness, and an accomplished expert.

Thus we have testimony, on behalf of complainant, of disinterested witnesses, who made observations on a large scale, and testified of what they actually saw.

On the other hand, we have the testimony of witnesses for the defendant partly interested, who made experiments on a small scale, whose opportunities for observation were imperfect and limited, and who testified as to what they did not see.

Again, the city, in its agreement with contractors for the laying of this kind of pavement, stipulated (p. 31), that "the spaces, one inch in width between the rows of blocks, "should be filled with clean bank-paving gravel, compactly "tamped down by means of a parver's tamping-iron, pre-"pared to fit the spaces, so that all parts shall be *thoroughly* "rammed,"—which method was followed by the contractors, according to Watson (p. 199), who says, that "they gen-"erally fill the space full even to the top of the block, and "then ram it until settled down about two inches, and "then they fill the space again, and ram it again." This is done upon a foundation prepared according to the Stow foundation (Ex. L, p. 31), and with a tamping-iron weighing from eight to fifteen pounds (p. 198).

The conclusion, therefore, is irresistible, that in all the pavement laid by the city directly on an earth foundation, with gravel between the blocks, rammed in the manner described in the city's specifications, the testimony of the contractor, Watson, (Transcript, p. 199), and that of W. H. Stow (Transcript, p. 77), the gravel extends below the blocks into the foundation.

L. HILL, AND
F. W. BECKER,
Of Counsel for Appellant.

IN THE

Supreme Court of the United States.

HENRY M. STOW,
Appellant,

vs.

THE CITY OF CHICAGO,
Appellee.

SUPPLEMENTARY BRIEF FOR APPELLANT.

L. HILL,
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F. W. BECKER,
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1881.

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SUPPLEMENTARY BRIEF FOR APPELLANT.

Besides the errors suggested in the former brief, the following additional errors in the findings of the court below are now assigned, viz:

Thirteenth. The court erred in holding the appellee not liable for the pavement laid on Twenty-third street.

Fourteenth. Also in considering the evidence or arguments relative to alleged licenses, under the Stow patents, and alleged payments for the pavements laid; no such defenses being set up in the answer.

Fifteenth. Also in considering the evidence or arguments relative to the alleged impossibility of making pavement with the gravel filling driven or rammed into the rammed sand foundation below the wooden blocks; no such defense being set up in the answer.

Sixteenth. Also in considering the evidence or argument that there was no patentable invention in the Stow pavements, but only a slight change from old structures "not rising to the dignity of invention;" no such defense being pleaded in the answer.

REISSUE No. 3274, EXHIBIT G.

Neither license nor payment being pleaded in the answer, these two defenses cannot be considered by the court, and it was error in the court below to sustain either of them.

Rubber Co. v. *Goodyear*, 9 Wall., 793.
Bates v. *Coe*, 8 Otto, 31, 47.
Story Eq. Pl., §§ 798 to 802.
Boone v. *Chiles*, 10 Pet., 212.
Vattier v. *Hinde*, 7 Pet., 274.

When the decree below could not properly be made, on the state of the pleadings, it should be reversed by the Supreme Court and the cause remanded.

Vattier v. *Hinde*, 7 Pet., 274, 275.

But, secondly, even if these defenses had been pleaded, which they were not, we submit that the evidence would not support them.

Let us consider, for example, three streets — Clark, Twenty-third and Market. These three streets were paved by McBean and Steele, who were contractors under the city government. It is in evidence that the contractors did not determine what kind of pavement should be laid, but the Board of Public Works of the city attended to this duty.

The control exercised by the board and by the city government, in this respect, is shown through all the defendant's as well as the complainant's evidence.

Under the Illinois State decisions this fact would render the city liable for any damages caused by the selected pavement being an infringement of the rights of a patentee. The rule laid down by the State courts is, that, to the extent to which the corporation controls the contractor's acts, the corporation, and not the contractor, is liable for damages caused by those acts.

R. R. Co. v. *McCarthy*, 20 Ill., 88.
Scammon v. *Chicago*, 25 Ill., 438.
R. R. Co. v. *Whipple*, 22 Ill., 105.
Lesher v. *Wabash Nav. Co.*, 14 Ill., 85.

The United States Courts will follow this rule established by the Supreme Court of Illinois, although it is based upon the unwritten law of the State, and even though their own opinion might not accord with it.

McKeen v *DeLaney's Lessee*, 5 Cr., 22.
Jackson v. *Chew*, 12 Wheaton, 153.
Henderson v. *Griffin*, 5 Pet,, 151.
Livingston's Lessee v. *Moore*, 7 Pet., 542, 543.
Beauregard v. *New Orleans*, 18 How, 502, 503.

Besides, the city accepted and has ever since used and enjoyed these three pieces of pavement, which amounts to a ratification and adoption of the contractor's acts in the premises.

The merits of the case, as to these three streets, will be best understood by regarding them separately.

The Pavement on Clark Street.

This was laid in 1873 (p. 77) by J. G. McBean, a contractor for the city (p. 214). The contractor says he got his authority to lay it from William H. Stow (p. 214), who *said* he was the patentee's agent (p. 214). He further says that he hasn't paid W. H. Stow, because he wouldn't *bring a receipt from the patentee* (p. 214); that he was "afraid of him" (Id.); that he had doubts as to his agency (Id.); that H. M. Stow, as soon as he was told of W. M. Stow's pretended agency, repudiated it, and "told me distinctly he was not" (p. 215); and, that the royalties are still unpaid. There is no evidence in the case that W. H. Stow was general agent for H. M. Stow, nor that he was a special agent in respect to this piece of pavement, but the contrary.

Several instances of special agency do not prove a general agency.

Angle v. *R. R. Co.*, 9 Iowa, 487.

Special authority to receive payments in each of several cases, is not evidence of general authority.

Smith v. *Kidd*, 68 N. Y., 130, 138.

A person's declaration that he was the agent of another cannot be received as evidence.

Floyd v. *Woods*, 4 Yerg., 165.
Howard v. *Norton*, 65 Barb., 161.
Stringham v. *Ins. Co.*, 4 Abb. (N. Y), App.

His declarations, even when accompanied by acts, are not competent, in favor of third persons, to prove authority as agent, when such authority is questioned by the principal.

Mussey v *Beecher*, 3 Cush., 517.
Brigham v. *Peters*, 1 Gray, 145.

Trustees, etc. v. *Bledsoe*, 5 Ind., 133.
McCarty v. *Strauss*, 21 L. Ann., 592.

It appears by Mr. McBean's testimony (p. 215) that W. H. Stow has sued the contractor in the State courts, for the use of H. M. Stow, for this piece of pavement. There is no evidence that this suit in the State court was brought with the knowledge or consent of H. M. Stow, or that he had anything to do with it. His bringing this suit for infringement in the United States Circuit court, is evidence that he repudiates the suit in the State court as he does the assumed authority of the plaintiff there. He is not to be compromised by such a suit, unless instituted by his direction. In such a suit, off-sets between the defendant and plaintiff therein would be allowable, and he might be seriously injured by being remitted to that remedy ; and, besides, his own denial to McBean of W. H. Stow's authority to make the alleged contract, would be a defense there. He has a right to insist that the matter shall be settled here, in a suit which *he has* brought, rather than in a suit brought by another whose authority he repudiates. Besides, he does not seek his remedy against the person who is defendant there, but against a more responsible party, the city itself, which is now using his invention without authority.

McBean's expressed willingness to pay H. M. Stow, is of no consequence. McBean made that statement (Ans. 566 and 567, p. 214) when on the witness stand. It was was not a legal tender ; the complainant does not recognize McBean's right to have anything to do with the payment ; and, if McBean had any right to tender payment in behalf of the city, a tender, *at that time*, should have included the costs of this suit.

The money has not been paid nor tendered. Authority in W. H. Stow to authorize the laying of the pavement in this street is not only not proved, but is actually disproved, as the evidence stands. It is difficult to see how the city can avoid liability to the patentee under such circumstances.

The Pavement on Market Street.

This was laid in 1871 by James Steele (p. 210). Steele (p. 212) says that he took the contract at "a public letting"; and that, in Chicago, under a "public letting," the contractor is never required to pay the royalty, but the city pays it. He says that the contractor would be the proper party to pay the royalty, *if he agreed to* (Ans. 533), but that in taking this contract there was nothing said between the city and himself about who was to pay the royalty, and that, in arranging with W. H. Stow to lay the pavement, the *contractors* were not to pay the royalty.

By this state of facts, the city was clearly bound to pay for using the invention.

The defendants do not even pretend that the patentee has ever been paid for the use of this piece of pavement.

There is no evidence here that there was ever any license from the patentee to lay this piece of pavement. Steele says he arranged *not with H. M. Stow*, the patentee, but with W. H. Stow. When asked (p. 212, Q. 546) if he knew whether W. H. Stow was the patentee's agent, he said, "No, I am not positive about it. I always "considered him so, and talked to me as the agent." We have already shown that agency can not be proved by that sort of evidence, and we have seen that W. H. Stow

was in the habit of assuming authority as agent where he had none. The facts proved are that this piece of pavement is an infringement; that it was laid by the city's agent; that H. M. Stow is not shown to have authorized its laying; that it has never been paid for, and that the city is still using the patentee's invention without any remuneration to him therefor. This clearly establishes the city's liability for the royalty upon it.

The Pavement on Twenty-third Street.

This was laid by Steele (p. 210). He claims to have paid the royalty on it; but when we examine the evidence (pp. 210, 211), we find that he does not *know* it was paid, but only says *his brother told him so*, which is not evidence; and, secondly, nothing was ever paid to H. M. Stow, but only to W. H. Stow, and W. H. Stow's authority, whether to lay the pavement or to receive pay for it, is not shown. This is not sufficient to clear the city from liability, especially when the only excuses are alleged license and payment, neither of which is pleaded in the answer.

We submit, therefore, that the city is clearly liable for infringing the first claim of Reissue No. 3,274.

But it is insisted, in the defendant's argument, that this patent is invalid because "it does not rise to the dignity "of invention *to change from stone to wood* in a pave- "ment."

No such question is involved in the consideration of the first claim of this patent, which is the claim in litigation, nor could it be raised without setting it up in the answer. This claim is for "a pavement composed of *alternate* "*tiers* of *square-ended* and *wedge-shaped* blocks, the

"wedge-shaped ends of the latter being driven into "a foundation-bed of sand or earth, substantially as and "for the purpose described." The claim is not based upon *material*, but upon a specific construction, which construction is clearly shown in complainant's Exhibit G, and is new. The pavement, Exhibit G, is the one laid on said three streets, Market, Clark, and Twenty-third. (p. 77.)

It is argued by defendant's counsel that the reissue has enlarged the original patent. This defense is not pleaded, and is therefore inadmissible. But this claim *is* for a device clearly shown and described in the original, and is *based upon a drawing exactly like the original*, and is therefore valid.

Herring v. *Nelson*, 12 O. G., 753.

That a patentee has the right to make, in the same patent, several different claims for distinct and separate improvements relating to the same subject-matter, is a point too well settled to need argument here.

That even if the second and third claims of the reissued patent are invalid, the first claim should be held good if new, and the patentee may recover upon such claim, is expressly provided by the statute (section 4,922), and is also too well known in practice here to require argument.

That a patentee has the right to withhold his disclaimer until the question of the validity of his claims has been passed upon by the Supreme Court, is also settled.

Silsbee v. *Foote*, 20 How., 386, 387.
O'Reilly v. *Morse*, 15 How., 121.
Seymour v. *McCormick*, 19 How., 106.
Smith v. *Nichols*, 21 Wall., 117.

PATENT NO. 134,404, EXHIBIT F.

This patent is to have a construction, if possible, that will support its validity, on the rule *ut res magis valeat quam pereat.*

An examination of it discloses that the real invention claimed in it is a pavement having, *in combination, three elements*, viz:

First. An artificial foundation of *sand* built up, on the natural earth of the roadbed, "to a depth of *not less than* "*three inches*," and *rammed while wet*, to a sufficient compactness.

Second. Rows of square-ended blocks set on *this sand foundation*, with a space between each two proximate rows.

Third. A sand or gravel filling in each space aforesaid, *swaged or driven into the sand foundation* beneath.

A combination of any *two* of these elements neither *anticipates* nor *infringes* the patent, because the specification and claim point clearly to the *three* combined elements as constituting the invention.

Imhaeuser v. *Buerk*, 17 O. G., 795, 797.
Parks v. *Booth*, 17 O. G., 1,089.
Bates v. *Coe*, 8 Otto, 31, 48.

The alleged anticipating *patents* are all analyzed in complainant's original brief, pp. 10 to 19, where it is shown that no one of them, prior to the date of Stow's invention, contained all the elements of the claim here in controversy. Even Munday, the defendants' expert, admitted such to be the fact. (Transcript, 205.)

Stow's invention dates back to January or February, 1870. He made a model of it at that time (Transcript,

88.) Robertson (2d, p. 164) saw the model before July, 1870. Fallis (Id. pp. 100, 101) made a cut of it in the summer of 1870. Barnard (Id., pp. 101, 102) printed illustrations of it in said summer. Stow filed his application January 10, 1871, (Id. p. 91.)

At least six of the alleged anticipating patents, to wit: those of Cowing, Prescott, Willett, Phillips, Morong and May, were granted *after the date of Stow's invention.* Defendant's counsel endeavors to extend the effect of these patents back to the alleged date of their respective applications; but a patent, *when used as a defense*, speaks only as a public grant, and, therefore, takes effect only from its date, and the application papers, etc., are not evidence available to the defense for the purpose of proving priority of invention.

Howes v. *McNeal*, 17 O. G., 799, (Blatchford, J.) and see, for same principle, *The Corn Planter case*, 23 Wall., 181.

These six patents, therefore, speak only from their dates, and their dates being all subsequent to the date of Stow's invention, they should be entirely disregarded. It was error in the court below to consider any of them.

An examination of all the patents prior to Stow's *invention*, will show that no one exhibited either a *rammed sand foundation* or a gravel or sand filling *rammed down into a sand foundation.* Their expert, Munday, (p. 205, Ans. 462) admits this fact.

The defendants have taken a great deal of evidence (fully rebutted by the complainant) to show that it is impossible to drive the sand or gravel filling down between the blocks *into* the sand foundation,—in other words, impossible to work the invention according to the directions

contained in the specifications. *The answer, however, raises no such defense*, and without *pleading* this specific defense, the defendant cannot avail himself of it in an infringement suit.

"The proposition that the patent is fatally defective, "because it is impossible to make merchantable goods ac- "cording to the directions contained in the specifications, "cannot be entertained. The answer contains no aver- "ment upon the subject. No such issue was tendered to "the complainants, and they have had no notice that such a "defense was to be relied upon. In equity the proofs "and allegations must correspond. The examination of "the case by the court is confined to the issues made by "the pleadings. Proofs without the requisite allegations "are as unavailing as such allegations would be without "the proofs requisite to support them."

Rubber Co. v. *Goodyear*, 9 Wall., 793.
Harrison v. *Nixon*, 9 Pet., 503.
Foster v. *Goddard*, 1 Black, 518.
Simms v. *Guthrie*, 9 Cr., 25.

For the purposes of this case, it must be assumed, therefore, that the gravel filling *can* be rammed into the sand foundation, and this fact effectually disposes of the defense of non-infringement, since it is admitted by all the witnesses that the city pavements are all laid with the filling heavily rammed. The experimental model, Exhibit M (Rue, p. 119; Stow, p. 127; Hanson, p. 113; Cowles, p. 162), shows that the pavement can be laid as described in the patent.

Thompson's Pavement.

The proofs regarding this old abandoned experiment are fully discussed in complainant's original brief, pp. 19 to 27.

In addition to the remarks there made (pp. 19 to 23) about the alleged Thompson pavement, it may also be noted that both Thompson (Rec., 177) and Watson (*Id.* 150) admit that it was a mere experiment; that Zeep (*Id.* 168, 169) shows that it all rotted out in a short time; that Thompson (p. 177) "was not confident it would stand"; that, although Thompson was superintendent of streets, *the board of public works couldn't be induced to believe Stow's arguments about the stability of such a pavement, until he, Stow, had demonstrated the fact to their satisfaction by an experiment* (McArthur, pp. 104–106; Carter, pp. 108–110); that, after this experiment, they changed their views (*Id.*); and that they have been laying large quantities of this pavement since (p. 77), and stipulate in their contracts (p. 31) that it shall be *thoroughly rammed* in the spaces between the blocks.

These facts demonstrate, first, that Thompson's experiment, if ever made, was fruitless and abandoned; secondly, that the invention was *one which required experiment to demonstrate:* thirdly, that, requiring experiment and test, it was not an obvious expedient nor a mere equivalent of the wedge-pavement of 1867.

The city ought to be estopped to say that it is a mere obvious expedient and an equivalent of the 1867 pavement, after examining several witnesses and an expert, to prove that it can't be done at all!

The two defenses, *that it can't be done*, and *that Thompson did it in 1864*, are so inconsistent as to show

a want of good faith towards the court—an utter absence of sincerity in the defendant's case.

There would have been some plausibility in the defense that it is only an obvious expedient, if the defendants had not succeeded in clearly *proving that it is not*, and thereby greatly strengthened the patent.

The piece of pavement laid by Thompson, in 1870 or 1871 (Thompson doesn't remember which), was laid in the fall of the year, and therefore after the date of Stow's invention. (Thompson, p. 173; Watson, p. 190; McBean, pp. 217, 235.)

It was after the date of Stow's printed cuts, which were evidently made as advertisements, and some of which probably came into the hands of Thompson or the board of public works and stimulated them to try the experiment.

As to the piece of pavement alleged to have been laid by Thompson in 1864, the defendant's evidence is entirely inconclusive, and is completely rebutted. The following schedule of proofs will show how utterly it fails to establish the defense.

SCHEDULE.

Thompson, p. 173: Told men what I wanted and then left.

Mackin, p. 217: Saw it while passing and while sitting on a rail talking to Thompson.

Bristol, p. 232: Didn't see it laid. Afterwards took up some and relaid it. Didn't ram gravel filling.

Burley, p. 238: Didn't see it laid. Afterwards saw blocks taken up.

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Whitney, pp. 85, 86, by what Thompson and Burley *said*. Thompson said it was like Ex. Thompson 4.

H. M. Stow, pp. 89, 90, by Thompson and Burley saying Stow pavement would *sink*.

Pitkin, p. 96–100, by what Thompson said.

Woodman, p. 112, who passed three or four times a day, but didn't see it there.

W. H. Stow, p. 123, who passed frequently and didn't see it there.

W. H. Stow, p. 124: Thompson *didn't remember what it was* himself.

W. H. Stow, p. 124: Dug for it where Thompson indicated, and couldn't find it; found remains of *Nicholson* pavement.

W. H. Stow, p. 126: Thompson said it was like Exhibit Thompson 4.

Smith, p. 165, *who laid it*, with Geggle, and *swears filling was not rammed.*

Geggle, pp. 167, 168, *who laid it*, with Smith, and *swears filling was not rammed.*

Thompson, p. 177: Laid it as an experiment. Never laid any like it before or afterwards.

This evidence clearly does not meet the rule that the defense of prior invention must be made out *beyond a reasonable doubt.*

Coffin v. *Ogden*, 18 Wall., 124.

The Defendant's Brief.

This pamphlet, undoubtedly through inadvertence of counsel, contains so many misstatements of fact, in regard to both of the patents and the defenses to them, that it is almost impossible within the limits of a brief to correct them all.

But it admits (p. 25) that none of the *English* patents show the filling rammed into the foundation. Also (same page) that the *Nicholson* pavement does not anticipate Stow's invention. Also (p. 26) that *Chappell's* is the same as Nicholson's, but describes, as old, a pavement in which a gravel and gas-tar filling was used, though *not rammed into the foundation.* It admits (p. 27) that *Whitehead's* pavement is different from Stow's, and (same page) it does not undertake to argue that *Miller's* pavement is like Stow's. It does undertake to argue that the *Van Camp & Hodgman* pavement is like Stow's, whereas a mere glance at said pavement shows that it is utterly unlike it, containing blocks seated in *a concrete bed*, and separated by a *concrete filling.* The form of the spaces between the blocks is peculiar, and is utterly unadapted to the ramming of dry gravel into the foundation. There is no gravel filling, and no rammed sand foundation.

All the other patents which the defendant's brief discusses are later in date than Stow's invention, and therefore need no comment. See, however, remarks upon them in complainant's original brief.

When it comes to the discussion of the Thompson experiment, it makes the grossest misstatements of fact. For example, on page 39 it says, that Smith and Geggle both swear that, in that experiment the spaces between

the blocks were "filled with gravel and *rammed*," whereas *both witnesses swear positively that there was no gravel rammed in said spaces*, and it is upon their testimony that we rely as conclusive evidence of that fact.

"Did you use any tamping iron or swedge between "the blocks?

"A. *No.*"

Smith, p. 165.

"Was any tamping iron or swedge used in driving "down between the blocks?

"A. *No; just a shovel, and with a broom swept it "over.*"

Geggle, p. 167.

"Did you use rammers of any kind on that pave-"ment?

"A. Used a *pounder* to *level it off.*

"Q. Was that on the blocks or on the filling?

"A. On the blocks and filling altogether.

"Q. That is, the ramming was done after the work "was put in?

"A. Yes; *the rammer was a foot square.*

"Q. Was it after the sand was put into the cracks?

"A. Yes.

"Q. Please describe how the rammer was made?

"A. A foot square and six inches deep.

"Q. Was there a handle to it?

"A. Yes, a handle to it."

The brief then (page 39) goes on to say that Zeep, in 1867 or 1868, found the pavement constructed just as the witnesses, including Smith and Geggle, had testified; but the fact is that Zeep doesn't say a word about finding the gravel *rammed* or *the filling extending below the blocks.*

All he swears is that the blocks were rotten and worthless.

The brief then (pp. 39, 40,) goes on to say that Watson found some of these blocks and took them up and carried them to the board of public works, in 1872; *but it carefully ignores the further statement of Watson* (p. 170,) *that the blocks looked "as though they had been packed "right tight together,"* and that Thompson then and there made the remark that "*they were packed in together,*" and in a subsequent answer, (same page,) that *Thompson "made the remark that they were just packed right "together, one against the other.*" The brief also studi- "ously ignores Watson's statement, (bottom of p. 170,) that "where the gravel was *rammed* down" "it would leave "an indenture on the sides of the blocks," but "*these "blocks showed nothing of that kind.*"

The brief also states that the date of the filing of Stow's application for his 1872 patent is not in evidence; but it will be found proved at the top of page 91 of the transcript.

For want of time and space, other gross departures from the evidence are necessarily omitted from comment.

The Opinion of the Court Below.

First, as to the 1867 patent and its reissue. The court holds that the streets having this pavement were laid under licenses or had been paid for. This holding, as already shown, was outside of the pleadings, and therefore erroneous, and besides, was not fairly supported by the evidence. It holds, secondly, tnat the patent was anticipated "*in part*" by Stead. This, however, is not a good defense. If not anticipated *in whole*, it is not met at all. If Judge Blodgett means that the third claim is anticipated by Stead, that fact does not invalidate the first claim, which is not anticipated by Stead, and which is clearly infringed by the city.

Secondly, as to the 1872 patent, No. 134,404. The court below states this invention accurately (transcript, middle of p. 244), but, as we respectfully submit, falls into gross errors in considering the state of the art and the law.

1st. The court errs in considering its relation to the Nicholson patent, (pp. 244, 245). In the first place, the Nicholson pavement had a board foundation *into which sand or gravel could not be driven*, which boards were liable, in time, to work the blocks loose ; and had boards in the lower half of the spaces so that the gravel above the boards in said spaces could not by any possibility be *rammed into the foundation.* The omission of these boards beneath and between the blocks, and the substitution of the rammed sand foundation and rammed gravel filling, therefore, produced a new combination and new results, and made the Stow pavement a new invention. Judge Blodgett thinks "that it does not rise to the dignity of an invention," but it is in evidence (bottom of p. 111) that the city was very

anxious to avoid payment of royalties to the owners of the Nicholson pavement, and to get the cheapest pavement possible; yet until Stow demonstrated the practicability of laying their pavements in this way, the city authorities did not believe it could be successfully done. Stow's change made a *different* structure from the Nicholson, a *cheaper* structure, and a structure which required experiment and test to demonstrate. The law calls this an *invention*, whatever may be its "dignity." Even the defendant's brief, (pp. 25, 26) referring to the Nicholson patent, says, "*It is not contended that the pavement described by Stow, if new at this date, is anticipated by it.*" Since Stow demonstrated its practicability and cheapness, the city has extensively used it. It uses it now in preference to the Nicholson, although the latter has become public property. (Transcript, p. 151.)

2d. The court errs in saying (p. 246) that the only difference between the Stow pavement and the pavement described in Chappell's patent is, that Stow rams his filling "*harder* down into the sub-grade." In the Chappell patent there is no description or hint of ramming it down at all—it is simply to be "placed" in the openings between the blocks! It did not go into the foundation, nor compact the earth beneath. The difference, therefore, is not one merely of degree, but of principle.

3d. The court errs in considering the Cowing patent as though it had been granted in 1865, whereas it was not granted till 1870, after the date of Stow's invention, and, as a defense, it speaks only from the date of the grant.

4th. The court further errs in considering that, in the Cowing patent, the filling could be rammed below the blocks. It could not. *The blocks come together at their*

lower edge, and nothing could be rammed below the line of their contact with each other.

5th. The court errs in considering the Van Camp & Hodgman invention like Stow's. It is not. It is far more expensive and difficult to lay. It has no rammed sand foundation and no rammed gravel filling, but merely a bed and filling of soft concrete which had to be laid hot. Its blocks would unquestionably rot out sooner than blocks laid upon sand.

6th. The court errs in considering the Prescott patent an anticipation. It was later than Stow's invention. It did not have a sand or gravel filling rammed into the sand foundation, but had a soft concrete filling which was *poured into* the opening and into a crease in the sand below, and then *dried and set* so as to make a solid water-tight wedge in the sand, something like Stow's 1867 patent.

7th. The court errs in considering the Thompson pavement an anticipation. It had no rammed filling, and was, besides, a mere abandoned experiment.

8th. The court errs in holding that the pavements claimed in Stow's patents are not *inventions*. No such defense is set up in the pleading. On the contrary, the answer was drawn upon the theory that they were inventions if novel, but in fact were anticipated by prior patents. We have, as we believe, shown conclusively that no prior patent or invention contained all the elements of the first claim of the reissue, nor all the elements of the claim of the 1872 patent.

For these errors, we submit that the decree ought to be reversed and the case remanded, as to both patents.

L. HILL,
Of Counsel for Complainant.

F. W. BECKER,
Solicitor for Complainant.

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Supreme Court of the U. S.

No. 329.

HENRY M. STOW,
APPELLANT,

vs.

THE CITY OF CHICAGO.
APPELLEE.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Brief for Appellee.

LESTER L. BOND, OF COUNSEL.

E. B. STILLMAN, PRINTER, 166 WASHINGTON ST., CHICAGO.

1880.

Supreme Court United States.

HENRY M. STOW,
APPELLANT,

vs.

THE CITY OF CHICAGO.
APPELLEE.

BRIEF FOR APPELLEE.

THIS suit was brought in equity for the alleged infringement of four patents; and the defense to each patent being separate, they will be severally considered, as though each patent was the sole matter in controversy.

REISSUE 3,274.—Exhibit C.

This patent is a reissue of the original patent No. 72,110, dated December 10, 1867, Complainant's Exhibit A, and in reference to it the Court below found as follows, p. 241:

"The patent issued December 10th, 1867, and reissued January 19th, 1869, is for a pavement composed of alternate tiers of square ended and wedge-shaped blocks, the latter, that is the wedges, being driven down into the foundation bed of sand or earth; also a pavement composed of blocks, with the

lower ends all wedge-shaped, and all driven or rammed down into a foundation of stone or earth.

From the proofs in this case it appears that the complainant has been paid for all the pavement in which this device has been used, except a block on Market st. between Randolph and Lake, and the intersection of Lake & State sts., which were laid as samples, under the direction of complainant and his brother, W. H. Stow. There were some of these pavements put down on Clark street, but Mr. McBean testifies that he did this under a license from the complainant, and the defendant was not to be liable therefor. He states that he has not yet paid Stow, but that does not make the city liable. It, therefore, seems hardly necessary to consider this patent, but if deemed material to do so, I would be of the opinion that this patent was anticipated in part, by an English patent issued to Stead in 1839. In 1839, David Stead received a patent in England, which is a matter of public record in that country, and also in this country, by patent, and by publication, for a wooden pavement made of octagonal blocks set together, and as the blocks go together, they leave a square opening through which he drove a pile or wedge down into the earth or gravel, for the purpose, as he says, of laying his pavement firmly upon the earth in newly made embankments. The reason which the patentee gives for the operation or use of his device, is not conclusive. A man may, in other words, invent an improvement producing results beyond what he knows or dreams of, and a better reason may be given by a skilled person than the one assigned for the use of the device which is used or adopted. So, in this case, these wedges could be driven just the same under the Stead patent and the Stead device, as they could be under the Stow device, although Stead does not allude to the driving of the wedge for the purpose of compacting the earth, yet it produces that result. His failure to state that as one of the reasons or results, does not necessarily change the fact, that there is no longer anything novel in the Stow device, from the fact that Stead anticipated him by a great many years."

It is hardly necessary to consider this patent, as the Defendant has produced receipts for all of the pavements laid which are named by Complainant, or which in any way resemble that shown, except one crossing laid by the Complainant, and one block—Market street—which were both laid as samples, and were not to be paid for.

This is the pavement known as the "Stow Foundation Pavement," and as the Complainant seems to claim almost any kind of a pavement laid on sand, earth or gravel, this class of foundations will be considered, in reference to this feature, with the other patents.

The claims of this patent are as follows:

"1. A pavement composed of alternate tiers of square-"ended and wedge-shaped blocks, the wedge-shaped ends of the "latter being driven into a foundation bed of sand or earth, sub-"stantially as and for the purpose described."

"2. A pavement, composed of blocks, with lower ends "wedge-formed, and all driven down into a foundation bed of "sand or earth, substantially as shown and described."

"3. A pavement composed of wood, or in whole or in part "of other suitable material, laid on a foundation bed of sand or "loose earth, as described, and a portion of the blocks driven "down into said foundation bed, to pack the same, substantially "as and for the purpose specified.

The first and third claims are in terms met in the English Patent of David Stead of 1839, and the third is identically met by Stead. Stow in his specification, says: "The nature of my "invention consists in putting down a pavement of wood, or "other suitable material, upon a foundation bed of sand or loose "earth, and packing the sand or earth by means of wedge

"blocks driven down into the same, and forming a part or the "whole of the pavement." This is his entire statement of invention.

In various parts of his patent he specifies as follows: "the "said blocks, No. 2, may be made some two or three inches "longer than the blocks, No. 1, and driven down until their "upper ends are only half or three-fourths of an inch, or there- "abouts, below the upper ends of blocks No. 1, *leaving shallow "grooves merely to give a foot hold for horses.*" "When the "foundation-bed is composed of sand, or loose sandy earth, it "will not be absolutely necessary to bevel the lower ends of "the blocks No. 2, as even square-ended blocks will operate as "wedges."

"Nor is it absolutely necessary that the blocks, when of "wood, be sawed or dressed into regular forms, and set in reg- "ular tiers, as a very good cheap pavement, *involving the prin- "ciple of my invention*, may be made of blocks of split wood of "irregular form, set on their ends, *and a proper proportion of "them, at regular intervals*, (as near as may be) *driven down "into the foundation-bed*, so as to produce the requisite packing "of the same. Said blocks No. 1 may be of dressed stone or of "a concrete composition moulded into the form of blocks, * "* * and the blocks No. 2 may be of dressed stone brick "or wood, or of any suitable material that will bear driving "down into the foundation bed."

We therefore find from the specification that the material of which the pavement is to be composed, is unimportant; that no part of the blocks are necessarily wedge-shaped; that they need not be laid in tiers; that the blocks may be octagonal or of any form—regular or irregular—and that concrete or gravel between the rows is no necessary part of the pavement, as the





I should recommend the before-mentioned cavities either to be

packing blocks may be made longer than the main blocks, and be driven only far enough below to furnish a foothold, leaving the surface composed entirely of the same material.

From this it follows that the first claim and the specification do not agree, for if the pavement is laid *as described*, the rows (tiers) need not be rows at all, and need not be composed of square ended and wedge-shaped blocks, as they may all be square-ended. The specification is drawn to meet the third claim, and the "as described" of the first claim makes it the same as the third, but even in its restricted form it is met by the English Patent of 1839, to David Stead.

Stead's Figures 18 and 19, show a pavement composed of alternate rows (tiers) of square-ended and wedge-shaped blocks the wedge-shaped ends of the latter being driven into a foundation-bed of earth. (See said figures put into perspective, and inserted here in first sheet of drawings.)

Stead's statement and description are as follows:

"Figures 18 and 19 is a plan and side view of a portion of a "roadway formed by a series of octangular blocks L, L, placed "with the fibre vertical, so as to leave a square recess or inter-"val between them, into which may be inserted a corresponding "piece *m*. *When this kind of paving is laid upon a road formed* "*upon a newly-made embankment or shrinking-base, I should rec-*"*ommend a pile to be driven into the earth through the square* "*recess or interval* of about the size and form represented by the "dotted lines, Fig. 19, in order to support and keep the blocks "firm in their position."

"When the octangular block-paving is used for acclivities, "I should recommend the before-mentioned cavities either to be

really contrary to it, as will appear from the following quotation from the specification.

"The nature of my invention consists in putting down a "pavement of wood, or other suitable material, upon a founda- "tion bed of *sand* or *loose* earth, and *packing the sand or earth* "*by means of wedge blocks driven down into the same.*"

"In constructing the street pavement, the street is first filled "with clear sand, loam, or *loose* earth, free from stones * * "*and smoothed off* so as to conform to the desired arch or crown "of the street."

"*The driving down of the wedge shaped blocks*, as described, "*packs the sand or earth* so compactly that the most heavily- "laden wagons passing over the pavements will never occasion "any unevenness in the surface thereof. The *sand* or *earth* "forming the foundation-bed *should be thoroughly wet* when "the blocks are put down."

The third claim is for a pavement which is to be "laid on a foundation of sand or *loose* earth."

These are all the unconditional statements concerning the foundation, and instead of finding that the foundation is to be rammed, we find the only conditions to be, that it should be "loose," and "thoroughly wet." A thorough wetting would unpack previously rammed sand, and ramming "thoroughly wet" earth would so compact it that it could not be loose. Besides we find a positive way of compacting the foundation, stated in the patent, to-wit: "packing the sand, or earth, by means of wedge blocks driven down into the same."

The ramming of the foundation is an after consideration, not thought of at the date of this "Stow Foundation" patent, for the foundation (with the exception of the "wetting," which

is never used,) is the identical cobble-stone foundation, from which Stow "got his first idea" and which he never changed, and is also a David Stead foundation.

Wood in his English patent of 1841, says that his pavement will be firm and solid "even when put down on a foundation of " mere *shingle, gravel or sand;*" and in reference to his first modification, Fig, H, says it "has the two-fold advantage of afford- " ing a secure foothold to horses, and of throwing the weight " and pressure of the traffic on some blocks which (being the " sections of pyramids with the bases upwards,) when *pressed* " *or driven, tend to consolidate the road.* This is effected by " making those blocks *taller than the rest*, say half an inch " *more or less.*"

These blocks are either in rows or checks; both forms being shown in the patent and the longer or taller blocks to be driven at all must be driven *into* the foundation of gravel or sand, so that we again have the Stow foundation with pyramidal blocks driven into it.

INFRINGEMENT.

So far as this patent, Reissue 3,274, is concerned, the question of infringement hardly needs discussion for the reasons: 1st, that the patent is fully anticipated in the art, and 2d, that if valid, all of the streets named as having infringement pavements, have been paid for, as shown by the receipts exhibited, and those short sections not paid for, were laid as experiments for which pay was neither expected or demanded.

The finding of the Court below upon the payments and experiments is upon the following evidence:

The streets named as infringing this patent, by W. H. Stow, p 77, Appellant's sole witness on this point, are:

Market: between Randolph and Lake.

West Randolph: Halsted to Union Park.

West Washington: Ashland avenue to Leavitt.

Warren: Ashland avenue to Leavitt.

Clark: Madison to Monroe.

Twenty-Third: State to Wabash Ave., and a sample at the intersection of Lake and State.

Of these streets, Defendant's "Exhibit 28, Five Receipts," p. 73, 4 and 5, shows the payment for West Randolph and Warreu Ave., and Defendant's Exhibit 29, shows a receipt for West Washington street. A. J. McBean, pp. 213-16.

James Steele, p. 210, testifies that he paid Stow for the block on 23d street, and on pp. 210 and 211 that no royalty was to be paid on Market street.

J. G. McBean testifies, p. 214, that he laid the block on Clark street under a contract with Stow; that he tendered payment or offered to pay at any time a receipt would be given from H. M. Stow; and on page 215, that he has been sued on that contract by W. H. Stow for the use of H. M. Stow. McBean exhibits his contract as exhibit "James McBean 1." This pavement having been laid under a license, it is wholly immaterial so far as the City is concerned, whether the license fee has been paid or not. We have shown on the part of the city, payment or license for every foot of this pavement laid in this city, except the intersection of State and Lake streets, which was laid as a sample and superintended by H. M. Stow himself.

This testimony is partly confirmed by Appellant, pp. 91-2,

and there is no attempt to rebut any part of it. It stands clear and nncontradicted, This patent should never have been included in the Bill of Complaint.

The only question that can be passed upon by the Court, is the naked question of the validity of the patent, and on this it is insisted that the patent is invalid and void, it being clearly anticipated in the art.

NOTE.—Defendant's Exhibit 29, McBean's Receipt p. 216; Exhibit 30, Nicolson's Reissue Patent, p. 217; Exhibit 1 to McBean's deposition, p. 215; Exhibit Smith No. 2, pp. 166, 168, 238 are in some way omitted from the record. 29 and 1 McBean are not important, as they are fully explained, but the others are, and Exhibit 2 Smith is restored on the drawings hereto attached,

That it does not rise to to the dignity of invention to change from stone to wood in a pavement, see

MacNamara vs. Hulse, et al, 9 Carrington & Payne, 258;
1 Carrington & M., 471.

See also, on material, and on the older art:

Hotchkiss vs. Greenwood, 11 How., 266.
Hicks vs. Kelsey, 18 Wall., 637.
Tucker vs. Spalding, 13 Wall., 453.
Dalton vs. Jennings, 3 Otto, 271.
Roberts vs. Ryer, 1 Otto, 159.

PATENT NO. 74,862.—Exhibit B.

In reference to this patent the court below p. 242, fonnd as follows:

"The second patent is for a pavement composed of tiers, or rows of wedge-shaped wood blocks driven into a foundation of sand or earth, as there shown. It is claimed that by such means the earth would be compacted. The spaces between the rows are then filled in with gravel.

It is sufficient in regard to this patent to say, that there is no proof that the city has ever used it; but if it had been used, it may well be doubted whether the patent can be sustained, as his wedged blocks do not, it seems to me, differ in principle form the old cobble stone pavement, made of cobble stones with their sharp or pointed ends, or smaller ends, set downwards, and the whole rammed or driven into the sand or gravel on which it was laid. We all know, of our own knowledge, that is, every person who has seen a cobble stone pavement, knows that the process of making it was to set the cobble stones with their small end downward npon the ballast or gravel, to fill the spaces between them, and then ram the whole structure down solid. Now here is simply this difference: A man, instead of using the sharp ends of the cobble stones, sharpens wooden blocks and sets them together, and drives them down so as to make a solid foundation. It being conceded that the cobble stone pavements are so laid, and that the substitution of a new material is not patentable. This patent is also obviously anticipated in the second form of the original patent of Dec. 10, 1867. Mr. Stow states that he claims a wooden pavement composed of blocks with the lower ends wedge formed, and all driven down into a foundation bed of sand or earth. Now here in 1867, the year before this patent, in his first patent, where he claims the alternate wedge shape and

square ended blocks, he also described and claims a series of wedged shaped blocks, all driven down into the sand or gravel; so it seems to me that he has here, by the second patent, attempted to prolong the life of his first patent, or first device, by taking a patent afterwards upon the wedged shaped blocks, shown and claimed with the wedge shape and alternate square ended blocks.

The blocks of this patent are the same in form as those shown in the lower figure of Complainant's Exhibit C, reissue No. 3,274, the only difference being, that the blocks are spread, and the spaces between them filled with gravel. The claim is:

"A pavement composed of tiers of wedge-shaped wooden "blocks, driven into a foundation bed of sand or earth, with "spaces between said tiers packed with gravel, or sand and "gravel, substantially as shown and described."

It is difficult to understand why this patent was included in the complaint, as there is no proof of its ever having been used, either by the city or its contractors, and there is no pretense that there is a foot of pavement, of the kind shown and described, laid in the City of Chicago, or anywhere else; except an experimental section of about twenty feet in San Francisco. It is therefore hardly necessary to consider it, and it will be dismissed by calling attention to the fact that the blocks are the identical blocks of the older patent, and that the only difference between this and the older patents, is in the gravel spaces. Gravel spaces are old in the same kinds of pavements, and are shown in the upper figure of the reissue 3,274, it is therefore insisted that it did not amount to an invention to spread the blocks of the older patent so as to form old spaces, and fill them in the old way, and that the finding of the court below in this respect, is correct.

The foundation of this pavement is the same as the other, the "thorough saturation" by water is retained, but there is nothing said about ramming it. The patentee is still using the old cobble-stone foundation, with only the addition of water.

It is believed that this pavement would be utterly worthless made as patented, for the reason that the wedge blocks have all of their incline on one side, or in one direction, and are so laid that each row not only has a tendency to incline from the vertical line, but to crowd its neighboring rows over, and thus destroy the whole pavement in a short time.

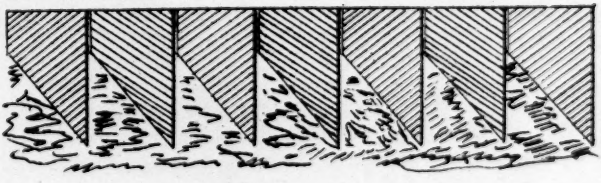
It does not appear that enough has ever been laid to test its practicability.

That gravel space filling from top to bottom, is old, see Austin of 1843.

Stow Feb. 25, 1868.



Stow Dec. 10, 1867. Model B.



DeGolyer April 6. 1869.

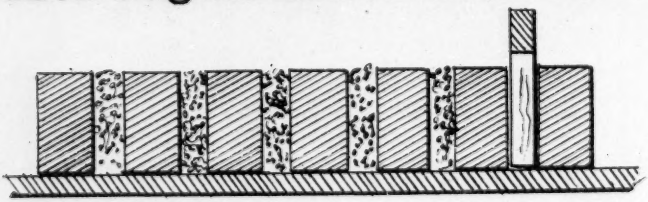


Thompson's Pavement 1864.

From G. F. Smith's Exhibit 2.



McDougall March 24, 1868.



PATENT NO. 88,365—Exhibit D.

In reference to this patent the Court below found as follows:

"The DeGolyer patent (the 3d) is one for a method of spacing distances between the blocks, by the use of a removable strip or board of the thickness of the required spaces. That is to say, the way in which the blocks were set up against each other, and a board set between them while they were being set, and after they were set, the board was removed so as to leave a space the required distance between the rows or tiers of blocks.

This is fairly antiaipated, in my estimation, by the patent of McDougal, where he had a spacing apparatus like this, that set between the blocks, and was removable. But, in point of fact, as the evidence shows in this case, the skillful workmen who lay these wooden pavements, no longer depend upon the spacing apparatus at all, but use their fingers and their eyes; and they become so expert that they can readily make the spaces of an uniform width by the application of their fingers as they lay their blocks, as well as by a spacing board, or any other device of that kind. * * There is also no evidence in the record, that I can find, and I have looked carefully through it, of any use, by the city, of this special device. I find no proof that the city has ever adopted this removable spacing board, as a matter of practice. But even if they had, such a mere mechanical device, such as is used by joiners in fitting floors together, or in fitting lattice work, or pickets on a picket fence, or any other place where uniform spacing is required, would seem to anticipate this device. In setting an ordinary picket fence, the joiner who sets the picket, uses another picket or spacing board for the purpose of securing uniformity in the spacings."

There are three defenses to this patent: First, that it is

fully anticipated in the Art; Second, that Complainant has no title which authorizes him to bring suit in his own name; and, Third, that the city has not used it.

I.

This patent has no reference to a completed pavement, it being simply for a device to be used in the process of laying pavements. The claim is as follows:

"The method herein described of constructing a wooden "pavement, consisting of wooden blocks set in row, with spaces "or channels between, filled with gravel, broken stone or other "suitable material, and tar, which method consists in the "use of an auxilliary removable strip or board, to determine the "parallelism of the rows, and the width of the channels, *but* "*forming no part of the completed pavement*, substantially as "herein described."

The specification shows, and its disclaimer admits that the completed pavement is the Austin English pavement. The only novelty described, and in fact claimed, is the use of the removable guide for keeping the blocks in rows, and determining the width of the channels, which last feature, of course, depends upon the thickness of the guide, so that, when stripped of all its verbiage, the method claimed is the use of a guide for laying the blocks in rows.

This De Golyer patent is fully and completely anticipated by the patent to McDougal, Stewart & McDougal, dated Mch. 24, 1868, Defendants' Exhibit 5. The record shows that the application was filed September 27, 1867, thus showing it to be

something over a year and a half older than the Appellant's patent. The process of laying pavement is identical with that shown and described in the De Golyer patent, the only difference being that the "guide" of Exhibit 5, is slotted, while in De Golyer it is solid or close, but the use or non-use of the slots is optional as a guide. The McDougal is the same device.

The nature of the invention is stated in the specification of this Exhibit 5, after describing the difficulty of laying blocks and filling the spaces between them, where the channels go to the foundation, as follows:

"My invention consists in remedying this difficulty by using "a slotted *guide*, having a sufficient number of openings to ad- "mit of partially filling the channels before the guide by which "the *blocks are laid in rows* across the street, is withdrawn, so "that when the *guide* is withdrawn, the filling of the channels "with concrete can be completed, or rammed down, without "displacing the blocks, and without securing the blocks to the "foundation; and in the construction of a slotted guide to facil- "itate the laying of pavements when the cells or channels ex- "tend to the foundation."

McDougal's patent, as it stands, claims the guide, and has no claim for a process, but a simple inspection of the drawing, even without the complete description of the process found in the specification, shows that the identical claim made by De-Golyer, is as applicable to this patent as it is to the De Golyer patent. It contains and describes the same invention.

We therefore contend that this patent, No. 88,365, is as fully anticipated in the art as it is possible for one patent to anticipate another, and its consideration, therefore, might properly be dismissed, without considering the second proposition.

II.—Title.

The objections to the Appellant's title, are: First, that it rests simply on an agreement to convey, at some future time, the exclusive right to use the invention in laying *only one kind of pavement*, to wit: pavements *without a board or plank foundation.*

Considering the agreement as an equitable, or a sufficient title to all that it purports upon its face to grant, we then find: Second, that it amounts only to a license granting to the Appellant the exclusive right, *not for any territory*, but only for *one kind of pavement*, to wit: *a pavement laid directly upon earth or sand;* and that it is not therefore such a title as will enable the Appellant to maintain an action in his own name.

The law on this subject is settled, as will be seen from the following citation:

"By the fourteenth section, the patentee may assign his "exclusive right within and throughout a specified part of the "United States, and upon such an assignment, the assignee may "sue in his own name for an infringement of his rights. But in "order to enable him to sue, the assignment must undoubtedly "convey to him *the entire and unqualified monopoly which the "patentee held in the territory specified—excluding the patentee, "himself, as well as others.* And *any assignment short of this is "a mere license.* For it was obviously not the intention of the "Legislature to permit several monopolies to be made out of "one, and divided among different persons *within the same limits.* Such a division would inevitably lead to fraudulent imposition upon persons who desired to purchase the use of the "improvement, and would subject a party who, under a mistake "as to his rights, used the invention without authority, to be "harassed by a multiplicity of suits, instead of one, and to successive recoveries of damages by different persons holding dif-

"ferent portions of the patent right in the same place. Unques-
"tionably, a contract for the purchase of any portion of the
"patent right may be good as between the parties *as a license*,
"and enforced as such in the courts of justice. But the legal
"right in the monopoly remains in the patentee, and *he alone*
"*can maintain an action* against a third party who commits an
"infringement upon it. This is the view taken of the subject in
"the case of *Blanchard vs. Eldridge*, J. W. Wallace, 337, and
"we think it the true one."

Gayler, et al, vs. Wilder, 10 How., p. 494.

From this citation it will be seen that Stow cannot, in his own name, maintain an action upon this DeGolyer patent, under the title exhibited by him.

III.—INFRINGEMENT.

We do not yet understand why this patent was included in the bill of complaint, as there is not a word of testimony even tending to show that it was ever used in or by the city.

PATENT NO. 134,404. Exhibit F.

In the opinion of the Court, p. 243, 3d line of 2d paragraph, the word " this " should read " his first," the complete sentence reading, as corrected, as follows: " The device covered by *his first* patent, is described," &c. The quotations are from the reissue of his first patent.

The Court below found this patent (134,404) to be in fact for a Nicolson pavement with the foundation planks omitted; also, to be the 1867 pavement as described in his reissue 3,274, " Exhibit C," with the wedge of a different material, or under the liberal terms used in reference to material in the reissue, it was found to be the same, as the reissue covers anything that will drive, and the wedge of this patent being converted into concrete after it was inserted that it was in fact the same wedge as that of the older patent. Also, that it was anticipated by the Prescott Patent, No. 116,217, of June 20, 1871, Defendant's Exhibit 13. Also, by the Thompson pavement, which has been in constant use by the city since commencing in 1864. Also, by the Cowing Patent, Defendant's Exhibit 10. Also, by Van Camp and Hodgman, Defendant's Exhibit 9; and that in view of the older art and Appellant's older patents, this patent (134,404) did not disclose a patentable subject matter.

This is, in fact, the only patent in real contest, as we have already shown that the City has paid for every foot of pavement upon which any claim has ever been made, that was laid under the patent of 1867, Reissue 3,274; that none was ever laid or pretended to have been laid like that shown in the patent of 1868, No. 74,862; that the De Golyer patent 88,765, is fully anticipated; that even if it was not, the Appellant has not a suffi-

cient title to maintain an action, and that there is no proof of infringement.

The claim of this patent is as follows: "A pavement com- "posed of blocks laid in rows directly upon the sand founda- "tion with spaces between the rows filled with sand or gravel, "which is swaged or driven *into said foundation*, substantially "as and for the purpose specified."

The drawing shows a pavement constructed with ordinary blocks, with ordinary spaces between the rows filled with gravel in the ordinary manner, and rammed, in the proportion shown, slightly over an inch into the foundation.

The claim *of the patent* is decidedly more modest than the claim of Stow *under the patent*, as the claim is limited to driving gravel into the foundation sufficiently to compress it, while Mr. Stow claims under the patent to hold everything in the shape of pavements laid directly upon a sand or earth foundation, irrespective of the extent of filling or process of laying.

The specification mentions the following points in the process of laying, which are to be considered in the "substantially as and for the purpose specified." The street is first graded; then covered with sand or loam; then wet and packed with a maul or rammer, uutil the whole is of sufficient compactness; then strike the surface; then lay the blocks transversly across the street—"placing between the rows a removable strip of "wood, B, of sufficient thickness to form the necessary spaces "between the blocks," then remove the strips B; then partially fill the spaces with sand or gravel; then drive the gravel or sand in the spaces into the sand foundation by means of a *swage* and *maul*, or other suitable instrument; then complete the filling of

spaces with gravel or sand and coal-tar or other cement; then go over the whole with smoothing iron to finish the surface.

Attention is called to the points named for the reason that it will be observed that the claim goes to the laying of the blocks in rows directly upon the sand foundation, with the spaces filled as specified; or, in other words, that the process ot making is included in the claim.

Attention is also called to the fact that the use of the De Golyer guide strip is a part of the process. Complainant's patent was issued December 31st, 1872, and he attempts to carry the invention back of the patent; but does not carry it back to the date of his contract with De Golyer, which is dated March 30, 1869, in and by which contract *he accepts from De Golyer, a license to lay pavements directly upon a sand or earth foundation, by the use of the same guide strip, covering the entire ground of the patent*, 134,404, with the exception of ramming the filling below the bottom of the blocks. Attention is also called to the fact that in ramming the filling below the blocks, tha Complainant specifies that the channel shall be first partly filled—a statement which will be found important in view of the testimony hereinafter cited.

Attention is also called to the fact that Stow directs the use of a *swage and maul* in compacting his filling, for the reason that Complainant in his proofs insists that this can be done by the use of a tamping blade, which his witnesses state to be ten times more powerful than the swage and maul mentioned in the patent.

STATE OF THE ART.

A portion of the art has been exhibited to meet Stow's claim, rather than the claim of this patent, as he has undertaken to claim and cover by his patent all manner of pavements laid directly upon an earth or sand foundation.

As the foundation is one of the main elements claimed, it will be to a certain extent separately considered. It will be observed that in canvassing the art, as exhibited, that the principal portion of the various forms of pavements covered by Stead's English Patent of 1839, are laid directly upon an earth or sand foundation; and it will be remembered that in Elizabeth vs. Pavement Co., 7 Otto., 131, the Nicholson patent escaped the Stead from the fact that Stead laid his blocks directly upon the earth, instead of upon a plank or prepared foundation.

Of the various forms shown in the Stead patent, attention is called to Figures 16 and 20. The pavement shown in Fig. 16, is made of cylindrical blocks laid directly upon an earth foundation, with the spaces between said blocks filled with concrete the entire length of the block, or down to the earth foundation. Fig. 20 shows a pavement made of hexagonal blocks or hexagonal blocks on ends, with boards on edge between them, (both forms being shown) leaving triangular spaces the entire length of the blocks, which are filled with concrete down to the earth foundation. We therefore have, in the oldest patent in the art, three forms of pavements composed of blocks laid in rows directly upon a sand or earth foundation with the spaces between the blocks filled with gravel or sand, and either coal-tar or natural asphalt for cement. Stead does not describe any ramming process.

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For the antiquity of sand foundations see: Stead vs. Williams, 7 Manning and Granger, 818.

The differences between the two pavements are only these, that while Stead's blocks are laid in rows across the street, his channels are not, and his filling is not rammed below the blocks, so far as appears from anything in the patent.

Wood's English Patent of 1840, Defendant's Exhibit 3 shows a wooden pavement made in rows, extending across the street, and resting upon what he terms a foundation of "shingle," (beach gravel) "gravel or sand," and for one form of his pavement he specifies long and short blocks, with the spaces over the short blocks, and between the long ones filled with broken stone or concrete.

Austin's English patent of 1843, Defendant's Exhibit 3, describes a pavement laid upon a board foundation, made in sections, upon which rests the identical superstructure shown in Complainant's, 1872 patent; that is to say it has the same blocks laid in rows across the street, alternating with channels running clear across the street, and such channels filled to the bottom of the blocks in the manner specified by Stow, with the exception of ramming below the bottom of the blocks, it is the identical pavement shown in the De Golyer patent. The only difference between Austin and DeGolyer is in the process of manufacture or method of laying it on the street.

The English Patent of Lillie, Defendant's Exhibit 4, describes a pavement made of blocks of various material.

This pavement is composed of alternate rows of blocks of wood and of concrete, or of wood and stone laid directly upon an earth foundation, so that we have here a pavement composed of blocks laid in rows directly upon a sand or

earth foundation, with the spaces between the rows filled with concrete, and in a form which can be driven below the wooden blocks much better than Stow's, although no mention is made by him of forcing the concrete below the wood. He specifies that when his concrete, or as he calls it "small stones cemented together," is formed into blocks, as it may be, they are to be so made as to be capable of use on four sides, and laid in rows alternating with rows of wooden blocks. He then says: "This com- " bination of wood and stone may be carried into effect on roads " or streets *without rendering it necessary to have the above mate-* " *rial cast into blocks.*" When his concrete is not cast into blocks, but is poured or driven into the spaces between the rows of wooden blocks, we have the identical Stow pavement, with the exception of the ramming of the concrete, or filling, into the foundation below the blocks. Appellant's expert did not find the pavement of the 1872 patent described in Lillie's specification, for the reason that he found the concrete cast into blocks; he evidently overlooked the statement that this conerete could be used for filling the spaces between the wooden blocks. without being cast into form.

This completes the showing of the English art, and we find by this showing that the claim is anticipated in its exact form, with the exception of driving the filling into the foundation; and that sand, gravel, and earth foundations are as old as the art, and older than plank or continuous foundations, such as are used by Nicolson.

The art as exhibited from U. S. Patents is first shown in the Nicolson, Defendant's Exhibit 30, which had a board or continuous foundation, practically water proof. This patent is so well understood that it need not be especially considered, and it is not

contended that the pavement described by Siow, if new at his date, is anticipated by it.

The next patent in order, is Chappell's patent of 1864, Defendant's Exhibit 6. The pavement described in this patent is mainly a Nicolson pavement chemically treated. The patent, however, contains this recitation: "Wooden pavements have been constructed on the continent of Europe and the United States by laying wood blocks endwise of the grain in parallel rows, with openings or channels between, into which gravel and gas-tar were placed."

The next in date is the patent of Cowing, assignor to T. E Brown, Defendant's Exhibit 10. This patent was issued in 1870, but the record, Defendant's Exhibit 20, shows that the application was filed November 13, 1865. This patent is composed of wooden blocks laid in rows, but, as shown, the rows are so laid that the channels between the blocks break joints: and the blocks are tapering, so that the gravel spaces come to a point at the bottom.

Stow, in his testimony, claims that he was the first to ram or pack a foundation of sand or earth prior to the laying of the blocks. Cowing says: "to construct my pavement, prepare "the roadway by grading it to the proper form, and ramming "solid; then set the blocks; * * then fill and ram the crev- "ices with earth and gravel." We have here the identical foundation compacted by ramming; the blocks set in rows; the spaces or channels filled between them, and the gravel or filling in the spaces, rammed as set forth by Stow. The sole and entire differences between them are: First, that the channels do not extend across the street in a continuous line. Second, that the filling is not rammed below the bottom of the blocks. As to the

first point of difference, we have seen that Austin, Wood, Nicolson, Lillie, Chappell, DeGolyer and McDougal, lay the blocks in rows across the street, with continuous channels across the street, the same as shown by Stow; there can therefore be no point in favor of Stow, from the fact that Cowing's channels, while they extend across the street, are not in a straight line, but break joints.

Whitehead's Patent of 1866, Defendant's Exhibit 7, shows a wooden block pavement, having the blocks set in frames, and laid directly upon a gravel foundation. This, as a completed pavement, is a different pavement from Stow's; but it has the sand or earth foundation without the intervening boards of Nicolson.

Miller's Patent of 1867, Defendant's Exhibit 8, shows still another form of pavement laid upon a sand foundation.

Van Camp & Hodgeman's Patent, Defendant's Exhibit 9, shows a wood pavement in which the filling of the channels extends down into, and becomes a part of the foundation. In the form shown at Fig. 1, the channels are the same as Stow's; in that shown in Figs. 2 and 3, (Fig. 2 being shown in the sketch) the blocks are grooved at the sides so as to widen the spaces near the lower ends of the blocks, to form a lock. They say: "The blocks thus prepared are seated in a concrete "bed, sufficient space being left between the blocks, say from "one to two inches, for the admission of the cement, and to al- "low of its being freely rammed until the same is thoroughly "packed." They also say, "*the* concrete *b*. may be rammed "between the blocks by any desired method. We generally use "hot tamps provided with a broad blade-shaped head, the width

"of the head being a little less than the distance between the "blocks."

We find described in this patent the peculiar tamping iron which Stow (p. 78) says is ten times more powerful than the maul and swage, which the patent directs to be used, therefore the tamped filling in the Van Camp and Hodgeman pavement would be ten times more liable to be driven below the bottom of the blocks, than it would be in Stow's pavement.

Ths matter of tamping will be considered further on, when we consider Stow's experiments, and his Exhibit "*Han-*
"*son.*"

Gaytes' patent of 1870, Defendant's Exhibit 11, shows a pavement with the lower end of the blocks so formed that they can be driven into and compact the foundation, and it also shows a sand foundation.

Willett's patent of May 16th, 1871, Defendant's Exhibit 12, shows a wood pavement laid upon a sand foundation, the blocks being set in courses, with spaces between them, filled with concrete, extending to the bottom of the blocks, and resting in or upon the sand foundation. His claim is as follows:

"The blocks A, formed of a double wedge shape, with the "widest part at the middle, to be imbedded in a concrete com-"posed of sand and asphalt or tar, and placed upon a *foundation of sand*, substantially as and for the purpose described."

This, as a complete pavement, is the same as Stow's, with the exception of the swell in the middle of the block, which swell is the feature constituting the nature of the invention.

May's patent of March 21st, 1871, Defendant's Exhibit 15, shows a pavement in which the lower end of the blocks are rab-

betted, and rest on strips of wood, which strips do not extend beyond the boundaries of the blocks, so that the gravel spaces extend to the foundation, which is formed of sand or loose earth. The spaces extending to the bottom of the wood part, he says are "filled with gravel or any suitable material or composition, as in the usual manner." The usual manner, as shown by Nicolson and others, was to compact the filling by ramming. He also specifies a mode of filling these spaces with wooden blocks or key wedges which are "driven into the ground several inches "below the pavement, for the purpose of making the pavement "firmer and more lasting."

We have in this pavement the wood and the gravel filled spaces put as equivalents, and the wood shown to be driven into the foundation, the same as Stow proposes to drive his gravel.

Prescott's patent of June 20th, 1871, Defendant's Exhibit No. 13, shows a pavement identical with that shown in Stow's 1872 patent, and the claim is almost identical. It is as follows: "A pavement composed of a series of blocks having their inter-"mediate spaces filled with concrete, the concrete being caused "to extend downward below the lower line of the blocks into "the road-bed for the purpose of forming water-stops, as des-"cribed." He specifies that "the concrete being placed *or* "*driven* into the interstices between the blocks, and extending "at about three or more inches below the surface of the road "or street bed, so as to effectually prevent both the water from "getting under the blocks, and also to prevent the water from "accumulating and running under the pavement when laid, "and carrying away the ground or sand from under the "blocks." His mode of laying is as follows: "After laying the "blocks in the manner aforesaid, a swage is driven down be-

"tween the several *rows* of blocks, two, three, or more inches "below the surface of the road or street-bed, and the entire "space thus made between the blocks is filled with melted "tar and gravel, concrete, or any similar, suitable composite "material."

Prescott specifies a way by which a filling may be made to extend below the blocks, while Stow does not.

Phillips' patent of December 5th, 1871, application filed January 3d, 1871, Defendant's Exhibits 14 and 22, shows a pavement composed of blocks cut from round timber laid directly on sand or gravel foundation, "rolled or rammed so as to be solid" with the spaces or openings between the blocks "filled with "good hard coarse gravel and sand, and again rolled or rammed, "after which the whole is covered with gravel or sand to a depth "of about one inch."

Morong's patent of October 29th, 1872, shows the identical Stow pavement, laid by the same process, even to the use of the DeGolyer or McDougal strips, with the addition of turning on a stream of water for the purpose of "puddling or softening" the earth foundation, so that he can drive his concrete filling between the rows down into such foundation. His claim is as follows: "The method of puddling the foundation bed of wood "pavements, and of giving to the latter a firm bearing, consisting "in applying water to said foundation after the blocks have been "laid in position, and the channels partly filled with pebbles or "gravel, and afterwards ramming said filling and blocks sub-"stantially as specified."

This patent is but a few months older than Stow's. It shows all that is shown in Stow's patent, and as it does not appear that Stow asked for any interference therewith, it ought to stand in

accordance with its date, as the older patent, there being no proof of the date of the filing of Stow's application; and Stow's attempt to carry the invention back of his patent is not sufficient to carry his date of invention back as against an older claimant for the same thing.

THOMPSON'S 1864 PAVEMENT.

The proofs show that J. K. Thompson, then City Superintendent, in 1864, laid a piece of pavement on North State street, the full width of the street, and about twenty-five feet in length, connecting the planking of the viaduct at the north end of State street bridge with the cobble-stone pavement on Kinzie street.

This pavement was in all respects identical with the pavement now laid by the city, with the immaterial exception that the blocks were thicker. The blocks were laid in rows across the street, resting upon a sand foundation, having spaces between the rows extending to the sand foundation, which said spaces were filled with gravel, and thoroughly rammed. This pavement was constructed by precisely the same process or mode of operation that has continued in use in and by the city from that date to this.

There can be no serious question about the construction or existence of this pavement, as the proofs in support of it are ample.

Thompson, p. 178, testifies as follows:

Q. 6. What wood pavements, if any, were laid by the city, with the blocks directly upon a sand or earth foundation, while you were superintendent of streets, if any; please give the

time the pavement was laid, and its location? *A.* I think that the first wood pavement that was laid directly upon the ground here, was a piece that I had laid myself, in the fall of 1864. That was a piece at the intersection, or near to the intersection of North State and Kinzie streets. Another piece was laid, I think, in 'seventy-one (1871), at the north end of the La Salle street tunnel. I would not be so positive about the time, but I think it was 'seventy-one (1871). Might have been 'seventy (1870).

P. 180. C. Q. 123. Did you put the first row of blocks immediately upon the sand? A. Yes, sir.

C. Q. 124. Did you put any board between the sand and the blocks? A. No, sir.

C. Q. 125. Are you sure of that? A. I am positive of that.

P. 177, 178. C. Q. 82. How much of the pavement did you lay with your own hands? A. Well, I could not tell. Perhaps not more than one or two rows across the street.

C. Q. 83. Did you lay as much as that? A. I think so; just to show the men what I wanted there done.

C. Q. 93 How did you support the second row? A. The same way, they supported themselves. Being six inches square, they stood up very nicely.

C. Q. 95. You used no strip to put between them? A. No, sir.

C. Q. 95. Used nothing? A. Nothing but filling between the rows of blocks.

[P. 180.] C. Q. 128. Your knowledge of that is derived

not from seeing the pavement laid, but from seeing it after it was laid? A. My knowledge is from instructions that I gave to have it laid, and of the ramming in between the blocks. That gravel was rammed between the blocks, between the rows of blocks rather.

[P. 177.] C. Q. 71. Now why did you put in that kind of pavement at that particular place?. A. I put it in sir, as an experiment. The idea had struck me as a favorable one, although I was not confident it would stand. I put it in as an experiment, to see if it would stand or not, I could not see any reason why it would not, as stone would stand.

[P. 181.] C. Q. 148. How long did that pavement continue there? A. I think there was some of that pavement left after the time of the fire, if I recollect right.

The fire occurred Oct. 8 and 9, 1871.

[P. 179.] C. Q. 113. Do I understand you to say, you remember that distinctly, or is that now your present impression? A. I remember that distinctly *the ramming of the earth.* I should not certainly have put the pavement down on loose ground.

C. Q. 109. Did you see any ramming done to the foundation of this street, before the pavement was put on there? A. *Yes sir, I told the men to do that.*

State street was paved north from Kinzie street in 1865, and Horse Railway tracks put in. In reference to this, Thompson, on p. 181, says:

C. Q. 155. Are you sure about that? A. My recollection is I am pretty positive about that. I know the railroad was laid in there. I don't know but 1865, and they cut through this pavement I laid. Cut it, laid down their tracks, and re-

time the pavement was laid, and its location? *A.* I think that the first wood pavement that was laid directly upon the ground here, was a piece that I had laid myself, in the fall of 1864. That was a piece at the intersection, or near to the intersection of North State and Kinzie streets. Another piece was laid, I think, in 'seventy-one (1871), at the north end of the La Salle street tunnel. I would not be so positive about the time, but I think it was 'seventy-one (1871). Might have been 'seventy (1870).

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placed it again in some haphazard way. I know it was not put down properly. I do not think there was anything put down in 1865, except it was done by the railroad, and ordinary repairs.

Bristol, p. 232, testifies as follows:

C. Q. 824. Did you lay any tracks for that company across State street bridge and its approaches? If so, when? A. I laid tracks on the approaches, on the wooden approach and viaduct along the approach, in the year 'sixty-four.

C. Q. 825. While laying this track, did you have any occasion to take up any pavement at the north approach of State street bridge? A. Yes sir.

C. Q. 826. How did you find that pavement constructed. Please answer fully as to the construction? A. It was constructed of blocks six inches square, cubes, laid upon the filling; timbers taken and sawn them up into pieces six inches long, which would make them a cube. That is my impression of the form of the block.

C. Q. 828. What was in the space? A. Sand or gravel. It was fine gravel I should think, it would not take very coarse gravel for the spaces; my memory of it was something like three-quarters of an inch.

C. Q. 829. How were those spaces—between all the blocks or between the rows of blocks?

Objected to as leading.

A. I think they were between the rows.

[P. 238.] C. Q. Just state how you repaved it, giving us the modus operandi? A. I put the blocks in the same rows corresponding with those I had taken out, and filled in the

spaces, and where we came up against the rail, I had of course to fit the blocks to fit my rail both sides, then when I got them placed as near in the same position, that they were with the old work, I did'nt disturb, I rammed it in with sand.

C. Q. 836. Is your memory distinct as to that? A. Yes sir.

C. Q. 837. That is not the modus operandi of constructing pavement latterly, is it. A. No; that has made an impression, sir, on my mind, its the first piece I saw put in, in that way, I did not know there was any such piece in the City, until I ran across it in this track, I never had seen anything like it, or heard of anything like it.

C. Q. 840. Did you ram the place at all? A. Yes sir.

C. Q. 841. What with? A. Our shovels.

C. Q. 842. Did you put in sand or gravel? A. Well it was gravel, not coarse but still it would not come under the head of sand.

C. Q. 843. Do you remember what the foundation was, at the time you took up the blocks? A. My impression that of gravel. I did not disturb it; had no occasion to; did not dig into it.

C. Q. 834. Can you swear positively whether it was gravel or sand or wood? A. I can swear positively it was not wood.

C. Q. 845. No wood there? A. No, sir; not under the portion that I disturbed or took up.

Thos. Mackin, p. 217, testifies as follows:

Q. 695. Do you know of any pavement having been laid between the State street bridge or viaduct, and Michigan

street, in the City of Chicago; if so, state what kind of pavement was there laid, when and by whom? A. The pavement that was laid on that approach I recollect was in 'sixty four. Laid under the supervision of Mr. Thompson; my foreman by the name of Warner, I think, and men laid it down; the pavement was laid on ballast and sand or gravel, and I am not distinct in my recollection whether it was a four by six or six by six block, I cannot say which, but it was one or the other, laid down on the sand, and filled between with gravel, or sand ballast; some kind of gravel, I don't know whether it was Joliet or bank gravel; some kind of bank gravel; I don't know where it was got.

[P. 218.] Q. 610. Did you see that pavement while it was in course of construction, and have any conversation with Mr. Thompson in reference thereto; if so, please state what was said? A. Yes, sir; I was on the work there, and Mr. Thompson and I were sitting on the rail, he says, Mr Mackin—

Objected to conversation with Mr. Thompson.

he says, "why won't that be the future pavement of Chicago," he says, "I have a great mind to get a patent on it," and I said I thought it was first-rate; thought it would be a first-rate pavement.

Q. 608. Was the filling between the rows laid there, rammed in any way? A. My recollection is, that it was filled in and rammed. First tamping iron that I ever saw used was at this place; they tamped the gravel down between the rows.

[P. 227.] C. Q. 749. Was it possible to discern the manner in which that pavement was constructed, after it was finished? A. Yes, I suppose, if you examine it.

C. Q. 750. I mean looking at it from the surface? A. No;

I don't know as you would probably know what it was without you went in carefully to examine it.

Watson, p. 189, testifies as follows:

Q. 263. Did you ever see the pavement testified to by him as having been laid on State street, between Kinzie street and the viaduct on State street bridge? A. All I know about that is, I think it was in the spring of 'seventy one, I was driving on Kinzie street up to State, and saw them taking up some pavement, I jumped out of my buggy, and picked up I think two or three of the blocks, six inches square, six inches long, and threw them into my buggy, and took them around to the office, and gave them to Mr. Thompson, and I asked him whether they were oak, being so heavy, and he said they were pine, and he made the remark, they were laid some ten years ago. That is all I know about that. The men were throwing them out.

P. 190. Q. 205. When did you see this, sir. A. In 'seventy two, I should say it was the year after the fire, while they were raising the grade there; building a new viaduct.

From Complainants witnesses we have the following:

McArthur, p 106, testifies:

C. Q. 1182. Did not Mr. Thompson always contend that Nicolson and others who attempted to exclude the water from the blocks were on false theory; that the true theory was to keep the water in? A. I know that he claimed that the blocks laid on the solid ground made as good a pavement without a flooring as with it, but he agreed with the Board that the newly filled streets required flooring. That is my recollection of the information we got from him when I went into the Board.

Q. 1175. Prior to the laying of the pavement at the intersection of Lake & State sts. had you ever known of any pavement, any wooden block pavement laid in the city, without a board and plank flooring underneath the blocks? A. Yes, I was told by the Superintendent there was an intersection laid without flooring, but cannot now recall where it was.

P. 105, Q. 1176. Was it, or not, at the entrance of the La Salle street tunnel, at or near Michigan street? A. Oh, it is previous to the building of the LaSalle street tunnel.

P. 106 Q. 1179. Who was the Superintendent from whom you received this information? A. J. K. Thompson.

Q. 1180. Are you able to state, and if so state about the time when he made that communication to you? A. About the time of the discussion of this laying of this Stow pavement.

Woodman, p. 112, testifies as follows:

Q. 1269. What is your recollection in respect to the kind of pavement upon that street, between Kinzie street and the approach to the bridge? A. I recollect of their putting down a block pavement from the approach to the bridge to Kinzie street. The approach rise takes place at Kinzie street. But I do not know anything different from the block pavement and that pavement. I recollect distinctly when the pavement was laid, but I could not give the date of the time. It was something new to pave these approaches with block pavement—they used to plank them. And I recollect of their putting down a block pavement there—wooden pavement. I do not know of any difference in the block pavement in the city.

Q 1272. Do you remember the size of the blocks? A. I have an impression the block was more than a square block.

Won't swear to that. It was a long block and narrow—more of a square block; that is my impression. I do not know whether I am right or not. There was something odd in the block.

[P. 113.] Q. 1273. The shape was not the usual shape? A. Thatis my impression. More than square.

Q. 1274. Was there any difference upon the surface between that pavement and the other? A. Not that I have a recollection—

As to the appearance of a finished street, W. H. Carter, p. 112, testifies as follows:

C. Q. 1262. In passing over a street where the only difference in a pavement was the difference between blocks four inches and blocks six inches wide, would you be very apt to notice it? A. High you mean?

C. Q. 1263. Wide! In a finished street? No sir, I don't think we would.

George F. Smith, p. 165, John Geggle, p. 167, are workmen who helped lay the pavement in 1864, and they both fully confirm Thompson's statement that the foundation was rammed earth with a top dressing of sand; that the blocks stood on end in rows across the street, with spaces between the rows extending down to the sand of the foundation, and the spaces filled with gravel and rammed.

Michael Zeep, p. 169, testifies:

That in 1867 or 1868 he made some repairs on this pavement, and found it constructed as stated by Thompson, Bristol, Mackin, Smith and Geggle.

Watson recalled, p. 170, testifies, that in 1872 when the

pavement was being taken up for the purpose of raising the grade, he took some of these 6x6 blocks and carried them to the Board of Public Works, where they remained for several years.

A. H. Burley, p. 238, in 1867 a member, and afterwards president of the Board of Public Works, is not able to state the date of the construction of that pavement, but found it there while in office, and says that the description of it given by the witness, G. T. Smith, accords with his recollection of the construction of said pavement.

The complainant has undertaken to avoid the effect of this testimony upon two grounds: First, that all the blocks, which were six inch cubes, were laid in contact, without spaces between them; and in proof of this has introduced a model, made by himself, in which all of the blocks are in contact and has attempted to prove this to be a correct model of Thompson's pavement by calling a Mr. Whitney as to a conversation between himself and Thompson, but as Mr. Whitney is not certain whether the conversation related to a pavement completed, or to the form of the blocks used in constructing this pavement, Thompson's positive statements are not contradicted or shaken. Second, that it was a regular Nicolson pavement and produces some pieces of board which he took out at that place, showing pavement marks which he swears indicate that it was Nicolson.

The proofs also show that when a pavement is completed you cannot tell whether it is Nicolson, Austin, Thompson, DeGolyer, Stow, or any other kind of pavement which has been laid in rows, with gravel between the blocks, as the matter of the foundation and the depth of the filling in the cells

can only be ascertained by taking up some portion of the pavement.

Several witnesses have testified that they did not notice it. Ex-Alderman Woodman, called by the Complainant, testifies, [p. 112], that the only difference he ever noticed was that the blocks were larger. He, therefore, instead of contradicting Thompson, supports him, for when completed it would have the identical appearance of the Nicholson then in use, with the exception named by him, that the blocks were larger.

This pavement was in continuous use by the city from 1864 to October, 1871, when the viaduct and the approaches were burned, and portions of it were there when the approaches and viaduct were rebuilt in 1872. At that time the grade was raised between three and four feet, at the point where this section of pavement was laid. The blocks were then taken out, and the streets repaved with a similar pavement, except that the blocks were of the ordinary thickness.

If this stood by itself and nothing ever came of it, it might be held to be an abandoned experiment, but before this was finally taken up to have the grade raised in 1872, much pavement like it had been laid in other places in the city. After this thorough test another piece of pavement was laid in 1870, by the order of Mr. Thompson, which second piece was, in form of blocks, channels, filling, foundation, and in all other respects, identical with the pavements since laid in the City, when laid without a board foundation; and there cannot be any doubt but that the pavements now laid and complained of, are the result of Thompson's experiments and not of Stow's, for it will be remembered that Stow has never laid any pavement of this kind, even as an experiment. The only experiment proven is the one made by W. H. Stow, after the defendant

closed its proofs. It was the wedge pavement of 1867, that the efforts of Stow and his brother were entirely devoted to the introduction of, which pavement was superseded by Mr. Thompson's, as will appear when we consider Thompson's next step, to wit:

LA SALLE STREET TUNNEL PAVEMENT.

In the fall of 1870, there was laid, at the north end of the La Salle street tunnel, about 500 yards of the identical pavement complained of, as will appear from the following abstract of the testimony in relation thereto, and concerning which no attempt at rebuttal has been made.

A. J. McBean, p. 217 Defendant's record, testifies as follows:

Q. 598. What kind of pavement was laid at the north end of the tunnel, and when was it laid? A. There was an eight inch block laid at the entrance of the La Salle street tunnel, on the north side, being the intersection of Michigan and La Salle street; the block was placed on end on the sand, and the space between the blocks filled with Joliet or similar gravel, similar to Joliet screened gravel. It was laid in the fall of 1870.

Q. 600. Who did the work of laying it? A. James McBean superintended the work.

Q. 601. How did it happen that you laid that kind of a pavement; that is, by whose order or instruction and request? A. *It was the request of J. K. Thompson*, the City Superintendent, I think.

J. G. McBean, p. 235, testifies as follows:

Q. 874. Do you know anything about the pavement laid

at the north end of the LaSalle street tunnel, if so, what do you know about it? A. The intersection of Michigan and North LaSalle I laid, that was what I had reference to is all outside the tunnel, right there where the walls of the tunnel start, inside the tunnel was a different kind of pavement, but this outside of the tunnel, the whole intersection, I took up, the whole pavement there, and graded it up, and laid the sand foundation pavement, it was three by eight inch blocks on the sand, I prepared my sand foundation as we do now, and set my blocks on the sand in courses, leaving spaces of seven-eighths of an inch apart, and filled the interstices with gravel; fine gravel. I done that work in November, 1870. On the 15th day of November, I was working there, paving there. I cannot say positively whether I finished the work on the 15th or not, but I think I did. That is my impression.

Q. 877. How did it occur that such a pavement was laid at that intersection? A. If I rightly remember, the contract was to take up the old pavement, and relay it. The old pavement was on a board foundation, and after working there some time, *I was requested by Mr. Thompson to stop work*, as they wanted to change the mode of the pavement, and I then got orders to go on and lay this sand foundation pavement, and throw the old blocks away entirely, as they did not consider them fit to put down again. *The work was done at J. K. Thompson's request.*

Thompson, p. 186, testifies as follows:

C. Q. 221. Did you say this morning, in your direct examination, that the pavement of 1871, the LaSalle street tunnel pavement was the same pavement as laid by you in 1864? A. No, sir.

C. Q. 222. You dont mean to be understood, then, as saying that? A. I did not say it, with the exception of six by six, and that was cut from four inch plank.

C. Q. 223. With that exception, do you mean to say the two pavements are identical? A. I understand that way, yes sir.

P. 187, C. Q. 244. Had the result of the laying of this piece of pavement, anything to do with the subsequent laying of pavements upon sand, by or for the city? A. My impression is that it had, sir.

P. 188. C. Q. 250. How had the laying of the pavement of 1864, anything to do with the subsequent laying of pavement in Chicago? *A.* I think the idea was developed that a pavement upon a sand foundation would stand, would not bend down into the earth as many supposed it would.

Watson testifies, on p. 190, as follows:

Q. 266. When, to your knowledge, was the first pavement laid in the city of Chicago, where the blocks stood directly on an earth or sand foundation, with the channels or spaces between them extending down to the foundation? A. That was in the fall of 'seventy, September or October, I do not know which month.

Q. 267. Where was this pavement laid, and please state how it was constructed? A. It was laid at the intersection of Michigan and La Salle, at the north side, the tunnel was laid in that way, that was laid with the blocks on the sand, gravel work down to the sand, spaces filled with earth or pit gravel.

[P. 192.] C. Q. 302. At this intersection? A. It is a sixty-six foot street, less the sidewalk. I don't know exactly how

many yards it would be. Some five hundred yards. Somewhere about that.

[P. 193.] C. Q. 324. How did you know what kind of a pavement? A. *Mr. Thompson the superintendent, told me that was the way it was to be laid.*

[P. 195.] C. Q. 361. Is it still there? A. Yes, sir.

C. Q. 362. Is it in good condition? A. In very good condition, yes, sir.

[P. 194.] C. Q. 335. Did you assist yourself in this ramming or only supervised it? A. I just see that it was done properly.

C. Q. 336. Did you yourself see it done? A. I did, sir.

C. Q. 337. Is your memory distinct on that? A. Yes, sir.

C. Q. 338. Did you see the interstices between the blocks filled with gravel, yourself? A. I did, sir.

C. Q. 339. Were they rammed down? A. Yes, sir.

C. Q. 340. What was it rammed with? A. Iron rammer. Some I made with three-quarter bar iron, and fixed a blade to it about six inches wide, men take that in their hands and go along and ram it down, go over it twice. And then fill up the interstices and go over it again.

Some of the witnesses who testify from memory in reference to the La Salle tunnel pavement, are uncertain whether it was laid in 1870 or 1871, but the McBeans who laid this pavement for Thompson, and who testify from their books, say that it was laid in 1870. As the State street piece was not taken up till 1872, either date leaves the continuity of use by the city unbroken from 1864 to the present time.

It was from this pavement, and that of 1864, both of which

were successful, that this style of pavement came into use in Chicago, and not from any effort on the part of Stow, as the proofs show *that during the years 1870 and 1871*, the only Stow pavement known here, and *the only pavement which the Stow's were urging the City to lay was the wedge pavement of the patent of December, 1867*, up to the time of the great fire. It was therefore adopted, not from any effort on the part of the Stow's, but in opposition to their efforts. H. M. Stow, p. 95.

This Court, in *Elizabeth vs Pavement Co.*, 7 Otto., 134 practically held that six years was not an unreasonable experiment, or length of time for testing a street pavement. Thompson laid his first section in 1864; his second section in 1870, and gave his first section a time test of six years, so that it appears from the evidence that the pavement patented by Stow on the last day of December, 1872, had been in in continuous use in the City of Chicago, since 1864, with possibly the sole exception of the ramming of the filling, from one to two inches below the bottom of the blocks, which is the sole element of novelty in Stow's patent, and which, as will appear hereafter, the City has never used.

Stow in his patent of 1867, shows and describes a filling rammed (that being the only way in which it could be driven) into the foundation below the bottom of the blocks, which said filling is either all wood or part wood and part gravel, and as Stow insists himself that the 1867, 1868 and 1872, patents *are all* "*Stow foundation*," the 1872 patent is not entitled to any especial consideration for the ramming of the spacing filling into the fouudation.

If it should be contended that the section laid in 1864, was not of sufficient size to thoroughly demonstrate the utility of a pavement laid directly upon a sand foundation, with channels

extending down to the foundation and filled with gravel, attention is called to the fact that the section was larger than the only section ever laid of Stow's patent of 1868, and larger than Stow's experimental section of his patent of 1867, which was the only section laid until it was laid in Chicago.

INFRINGEMENT.

If the conclusions of the court below are found to be correct, the consideration of this question will not be required, but if it should be held that the driving of a gravel filling below the blocks, sufficiently far to have a compacting effect upon the foundation, as against the wood and gravel filling of his older patents, was a sufficient element of novelty to found a valid patent upon, then the consideration of the question of infringement is important for the City, as it is believed that the record fully demonstrates it to be a fact that no pavement has ever been laid by the City having that special feature.

It is not disputed on the part of the City that the pavements laid by or for it since 1870, which were laid without a plank flooring, or foundation, were laid, either by the use of the channel wedges, or pile blocks, which, as before shown have all been settled for; or were of the form laid by Thompson in 1864 and 1870; that is, they were laid with angular blocks placed in rows across the street, upon a sand foundation, with the channels between them filled with gravel, the full length of the blocks, but it is denied on the part of the city that it has ever laid any pavement of this, or any other form, in which a gravel filling was rammed below the bottom of the blocks, so as to compact, or have any especial effect on the foundation.

That this is so, see the following testimony,

Wilson, City Superintendent, p. 208.:

Q. 482. What pavements, if any, have been laid by the city, upon a sand or earth foundation, where the filling was make to project into the foundation, below the bottom of the blocks?. A. Where the filling between the blocks you mean?

Q. 483. Yes, sir? A. I cannot say that there is any.

J. G. McBean, an experienced contractor, who laid some of the streets complained of, p. 236.:

Q. 879. Have you made any experiments to determine whether the filling between the rows can be forced below the bottom of the blocks, by ramming. If so, state what they were, and what result you had? A. I never made any experiment on that. I have tried places two years ago, to ram my pavement thoroughly—as good as it could be rammed, and then took up the pavement to see if the gravel was below the bottom of the block, and *I never found it yet.* I do not think, as a practical man, it is possible to drive it down, *if you ram your sand foundation, and settle it properly.*

Mackin, also an experienced contractor, who has laid many pavements, p. 218:

Q. 612. Have you laid any, where the filling was laid or rammed into the foundation below the bottom of the blocks? A. Not that I know of. I have tried that; I have heard it claimed that the gravel would go below the block, and for my own edification I have tried that. I also saw it tried yesterday, the same thing, on Clark street.

Q. 613. When you tried it, was you laying pavement for

the City? A. Well, I was laying private pavement; I tried it on my own street, over there, the street I am doing.

Q. 614. What was the result of your trial. A. Well, it does not go within a quarter, and half and inch, *the gravel don't go down to the bottom of the block in some places from one quarter to one half an inch.*

Watson, the City Superintendent of Streets, in reference to the fact of the filling extending below the bottom of the blocks, and the process of laying, p. 199, says:

C. Q. 430. Do I understand you to say that it is your opinion that gravel rammed down by a rammer weighing fifteen pounds, on a sand foundation, will not go below the blocks? A. Not at all, sir.

C. Q. 431. You think that is contrary to nature? A. I do, so far as I have seen it work.

C. Q. 434. Place is first only partly filled, and then fully filled and rammed? A They generally fill the space full even with the top of the block, and then ram it until settled down, about two inches, and then they fill the space again, and then ram it again, then throw on the top dressing, that is gravel, all over the surface.

C. Q. 435. Don't they sometimes *put it half full*, and ram it, and *then fill it full and ram it?* A. I think they used to start out that way, *but found it would not work; wasn't gravel enough to hold the blocks.*

This, however, is the way stated in the specification.

Munday on the ramming of the filling below the blocks, on p. 204, says:

Q. 461. Why are you of the opinion that this would be

impossible? A. Because it is a well known fact in mechanics, that it is impossible to drive a column of sand by packing it, through a tube, and I have had ocular demonstration that pavements laid in this City, in the manner specified in this patent, in which the sand and gravel were driven down between the blocks, *did not present any penetration of the gravel into the sand*, I went with Mr. Wilson, and Mr. Watson, the other day, and took up some pavement and examined carefully to see if the gravel did penetrate the sand, I examined in three places very carefully, and am satisfied that it did not penetrate the sand. And in theory, I am quite confident that it cannot be made to penetrate the sand, I am supported in this belief by a remark made in one of the patents that I have examined in this case, in the patent of E. P. Morong, the inventor describes a pavement almost exactly the same as the Stow pavement, the patent is dated in October, 1872, after describing the manner in which he constructs his pavement, and sets his block, he says: "I then soften the road bed with the use of a profusion of water, conducted and directed into the channels, themselves; ram the pebbles so that they wedge against the blocks, and form rude ratchets or pawls; to hold and press the rows of blocks against each other, as the blocks are rammed down." This describes the action of the gravel when rammed, between the blocks, very happily.

Robinson brought by Complainant all the way from Detroit as a practical and skilled man testifies as follows, p. 84:

C. Q. 934. Have you ever taken up any portions of the street laid for use in Detroit, to ascertain whether or not the filliing was driven below the blocks? A. Never have taken any up, but I have seen it taken up in making connections for water, and so forth.

C. Q. 955. Did you examine it carefully, in that particular? A. Not carefully; but I have seen it and examined it.

C. Q. 956. How did you find it in those Detroit pavements? A. *I always found the gravel or filling penetrated to the bottom of the blocks, or to the ballast on the bottom of the blocks.*

W. H: Stow, a prime mover in the suit; the issuer of circulars to the city, the contractors, and the citizens, and the man to know if any one does, testifies as follows, p. 132;

C. Q. 1515. Then you don't know whether the city lays it like that exhibit or not? A. They lay the blocks in the same way, and put the gravel in the same way, *but whether they drive it, I cannot tell.*

Hanson, a city paver, called by Appellant, testifies as follows, p, 116:

C. Q. 1325. Where you have repaired pavements, did you ever notice whether the gravel went below the blocks or not? A. No, sir; I never noticed.

C. Q. 1326. How far, at any one time, have you paved a street—in repairing? A. Some places have blocks, along; for instance; where pipes have been laid in, we are paving right along; sometimes whole blocks.

Rue, called by Appellant, tells us how carefully Dearborn street was taken up, on page 121.

C. Q. 1393. How far below? A. From an inch to an inch and a half, so that it showed plain by persons walking along looking on it, because *the blocks were cut down smooth;* and the gravel showed without any exertion that the gravel had gone down—driven below.

Ex-Ald. Cox, called by Appellant, after examining Dearborn street after it was chopped down, and the gravel knocked loose and down, testifies as follows, p. 108:

C. Q. 1211. Did you ever find any other pavement where the filling went below the blocks? A. *No;* I did not know of any that was *driven below the sides, and appeared again at the bottom, although I examined many pavements.*

In order to further test and determine this question, notice was given to Complainant and his counsel, by the defendant, that it would proceed and take up portions of *the streets named by the Complainant in his prima facie testimony*, to ascertain whether, in fact, the filling did extend below the blocks in those streets. Blocks were carefully taken up on Clark street, Fifth Avenue and North La Salle Street, and it was found, as a matter of fact, that the filling did not extend below the blocks; but on the contrary, did not reach their bottoms by from one-fourth to one-half of an inch; *that instead of the gravel penetrating and compacting the foundation, it did not reach the bottom of the blocks,* as a portion of the foundation sand was, in all cases, found between the blocks, forming, as before stated, from one-fourth to one-half of an inch of the filling of the channels.

See the following testimony:

J. G. McBean, p. 235-6, says:

Q. 878. Was you present yesterday at the taking up of any portions of the pavement of Clark street and Fifth Ave., if so, state what was taken up, the purpose for which they were taken up, and generally what you found in reference to the relative depth in the foundation of the blocks in the filling? A. I was present yesterday afternoon with a number of parties,

taking up some pavement, we took up two places on Clark, street, between Adams and Jackson, and two places on Fifth Ave., between Washington and Madison; where we took up was about eight feet from the gutter. or from the curb wall; the places were about thirty feet apart, on either street the same. I understood the object in taking up these blocks was to ascertain if the gravel that was drove in the interstices between the blocks went beneath the bottom of the block and formed a wedge. *I found instead of the gravel going beneath the bottom of the block, that the sand around the block was higher than the bottom of the block, by from quarter to half an inch*, some places it was quarter of an inch, and some places it was half an inch, in no place did I find the gravel beneath the bottom of the block, I did not see any place where the gravel was as low as the bottom of the block.

Willson, p. 208:

Q. 484. Was you present at any time, at the taking up of any parts of pavements, to ascertain this point; if so, please state when it was, where it was, and what you found? A. I was present on Saturday last, that is the tenth, at the intersection of Michigan and La Salle street, took up some pavement there that was laid upon the ground, *I could not say that any of the material between the blocks was forced into the sand or earth below the blocks.*

Munday, p. 204:

I went with Mr. Wilson, and Mr. Watson, the other day, and took up some pavement, and examined carefully to see if the gravel did penetrate the sand. I examined in three places very carefully, and am satisfied that *it did not penetrate the sand.*

In the cases that I examined by taking up pavements, I found to my surprise that *not only did the gravel not enter the sand, but that on the contrary, in many instances, the sand itself was higher than the bottom of the blocks*, and partially entered the channel. This is, I presume, *due to the fact that the blocks were tapped with a hammer when they were set down, upon the sand foundation.*

Mackin, p. 219:

A. 615. I was at the trial on Clark street yesterday. I did not go over to Fifth avenue. I saw a trial made on Clark street, I think its south of Adams, where we had taken up some blocks there, and the first block was taken up, I think it was, *the gravel did not go within a half an inch of the bottom*, the second block taken up, I think it was a quarter of an inch, if I recollect right.

[P. 231.] C. Q. 810. What do you mean, the impression of the gravel on the block? A. The block showed its full size in the sand, and when it was all cleaned out it was measured. Down where this gravel was rammed, it didn't go to within half an inch of the bottom, when the first block was taken up.

Jaicks, p. 237:

Q. 891. Please state what was done, what the taking up of parts of the pavement was for, and in what relation you found the blocks and the filling between the blocks in reference to the foundation upon which the pavement was laid? A. I was present at the taking up of one block--that is, one square block on Clarke street, opposite the Custom House, and found gravel between the blocks, with a sand foundation, and the sand projecting upwards from the bottom of the blocks on the sides. Measured with a rule by Mr. McBean, and I think

on Clark street it was a quarter of an inch, sand projecting upwards; and on Fifth avenue, between Madison and Washington, the blocks were taken up the same way with two pick-axes, and *the foundation was found to be sand, with gravel between the blocks, with sand projecting up, between the blocks upwards, half an inch.*

There is no attempt to rebut this testimony, or to show that the streets named in the *prima facie*, did in fact infringe, for, as before shown, W. H, Stow, the only *prima facie* witness, when recalled, frankly stated that he did not know whether the city has any pavement where the filling is driven below the blocks, and had to go and make *a private experiment* to determine the fact as to whether, as a matter of possibility, any filling could be driven into the sand.

It is therefore insisted on the part of the city that it has never used that peculiarity of Stow of driving the channel filling into the foundation; but it has used and continues to use Thompson's pavement, which does not have that peculiarity.

Appellant has attempted to destroy or ward off the effect of this testimony, not by taking up any sections of streets, or section of any of the streets named by him in his *prima facia* case, but by attempting to show that in Dearborn street a street not named in the *prima facia*, where it was chopped through for the purpose of relaying the water pipes, that some gravel was found on that cut, below the bottom of the blocks. The proofs show that the strip taken up on Dearborn street, was not taken up carefully, but was cut and split through, every other block being split in a rough manner, which would rattle down the gravel, or move the blocks or gravel, so that it was no test whatever.

Dearborn street is not only objected to from the fact that the trench was roughly cut through, and had men traveling on its edges, and rolling water pipes over them so as to displace the blocks, foundation and everything else to a certain extent; but it is also objected to for the reason that Dearborn street was not named either in the bill of complaint or the Appellant's *prima facie* proofs, and is therefore not in rebuttal of anything in the case, but is wholly new matter, and Defendant insists upon the record objection that it is new matter and incompetent in rebuttal; and Defendant further insists that that street was not a test of anything.

Wilson, City Superintendent, in reference to a trench on La Salle street, testifies as follows, p. 210.

Q. 505. Was there any of it up when we got there? A. Well, there was this trench dug across. Of course those didn't show anything, we took up in new places to examine the pavement.

That the rude chopping of the blocks for the trench in Dearborn street, rattled the gravel down, is shown by the statement of Pitkin, p. 99, that he could see the gravel driven "kind of in the *formation of a wedge*," for when rammed, gravel does not take that form. The Appellant's Exhibit M, the product of Stow's private experiment to ascertain whether or not, as a matter of fact, gravel could possibly be driven below the blocks, shows that as soon as the gravel escapes below the blocks, it spreads laterally under them, and equally in all directions, and therefore takes a rose form instead of a wedge form.

Attention is also called to the fact shown by the record, that gravel extending below the blocks in a live pavement has not been found by the Appellant except in the absence of all persons representing the city.

The other attempt of the Appellant to avoid the effect of the positive testimony in relation to the streets named in the *prima facie* case, that the filling did not extend below the blocks in any one of those streets, is to go off by himself, without notice to any one, to a vacant lot, and make a little frame which would take three rows of blocks, fill it with sand, and take a heavy tamping iron and drive the filling below the bottom of the blocks.

This experiment is utterly worthless for the reasons: First, that the piece was too small to cause the block to offer any considerable resistance to the filling, as they would easily spread; Second, that the blocks used were not the ordinary paving blocks used by the city; and, Third, that in filling the channels they were partly filled and heavily tamped, and then again filled and tamped, a process which is not used by the city, the testimony showing that on the streets the channels are filled full in the beginning.

The character of the experiment is sufficiently indicated by the following testimony: Rue, p. 179, says:

Q. 1374. What were the preparations made for the making of that experiment, and how was it conducted; just state it in your own way, Mr. Rue?. A. There was a small space excavated, and timber put round the space, and then it was filled up with sand four inches and a half deep, usual for laying street blocks, and that sand was hammered down—rammed they call it—made solid, and then the blocks were set on top of it, inside of the frame work, and then the gravel was put on the blocks, and then a man there, who professed to be a street paver—he told me that was his business—he rammed the gravel in between those blocks, and when we made an examination, after

he was through ramming, we found that the sand had driven down—the gravel had driven down below the ends of the blocks.

Hanson, p. 113, says:

Q. 1288. How large a piece of pavement did you put down? A. About six by five, I think; or six by four. I could not say exactly. I did not measure it.

Q. 1289. Six feet by four to five feet; when you say four to five, you mean feet? A. Yes, sir.

Paving blocks used by the Street Railway Companies, are only about four inches in length, and were used by Stow, who testifies, p. 132, as follows:

C. Q. 1521. Was that a regular pavement? A. It's a regular pavement laid on the ground. Ground dug up.

C. Q. 1522. Is it there yet? A. No, sir; taken the blocks back; borrowed them from the railroad company.

In view of this testimony it is insisted that the experiments made by Stow and his expert are utterly worthless, and that the rebuttal has not moved or disturbed the testimony taken in behalf of the city. The fact, therefore, that the city has not laid any pavements where the filling extended below the foundation, stands uncontradicted.

Defendant's expert is of the opinion, and supports that opinion with strong reasons, that it is not practicable to ram the filling below the blocks when the channels are first filled full, from the well known action of sand and gravel under pressure, when confined between walls. It is also in proof by Mackin, (p. 218), an old contractor, that in laying new pavements the filling is not rammed below the bottom of the blocks.

The only demonstration which the Appellant has made, in order to avoid these proofs, is to show that, as a matter of possibility, the filling can be made to extend below the bottom of the blocks. This possibility has not been denied, for we have shown by Prescott's patent of 1871, Defendants' Exhibit 13, a very feasible way of doing it, that Stow did not mention, to wit: the ramming of the foundation between the blocks after they are laid, and before any filling is turned in. In that way it undoubtedly could be done. It also can be done, without doubt, by filling in slightly with repeated rammings, which is the process described in Stow's patent, a process, however, which neither Stow nor the city ever used, and which, as shown by the testimony, is inefficient, as it gets the blocks out of line, and leaves them liable to be toppled over.

W. H. Stow, p. 78, thinks that the filling can be properly rammed with the tamping rammers in use now, for the reason that they are ten times more powerful than the old swage and maul; but the old swage and maul is what is recommended in the Complainant's patent, and the tamping rammer is not even named, so that if it is to be done within the patent, it is to be done by the swage and maul.

The patentee, in his deposition, lays great stress upon the ramming of the foundation, and insists that he was the first to ever do it. He builds largely upon that fact, and insists that that is a principal element of all his patents; but in this he is mistaken, as appears from the following statements found in older patents.

In the Cowing patent, filed November 13, 1865, Defendant's Exhibit 10, is this statement: "prepare the roadway by "grading it to the proper form, *and ramming solid.*"

Phillips, in his patent, filed January 3rd, 1871, Defendant's Exhibit 14, says the foundation is to be "rolled or rammed so "as to be solid."

Van Camp & Hodgman, of 1869, Defendant's Exhibit 9, in their patent, say that their concrete bed, which is the foundation in one form, is to be "thoroughly rammed."

Stow, as before remarked, in his 1867 and 1868 patents, depended solely upon the wedges or wedge blocks to compact his foundation, and there is no intimation of any other compacting, except wetting.

Robinson, p. 83, testifies as follows in reference to the mode of laying the 1872 pavement in Detroit.

C. Q. 938. If blocks on a six-inch tamped foundation of sand will settle from one-half to three-quarters of an inch, how much good does the tamping do? A. You mean the tamping of the gravel?

C. Q. 939. And sand foundation? A. It does answer for this purpose. We try to make it as hard as possible before placing the blocks on it, to get it as firm as possible. Cannot always succeed. In actual practice, we go over it, *and tamp the blocks and all down, with very heavy rammers, again, and drive the* BLOCKS *into the sand or ballast.*

This supposed difference fails the patentee, and he is therefore like the foolish man of the Scriptures who built his house upon a sand foundation, which could not stand the storms, or tests of investigation?

MINOR POINTS.

It will be asked why Thompson did not lay more of his 1864 pavement before 1870. The first answer is that a pavement requires a time test, and that he did not wait any too long for that; the second is given by Mr. Carter, President of the Board of Public Works and Mr. Thompson's superior officer who, when asked upon this point, testifies as follows, p. 109:

Q 1229. For what reason? A. Well, main reason, especially with me—I give my own reasons—was, that in improving our streets, we had a large amount of filling to put in usually; some instances *five, six or seven feet;* it was thought that a block would not stand well on newly filled ground, *as most of our streets were at the time.*

Upon the cross-examination of Mr. Thompson, p. 182, the fact was brought out that about the 1st of March, 1870, he obtained a patent for a pavement which had a plank foundation under it. He gives the same reason for that as is given by Mr. Carter above.

And the further reason, p. 187, that as nearly all kinds of pavements had always been laid on earth, or sand foundations, he did not suppose that there was anything patentable about his 1864 pavement. He did not suppose that as planking was the only element of novelty in modern improvements, it was a patentable thing, to pull the plank from under an Austin or Nicholson pavement. Thompson's sound judgment on this point saved him much trouble and his money.

The Complainant is scarcely in a position to question Thompson's experiments as he admits that he never tried this

1872 pavement until this year (1876.) His testimony on this is as follows, p. 95:

C. Q. 1050. In all of your samples, there were none of them laid in the manner described in this patent, were there? A. All pavements that I laid previous to this year, *I think all the pavement that I ever laid previous to this year, the samples were of the first patent issued*, except the sample laid under the patent of February 25th, 1868, which is the first piece I laid in San Francisco, in 1866, except in laying the Stow foundation pavement, in several instances, left the wedges out in the spaces, and drove gravel, but to no great extent; merely as an experiment, to see whether it settled more than where the wedges were in.

The Complainant has attempted to get back of Thompson's 1870 pavement by claiming to have made the invention in January or February of the same year and says that he then made a model of it, which model went to the shades long ago. The following citations from his testimony, p. 88, shows the whole of the vast labor bestowed by him in inventing and introducing this pavement.

Q. 999. When did you invent, or reduce to tangible shape, in the forms of models or otherwise, the pavement described in your patent December 31, 1872? A. I made a *model in the winter of '69 and '70*—I think it was in January—either January or February. that I made the model.

Q. 1002. Have you that model now, or do you know what has become of it? A. I do not. All of our papers and everything we left there, in the office—pamphlets, two or three hundred, and I don't know but thousands; and they took the different models of other inventions that I had. They moved

to 39 Broad street, and put them up stairs, in the cockloft, and I cannot find anything. It has been years since. I cannot find anything of any of them, either our papers or anything else.

Q. 1003. Have you made search for them? A. Yes, sir; and I sent before I went there.

Q. 1004. Have you ever put down personally, the form of pavement described in that patent? A. *Never, only in putting down the Stow foundation pavement.* Have left out the wedges in some places in putting it down, and driven the sand. *Never laid down a regular sample of it.* The patent of 'sixty-eight I put down two years before I got the patent.

The fact appearing that H. M. Stow never did anything except make a lost model, W. H. Stow comes to the rescue with six little proof cuts of an engraving which the witnesses think were made in the summer of 1870, but owing to the fact that other pavement cuts were engraved and printed that summer, of which a record is found, and no record being found of this, there is some uncertainty about its age and W. H. Stow accounts for more than the printer says were printed.

See Barnard, p. 102, and W. H. Stow, p. 125.

Barnard says that there were six printed and Stow says that there were two hundred and that he gave some to Thompson. If Stow was correct the transaction must have been in 1871, as no considerable number were printed before December, 1870, and Mr. Barnard is only certain that they were printed before the great fire, which was in October 1871.

It will be seen from the testimony just quoted that the patentee puts his *best date* of supposed invention, to be in *January or February, 1870*, we again call attention to the

ridiculous position in which he has placed himself upon the record which is this.

I invented this pavement in January or February, 1870.

I *bought the right* of D. L. DeGolyer *to lay this identical pavement*, in March, *1869*, exhibit E, page 25.

Stow's 1868 patent shows some double wedge guide strips and he attempts to show that DeGolyer get into interference with him, and that he took the DeGolyer contract and withdrew his interference, or in other words, conceded priority of invention to DeGolyer. When we remember that the DeGolyer pavement *with the board foundation removed*, is the same as the pavement which Stow is attempting to cover by his patent of 1872, and that Stow purchased a right to lay the DeGolyer pavement without this board foundation, which he considered worth $10,000, we find that Stow's explanation of the transaction is as absurd as his original statement that he invented it ten or eleven months after he bought it. Stow's testimony, p. 91, is as follows:

"It was a direct interference with my patent, issued the 24th day of Februarv, 1869." * * "I met Mr. DeGolyer, and he asked me--he had been trying for some months to get a compromise--to allow him to get his patent. I told him when I came I would not take less than ten thousand dollars, but since I came here and was not allowed to bid on my patent, that I would withdraw my interference, and he was to have a patent before the 15th of April, upon his assigning to me the *exclusive right to lay it on a sand or earth foundation*, and pay me five thousand dollars. Under that consideration I withdrew my interference. He obtained a patent on the 6th day of April, 1869."

This testimony, and the exhibit E, puts the Appellant into the following dilemma: "He has either purchased and has sued on a thing which has no existence; or, in 1872, he applied for and procured, in his own name, a patent for that which he purchased of DeGolyer, in 1869.."

It is attempted to make a point in favor of this patent in the matter of saving the foundation planks or boards, but in view of Stead's patent of 1839, Wood's patent of 1840, Lillie's of 1860, Cowing of 1865, Whitehead's patent of 1866, and Miller's of 1867, no point of this kind can be made.

Complainant's expert undertook to make a difference between Stow's pavement and Cowing's, on the saving obtained in the cutting of the blocks, accounting as lost all that disappeared in the taper or wedge form of the blocks. He is evidently behind the times, as blocks of the Cowing form are cut double, and are sawed apart, buts and points, like shingle, so that if there is any saving at all, it is in Cowing's favor and not in Stow's, as the same amount of lumber will make less Stow than Cowing pavement.

The Complainant on p. 93, says:

"I believe that I am the first man on record in the Patent "Office and I do not know of any other that had laid a foun- "dation of wood pavement upon that foundation" (sand or "earth) with spaces between the blocks *filled by a wedge of* "*wood, of stone, of brick, of gravel, or sand*, or paper, or coal-tar "paper." As before stated, Stead in 1839, showed a pavement of wood on the same foundation with a wedge of wood, also two forms having spaces filled to the bottom of the blocks with concrete or gravel. Lillie has stone and concrete in the spaces,

and Cowing shows in 1865, all that is shown in this respect in Stow's 1872 patent.

Stow specifies in all of his patents that the sand foundation is to be "thoroughly wet." Now it is a well-known fact that thoroughly wet sand cannot be packed, a horse and wagon can scarcely be tracked on a wet beach so little impression does the weight make. Freshly shoveled sand can undoubtedly be packed to some extent, but it is doubted whether it can be after a thorough wetting. The effect of ramming wedges or filling into sand, with no greater weight resting upon it when being rammed than a wooden paving block on each side of the space, the ramming would seem to have no other effect than that of raising the sand under the blocks, as the displaced sand must go somewhere and as sand is not a shifting base, wedges cannot be of much if any benefit, for the practice of tapping the blocks as they are laid, and ramming the blocks of the completed pavement must be more effectual than stirring up a previously compacted foundation by driving into it.

This question is presented for consideration, whether it amounts to invention to take a pavement laid in the ordinary way, and drive the filling a little more or a little harder?

The Supreme Court, in *Roberts vs. Ryer*, 1 Otto, 150, held "that a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportion, degree, doing substantially the same thing in the same way, by substantially the same means, *with* better results, is not such an invention as will sustain a patent." This decision reaffirmed a similar one in *Smith vs. Nichols*, 21 Wall., 112.

The pavement patented is one where the filling is driven below the bottom of the blocks. Driving the filling down

against the foundation does not infringe by the terms of the patent itself, and could not, as to this extent it is old. The line between infringement and non-infringement then, is whether the paver, having his rammer in hand, stops pounding or not, at a particular time. If he over-drives the filling, he infringes, if he stops when the channel is properly filled, he does not. It is difficult to conceive of anything which is more a mere matter of degree than this.

The nature of the invention, as stated by Stow in his 1872 patent, is fully answered by his patent of 1867. He says in his 1872 specification, that his invention consists in laying the blocks in rows, with spaces between them, "and in filling, or "*partially filling* said spaces with sand or gravel and driving "or swaging the same into the sand foundation below, in "order to pack or compress the sand." The 1867 pavement corresponds exactly with this statement, as that has the spaces partially filled with gravel or sand, and the filling driven into the foundation.

The patent of 1872 says nothing about the *form of the blocks*. They are to be of any of the well known forms, and the form shown in the drawing, is one of the oldest forms known. The blocks may as well be wedge-shaped at the lower end, as square. *The only difference between the 1872 pavement, and that of 1868, is in the form of the lower end of the blocks*, and this difference between the 1872 and the 1868 pavements, *is not even named in the later patent*. The 1868 pavement can be as well laid under the 1872 patent, as the one shown.

The claim of the 1872 patent, so far as the two specifica-

tions are concerned, might as well be added to that of 1868 as to be where it is.

The difference between the 1867 and 1868 patents is the difference between driving the filling, without driving the blocks, and the driving of the blocks and ramming the filling. As against these patents, that of 1872, if it stands at all, must stand solely on the ramming of a different kind of filling, that is, of one all gravel, instead of part gravel and part wood,

Appellant, p. 93, says that he gave the name "Stow Foundation" to his patent of Dec. 10, 1867, "but I claim that all of my patents that I ever obtained, I think, are on the Stow foundation," and on p. 95, testifies as follows:

A. 1050. "All pavement that I ever laid previous to this year (1875), I think all the pavement I ever laid previous to this year, the samples were of my first patent issued, except the sample laid under the patent of February 25th, 1868, which is the first piece I laid in San Francisco in 1866, except in laying the Stow foundation pavement *in several instances left the wedges out in the spaces, and drove gravel, but to no great extent* —merely an experiment to see whether it settled more than when the wedges were in."

Thus showing that the Appellant himself understands that "a wedge of wood, of stone, of brick, of gravel, or sand, or paper, or coal tar paper," (Stow p. 93) are all one and the same thing and that his three patents sued on, are alike, and his statement in his specification and his claim that gravel can be driven so as to compact the foundation, and is driven for that purpose, brings the 1872 patent, in terms, within the reissue 3,274 of the '67 patent, for in that reissue he says: "The wedge-shaped blocks are driven down into the sand or

earth with a rammer and swage," that "it will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square ended blocks will operate as wedges," * * "and the blocks No. 2 may be of dressed stone, brick or wood, or *of any suitable material that will bear driving down into the foundation bed.*"

May, Defendant's Exhibit No. 15, makes gravel filling and wooden wedge filling, equivalents for each other.

Stow, in the specification of his 1868 patent, in reference to the space-gravel, directs "the said gravel to be well packed by rammer and swage," and when of mixed sand and gravel, that be "well packed in with rammer and swage." The same means for packing or ramming are here used as those in the patent of 1872, yet with gravel spaces only one half the depth of those of 1872, the gravel filling does not penetrate the sand, or extend below the commencement of the wedge turn.

W. H. Stow, in his *prima facie* deporition, p. 77, says, that West Randolph street was laid, from Halsted to Union Park, with pavement like Exhibit "G," the model of the 1867 pavement. He contradicts himself in his rebuttal deposition, p. 133, and changing his base, says, that that street was laid from Ada street to Union Park, without the wooden wedges,and laid like the Exhibit "I³,"the model of the 1872 pavement, and calls the witness Rue to help him, p, 120. Both Stow and Rue are careful *not to say* that these two blocks had a filling that was rammed or driven into the foundation. Stow says that the reason why it was so laid at all, was because the ground was frozen so that the wooden wedges could not be driven in. If a sharpened wooden wedge could not be driven, we can conclude with reasonable certainty, that loose gravel was *not* driven into the

foundation. This part of Randolph street, if the testimony is correct, has a Thompson pavement, instead of a Stow, laid on it for these two blocks.

These two blocks were paid for as being laid under Stow's 1867 patent, so that, if the evidence amounts to anything it amounts to an admission on Stow's part, that the 1867 pavement and the 1872 pavement are the same thing, as both simply attempt to compact the foundation by driving the filling. Both pavements are laid by the same process, that is, the channels are partly filled up and rammed into the foundation, and the filling then completed.

SUMMARY.

Having been advised by the city authorities that the case would be submitted upon briefs, upon its part, the brief has been made partly in the form of an argument, with quotations from the testimony, which have greatly increased its length. The following *resume* is therefore added in order to present the points made in reference to the older art, and to the facts proven in their simplest form.

PATENT OF 1867—REISSUE 3,274.

No proof as to any use or infringement of 2d claim, which claim covers a cobble-stone pavement.

1st and 3d claims fully anticipated by Stead's English Patent of 1839.

1st claim also anticipated by Wood's English Patent of 1840.

3d claim also anticipated by any cobble-stone pavement.

1st claim contrary to the specification, which says that the blocks need not be in rows.

Compacting foundation is the same as Stead's method.

That Stow has not the merit, even, of adapting an old device to a new use.

That his driving wedge blocks into the foundation to solidify it, is an old device to an old use.

That notwithstanding the fact that the patent is worthless, all of this kind of pavement has been fully paid for by the city.

That no attempt is made to rebut the proofs of payment.

That any attempt to extend this patent over the pavements laid since 1871, is tantamount to an admission that this patent and the 1872 patent are alike.

PATENT OF 1868—No. 84,862.

That this patent is for a form shown in the patent of 1867.

There is no proof that it was ever used in Chicago.

That there is no proof that it was ever used anywhere except a section of 20 feet in San Francisco.

That it is a worthless pavement.

DEGOLYER'S PATENT No. 88,365.

That this patent is fully anticipated by the patent of McDougal, Stewart & McDougal, Defendant's Exhibit 5.

That there is no proof that it has ever been used.

That the proofs are, that the blocks are laid without the

use of any guide, of any kind. That the completed pavement is admitte in the specification to be the Austin English pavement of 1843.

That Complainant has no title to the patent.

That Complainant cannot maintain an action in his own name. That his title paper, Exhibit E, is fatal to his claim that he is the inventor of the Thompson pavement.

1867, 1868, AND DEGOLYER'S PATENTS

That payment having been made for all the wedge pavement laid under the 1867 patent, and there being no proof that the 1868 and the DeGolyer patents, or improvements, were ever used, the bill should be dismissed as to these three patents, even if they should be faund valid.

PATENT OF 1872.

That this patent is anticipated by Stow's patent of 1867.

That the claim is fully met by the pavement shown in Stow's patent of 1868.

That the difference between the 1872 and 1868 pavements is the difference between square bottomed and angular bottomed blocks.

That the 1872 pavement may be laid with either angular or square bottomed blocks.

That if there is any difference, growing out of the form of the bottom of the blocks, that difference is not made material by this patent.

That the only difference between the 1867 pavement, and that of 1872, is the difference in the *material* of which the filling wedge is composed.

That the 1872 patent, by stating tn the nature of invention that the channels may be *partly* filled with gravel, leaving the balance to be filled with wood, or anything else, makes the pavement the same as that of 1867.

That the ramming of the filling sufficiently far below the blocks to perform some special office, effect, or result, being the essential feature of this patent, the city does not infringe.

That if the ordinary ramming of filling to the bottom of the blocks, when laid on an earth or sand foundation, is within the patent, that then it is fully anticipated by—

David Stead, Figs. 16 and 20, 1839; Lillie, of 1860; Cowing, of 1865; Miller of 1867; Van Camp & Hodgman, of 1869; Willett, of 1871; May, of 1871; Prescott, of 1871, and Morong, of 1872.

That all of these patents show wood pavements laid directly upon the earth, or a sand foundation, and in addition thereto, those of Wood of 1840, and Whitehead of 1866.

That the laying of pavements directly upon the earth, both with and without a sand covering, is the oldest known practice.

That the ramming of such foundation is an old practice, much older than any claim of Stow's.

That laying blocks in rows across the street, with spaces or channels between them, is an old practice.

That laying blocks in rows across the street with channels or spaces between them extending to the bottom of the blocks, is old, and is shown in Austin's patent of 1843; in McDougall, Stewart & McDougal's patent, filed in 1867, and in DeGolyer's patent of 1869.

That J. K. Thompson, in 1864, invented and laid the pavement now laid in, and used by the City of Chicago.

That he then laid a section of it, which was continued in use until the street was re-graded and paved, in 1872.

That in continuation of his efforts in this direction, Thompson laid another piece of this pavement in 1870.

That Thompson, and not Stow, introduced the pavements now in use.

That the pavements laid in the city are Thompson pavements.

That the difference between Thompson's pavements and Stow's is, in the ramming of the filling *below* the bottom of the blocks in Stow's, and only to the bottom in Thompson's.

That this is the identical difference between the pavements laid in the city, and that described in Stow's patent.

That so much of the De Golyer as is licensed to Appellant, is the Thompson pavement, and was not claimed by DeGolyer.

That the Defendant's proofs that the filling, in the streets named in the Complainant's *prima facie* case, did not, in fact, extend below the bottom of the blocks, has not been rebutted.

That the naming of new streets in the rebuttal, is irregular, improper, and should not be considered.

That an examination of a street, cut through with axe and pick, in opening a trench for water-pipes, is worthless, for the purpose of determining how low the filling originally went.

That Stow's experiments are worthless.

That the inference, that because *Stow could* ram some filling below the blocks in a 3x6 experiment, therefore the city

did ram the filling below, as a matter of fact, is illogical and worthless.

That Stow bought the invention of De Golyer before he claims to have made it.

That he never even made an experiment to test it.

That Stow's sand foundation has only the peculiarity of thorough wetting.

That the city has not used this peculiarity.

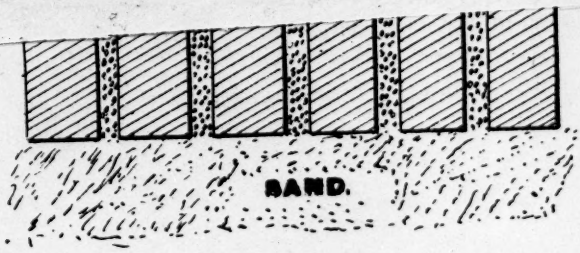
That over driving the filling does not amount to invention.

That the patent is thoroughly anticipated in the art.

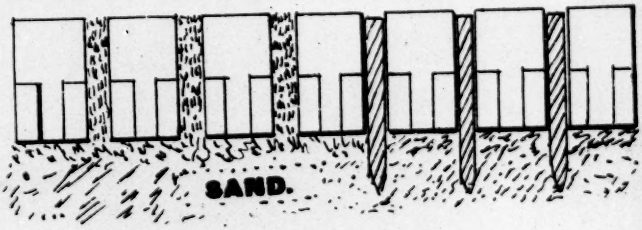
That it is not shown, and is not true in fact, that any pavement has been laid in, or used by the city, which has in it the peculiar driving of the filling described in this patent.

LESTER L. BOND,

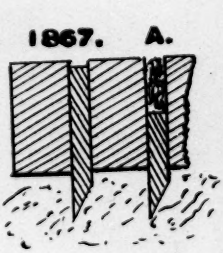
OF COUNSEL FOR APPELLEE.



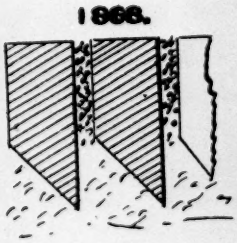
G. A. May. March 21. 1871. Filed Aug. 19. 1870.

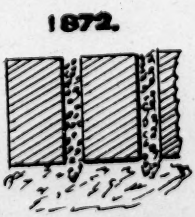


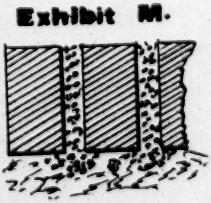
Stow's Wedges.





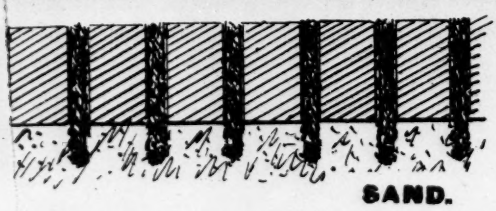




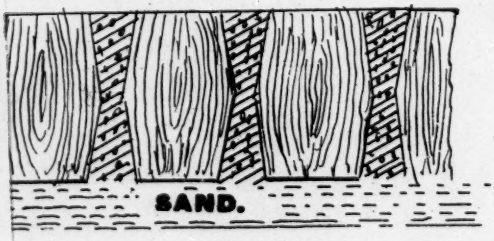




rescott Jan. 20, 1871,



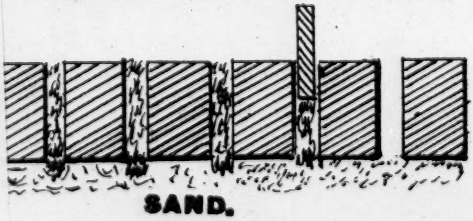
Villet May 16, 1871.



, 5. 1871. Filed Jan. 3. 1871.

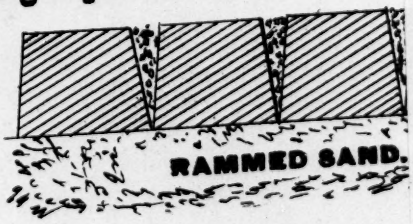


rong, Oct. 29, 1872.

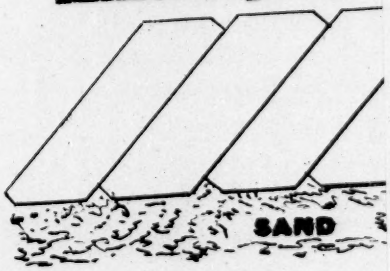




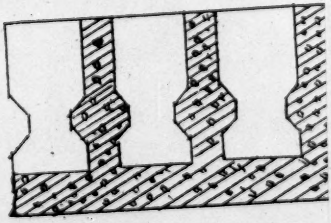
Cowing April 5, 1870, Filed



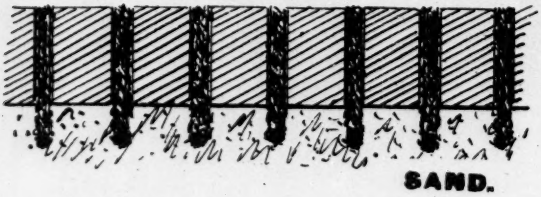
Miller April 2



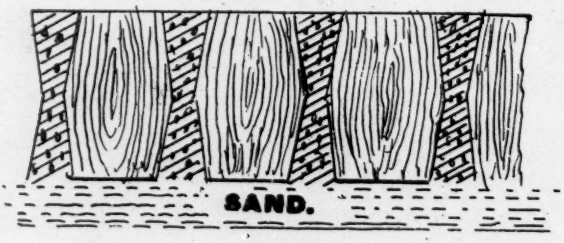
VonCamp & Hodgema



Prescott Jan. 20, 1871,



Willet May 16, 1871.



Phillips Dec. 5. 1871. Filed Jan. 3. 1871.



Morong, Oct. 29, 1872.



Thompson's Pavement 1864.

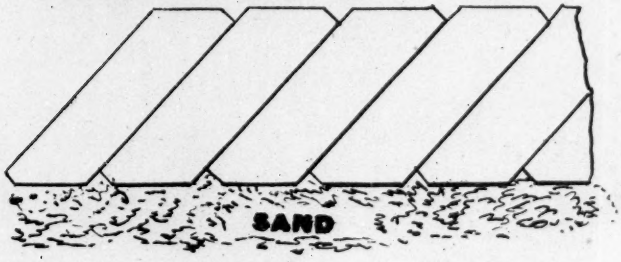
From G. F. Smith's, Exhibit 2.



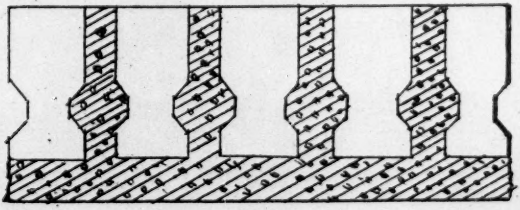
Cowing April 5, 1870, Filed Nov. 13, 1865.



Miller April 23, 1867.



VonCamp & Hodgeman, Nov. 16, 1869.

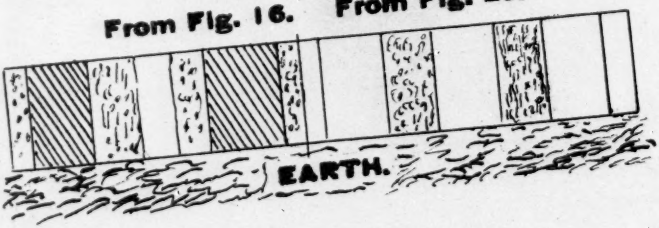


Cobble Stone.



Stead 1839.

From Fig. 16. From Fig. 20.



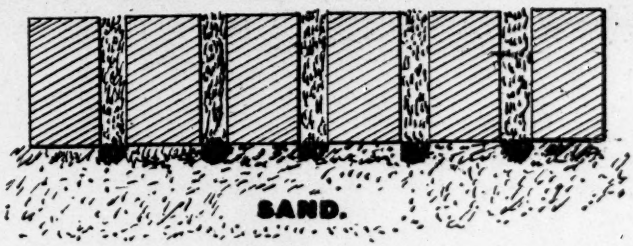
Austin 1843.



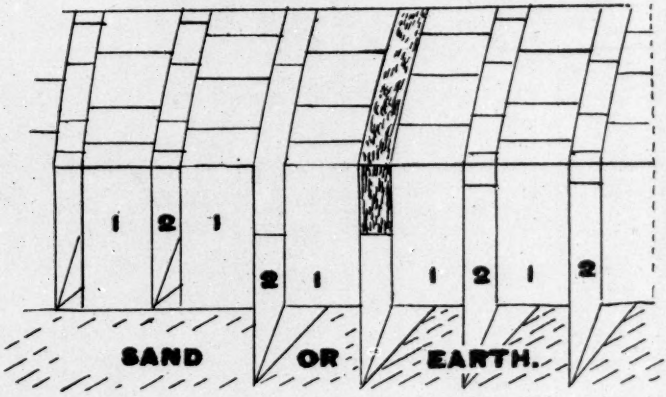
Nicholson 1854.



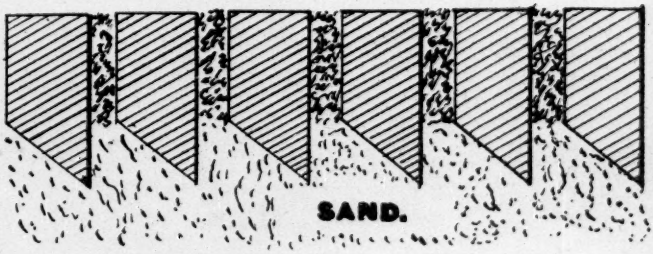
Stow Dec. 31, 1872.



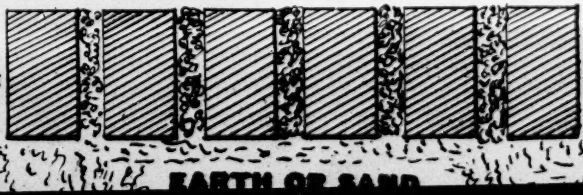
Stow Dec. 10, 1867.



Stow Feb. 25, 1868.



DeGolyer as licensed to Stow March 30, 1869.

Pavement  not claimed.

Post-mtd after Nov Term

Submitted Dec. 12. 1881

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 897.

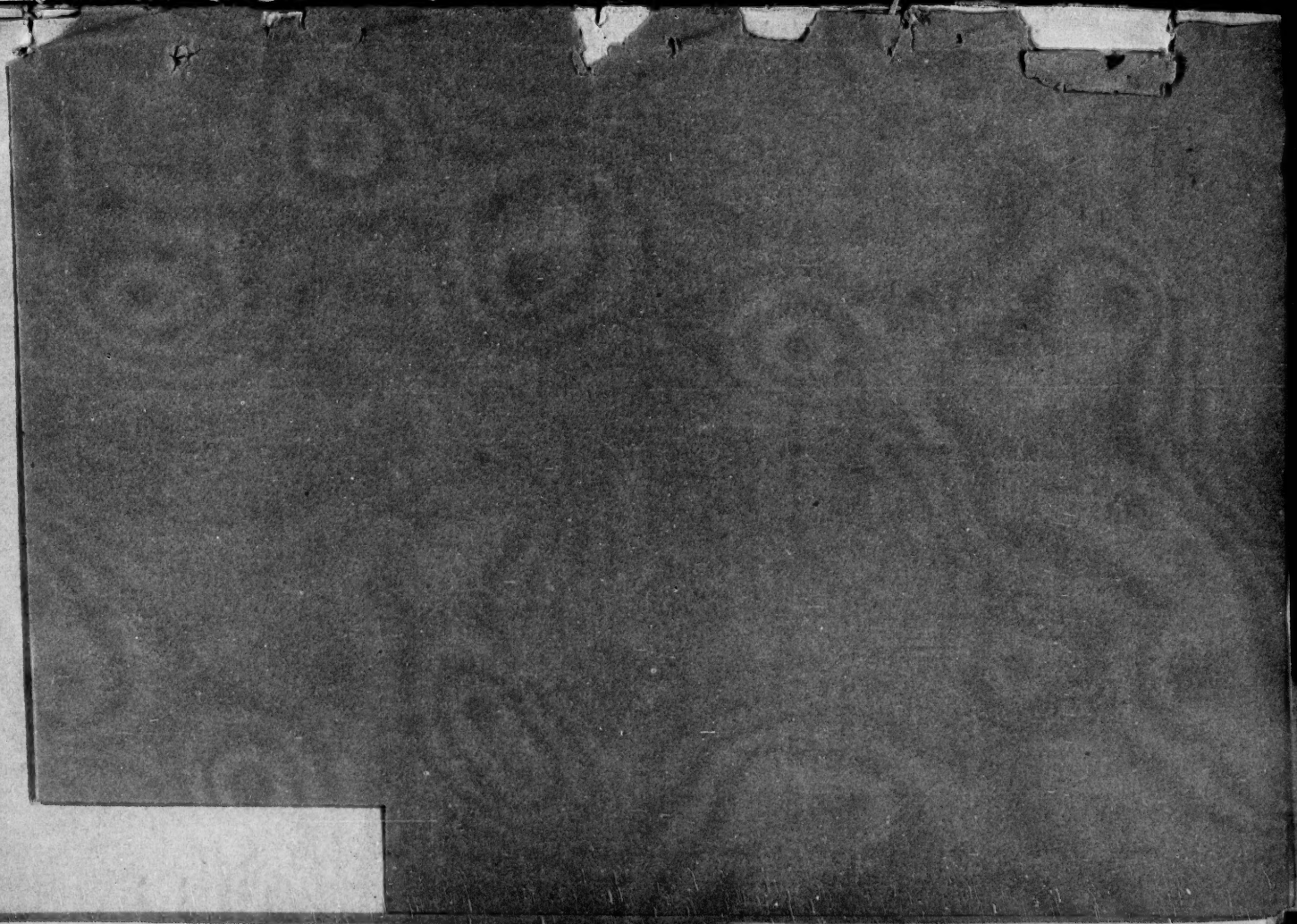
MARY JANE GRIGGS AND HER THREE MINOR CHILDREN, RUTH MATILDA GRIGGS, ROBERT COOPER GRIGGS, AND FLORENCE JANE GRIGGS, PLAINTIFFS IN ERROR,

vs.

R. G. HOUSTON & CO., A FIRM COMPOSED OF R. G. HOUSTON, JOHN B. NEELY, AND THOMAS O'CONNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED SEPTEMBER 12, 1881.



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1 *Pauper oath.*

I, Mary Jane Griggs, do solemnly swear that, owing to my poverty, I am unable to bear the expenses of a suit which I am about to commence in the United States circuit court for the eastern district of Tennessee against R. G. Houston & Co. (a firm composed of R. G. Houston, John B. Neely, & Thomas O'Conner) and the Cincinnati Southern Railway, and that I am entitled to the redress sought by said suit, to the best of my knowledge and belief: so help me God.

MARY JANE GRIGGS.

Sworn to and subscribed before me this 13 day of September, 1879.

A. Q. MOORE,
U. S. Commissioner.

I, J. E. Reed, clerk of the district and circuit courts for the western district of North Carolina, certify that A. Q. Moore, before whom the above affidavit was taken, was at the time said affidavit was taken a United States commissioner, and duly qualified as such.

J. E. REED,
Clerk United States Dist. & Circuit Court for the Western Dist. of N. C.

2 *Attorney's certificate.*

MARY JANE GRIGGS
vs.
R. G. HOUSTON ET ALS.

I, Wm. M. Baxter, do certify, as an attorney at law, that from the representations made to me of the facts upon which the foregoing action is founded, & which I believe to be true, the plaintiff, Mary Jane Griggs, has a good and legal cause of action against R. G. Houston & Co. & the Cincinnati Southern Railway.

WM. M. BAXTER.

(Endorsed:) Mary Jane Griggs vs. R. G. Houston et al. Pauper oath & att'y's certificate. Filed Oct. 16, 1879. A. R. Humes, clerk.

Summons.

The President of the United States of America to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded to summon the Cincinnati Southern Railway, R. G. Houston, J. B. Neely, & Thomas O'Conner, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the eastern district of Tennessee, at the Federal court-rooms in Knoxville, in said State, on the 2d Monday in January next, then and there to answer Mary Jane Griggs in an action to her damage five thousand dollars. Herein fail not, and have you then and there this writ.

3 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 16th day in October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104.

[SEAL.] A. R. HUMES, *Clerk.*

(Endorsed:) No. 688. Mary Jane Griggs versus The Cin. Southern Railway, R. G. Houston, J. B. Neely, & Thos. O'Conner. This summons was issued on the 16 day of Oct'r, 1879. A. R. Humes, clerk. Wm. M. Baxter, attorney, Hamilton County. Marshal's costs: Officer L. L. Sample, 112 miles, at 6 c., $6.72; 3 summons, at $2, $6.00; 3 copies summons, at $1.00, $3.00; total, $15.72. Filed Apr. 21, 1880. A. R. Humes, U. S. cir. c't cl'k.

Came to hand Oct. 17th, 1879, and executed, viz, by delivering a copy of this summons to Chas. D. McGuffy, agt. of C. S. R'y, at Chattanooga, this Oct. 17th; by delivering a copy of the within to R. G. Houston, at Chattanooga, Oct. 27th, 1879, and by delivering a copy of the within to John B. Neely, at Chattanooga, this Nov. 15th, 1879.

L. L. SAMPLE,
Sp'l D. U. S. Marshal.

Be it remembered that at a circuit court of the United States began and held for the eastern district of Tennessee, at the Federal court-room, in the city of Knoxville, within said district, and the sixth circuit, on the second Monday, it being the 12th day of January, A. D. 1880, present and presiding the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit, and the honorable Connally F. Trigg, judge of the United States district
4 court for the districts of Tennessee, the following proceedings were had, to wit:

MONDAY MORNING, *January 19th*, 1880.

Court met pursuant to adjournment.

Present and presiding, the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit.

MARY JANE GRIGOS
vs.
THE CINCINNATI SOUTHERN RAILWAY ET AL. } No. 688.

Upon motion of plaintiff's attorney in this case it is ordered by the court that alias summons issue as to parties not served.

Alias summons.

The President of the United States of America to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded to summon the Cincinnati Southern Railway, R. G. Houston, J. B. Neely, & Thomas O'Conner, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the eastern district of Tennessee, at the Federal court-rooms in Knoxville, in said State, on the second Monday in July next, then and there to answer Mary Jane Griggs in an action to her damage five thousand dollars. Herein fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 19th day in January
5 in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104.

[SEAL.] A. R. HUMES, *Clerk.*

(Endorsed:) No. 688, Mary Jane Griggs versus Cin. Southern Railway et al. Alias summons. This alias summons was issued on the 19 day of January, 1880. A. R. Humes, clerk. W. M. Baxter, attorney. Hamilton County. Marshal's costs: Officer Dearmond, 1 summons, $2.00; total $2.00.

Came to hand on the 12 day of June, 1880; executed in Knoxville on 12 day of June, 1880, on Thomas O'Conner. June 12, 1880.

R. T. DEARMOND, *D. U. S. M.*

Filed June 14, 1880. A. R. Humes, U. S. cir. ct. cl'k.

Alias summons.

The President of the United States of America to the marshal of the eastern district of Tennesse, greeting.

You are hereby commanded as heretofore to summon the Cincinnati Southern Railway & R. G. Houston, J. B. Neely, & Thomas O'Conner, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the eastern district of Tennessee, at the Federal court-rooms in Knoxville, in said State, on the second Monday in July next, then and there to answer Mary Jane Griggs of an action at law to her damage. Herein fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the sixteenth day in March, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th.

[SEAL.] A. R. HUMES, *Clerk.*

6 (Endorsed:) No. 688. Mary Jane Griggs versus The Cincinnati Southern Railway et al. Alias summons. This alias summons was issued on the 16 day of March, 1880. A. R. Humes, clerk. Wm. M. Baxter, attorney, Hamilton County. Marshal costs: Officer L. L. Sample, 3 summons, at $2, $6.00; 3 copies summons, at $1, $3.00; total, $9.00. Filed July 13, 1880. A. R. Humes, U. S. cir. ct. cl'k.

Came to hand on March 17, 1880. Executed by delivering a copy of this summons to C. D. McGuffy, att'y & ag't for C. S. R'y at Chattanooga, March 20th, also delivering a copy of same to J. B. Neely & R. G. Huston, March 22d, at Chattanooga, Tenn.

L. L. SAMPLE.

Counterpart summons.

The President of the United States of America, to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon the Cincinnati Southern Railway, R. G. Houston, J. B. Neely, & Thomas O'Conner, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the eastern district of Tennessee, at the Federal court-rooms in Knoxville, in said State, on the second Monday in July next, then and there to answer Mary Jane Griggs in an action for damages. Herein fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 19th day in April, in the year

of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th.

[SEAL.] A. R. HUMES, *Clerk.*

7 N. B.—This writ to be executed only to Tho's O'Conner.

A. R. HUMES, *Clerk.*

(Endorsed:) Counterpart. No. 688. Mary Jane Griggs versus The Cincinnati Southern R'y, R. G. Houston, J. B. Neely, & Thomas O'Conner. This summons was issued on the 19 day of April, 1880. A. R. Humes, clerk. Wm. M. Baxter, attorney, County. Marshal's costs: Officer E. S. Wheat, summons, $2.00; total, $2.00. Filed May 25, 1880. A. R. Humes, U. S. cir. ct. cl'k.

Came to hand this day of , 1880, and executed on Tho's O'Conner, by making known the contents of the within counterpart summons, this 18th day of May, 1880.

E. S. WHEAT, *U. S. M.*,
By W. T. WRIGHT, *D. M.*

EASTERN DISTRICT OF TENNESSEE, *ss:*

This is a counterpart of an alias summons issued on the 19th day of Jan'y, 1880, to the eastern district of Tennessee, for John B. Neely, R. G. Huston, Tho's O'Conner, the Cincinnati Southern Railway, in a suit of Mary Jane Griggs vs. R. G. Huston & Co. A. R. Humes, clerk U. S. c't c't.

Alias summons.

The President of the United States of America to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded as heretofore to summon the Cincinnati Southern Railway, R. G. Houston, J. B. Neely, & Thomas O'Conner, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the eastern district of Tennessee, at the Federal court-rooms in Knoxville, in said State, on the second Monday in July next, then and there to an-

8 swer Mary Jane Griggs in an action for damages. Herein fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 19th day in April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104.

[SEAL.] A. R. HUMES, *Clerk.*

(Endorsed:) No. 688. Mary Jane Griggs versus The Cincinnati Southern Railway, R. G. Huston, J. B. Neely, Thomas O'Connor. This alias summons was issued on the 19 day of April, 1880. A. R. Humes, clerk. Wm. M. Baxter, attorney, Hamilton County. Marshal's costs: Officer L. L. Sample, 1 summons, $2.00; 1 copies summons, $1.00; total, $3.00. Filed July 18, 1880. A. R. Humes, U. S. cir. c't cl'k.

Came to hand same day issued. Executed only as to C. D. McGuffy, att'y & ag't for the C. S. R'y at Chattanooga, Tenn., this April 20, 1880.

L. L. SAMPLE, *D. U. S. M.*

Be it remembered that at a circuit court of the United States, began

and held for the eastern district of Tennessee, at the Federal court-room in the city of Knoxville, within said district and the sixth circuit on the second Monday, it being the 12th day of July, A. D. 1880, present and presiding, the honorable John Baxter, judge of the
9 United States circuit court for the sixth judicial circuit, the following proceedings were had, to wit:

MARY JANE GRIGGS
vs.
R. G. HUSTON & CO. ET AL. } No. 688.

The plaintiff, by her attorney, comes and dismisses her suit as to the Cincinnati Southern Railway.

It is thereupon considered by the court that the defendant the Cincinnati Southern Railway have and recover of the plaintiff all the costs incident to making said railway a defendant, for which let execution issue.

The plaintiff thereupon moved the court for leave to amend the original writ so as to lay the damages at twenty thousand dollars, which amendment is allowed; and thereupon the plaintiff filed her declaration against R. G. Houston, John B. Neely, and Thomas O'Connor.

Declaration.

In the circuit court of the United States, eastern dist. of Tennessee, July term, 1880.

MARY JANE GRIGGS
vs.
R. G. HUSTON & CO.

The plaintiff, a citizen of North Carolina, as the widow of J. L. Griggs, dec'd, for herself and for her minor children, Ruth Matilda Griggs, Robert Cooper Griggs, and Florence Jane Griggs, sues the def'ts, R. G. Houston & Co. (a firm composed of R. G. Houston, John B. Neely, and Thomas O'Conner, all citizens of the eastern district of Tennessee), for this:

That whereas, heretofore, to wit, on the 22nd day of June,
10 1879, the def'ts were managing, controlling, and operating a certain unfinished line of railway, known as the "Cincinnati Southern Railway," running from Boyce's Station, Hamilton Co., Tennessee, up towards and in the direction of Rhea county, Tenn., and while the said def'ts were so managing, controlling, and operating said railroad the said J. L. Griggs, dec'd, was employed by the said def'ts as a day laborer upon said line of railway; and while so employed, to wit, on said 22nd day of June, 1879, he, the said J. L. Griggs, was, with the permission of the said def'ts, through their agents, riding upon a train of cars, drawn by a steam-locomotive, managed, run, and controlled by def'ts, when, in consequence of the negligence of def'ts, a collision occurred between said train upon which the said J. L. Griggs, dec'd, was riding, and a flat car or cars negligently placed or allowed to remain on the same track upon which said train was moving, by reason of which collision aforesaid the said J. L. Griggs, dec'd, without any negligence or fault on his part, was violently mashed, bruised, wounded and injured, and thrown from the train upon which he was riding; from which injuries so received in consequence of the negligence of the def'ts

he suffered great bodily & mental pain, and on the 25th day of June, 1879, died in consequence of the said injuries received by him,
11 whereby plaintiff and her minor children were deprived of his labor as a support, of his protecting care as a husband and father, and of his society, to plaintiff 's damage twenty thousand dollars; wherefore she sues, &c.

And the plaintiff for herself, as the widow of J. L. Griggs, dec'd, and for the benefit of her minor children, Ruth Matilda, Robert Cooper, and Florence Jane Griggs, further sues the def'ts for this, that heretofore, to wit, on the 22nd day of June, 1879, the def'ts were managing, controlling, and operating a certain unfinished railroad running from Boyce's Station, in Hamilton County, Tennessee, to some point in Rhea County, Tenn., and while so managing, controlling, and operating said railroad as aforesaid the said def'ts employed the said J. L. Griggs, dec'd, as a track-hand on said line of railroad. While the said J. L. Griggs, dec'd, was so employed by def'ts he was being carried on one of defendants' trains to or from his place of daily work whereupon it became & was the duty of def'ts to safely and carefully carry him; but they, the said def'ts, wholly forgetting and neglecting their said duty and obligation to said J. L. Griggs, dec'd, negligently and carelessly allowed a flat-car or certain flat-cars to be and remain on the railroad track in front of the train on which the said J. L. Griggs, dec'd, was being carried, and negligently & carelessly caused or permitted their said train on which the said J. L. Griggs, dec'd, was being carried
12 to collide with said flat-car or cars, utterly failing to observe any of the statutory precaution prescribed, when said flat-cars were or should have been discovered, whereby the said Griggs, dec'd was, without any fault or negligence on his part, mashed, mangled, injured, wounded, and violently thrown from said train, receiving injuries from which he died on the 25th day of June, 1879, after having endured intense mental & physical suffering for three days.

By reason of which wrongs pl'ff and her children were robbed of a husband and father, a protector and support, and the enjoyment and comfort of his society, to pl'ff damage twenty thousand dollars, wherefore she sues, and demands a jury to try the issue sthat may be formed on the two foregoing counts of declaration.

WM. M. BAXTER,
Att'y for Pl'ff.

MERRIMON & SONDLEY,
Of Counsel.

(Endorsed:) No. 688. Mary Jane Griggs vs. R. G. Houston & Co. Declaration. Filed July 12th, 1880. A. R. Humes, clerk. Wm. M. Baxter, att'y.

Plea.

In the circuit court of the United States for the eastern district of Tennessee. July term, 1880.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO.

13 And now come the defendants, R. G. Houston & Co., and for plea to each of the counts contained in plaintiff's declaration, say that they are not guilty in manner and form as the plaintiff hath in her said declaration alleged.

And for further plea to plaintiff's declaration, the defendants, R. G. Houston & Co., say that they deny that they were, on the 22nd day of June, 1879, or at any other time, managing, controlling, or operating a certain unfinished line of railway known as the Cincinnati Southern Railway, running from Boyce's station, in Hamilton County, Tenn., up towards and in the direction of Rhea County, Tennessee; deny that the said J. L. Griggs was employed by them at that time or at any other time; deny that Griggs was, on the 22nd day of June, 1879, with the permission of the said defendants through their agents or attorneys, or otherwise, riding upon a train of cars drawn by a steam locomotive managed, drawn, and controlled by defendants; and deny that in consequence of the negligence of the defendants a collision occurred between said train, upon which said Griggs was riding, and any flat-car, or cars negligently placed or allowed to remain on the track upon which said train was moving, by reason of which the said Griggs, without any fault on his part, was violently mashed, bruised, wounded, & injured, & thrown from the train upon which he was riding; deny that he received any injury by the negligence of the defendants; deny
14 that plaintiff & her children were deprived of the labor, support, care, &c., of said Griggs (deceased) by any act of defendants; and deny any and all negligence with which they are charged.

And for further plea to second count in plaintiff's declaration, they deny that they were, on the 22nd day of June, 1879, or at any other time, managing, controlling, and operating a certain unfinished railroad running from Boyce's station in Hamilton County, Tennessee, to some point in Rhea County, Tennessee. They deny that defendants employed said J. L. Griggs (deceased) as a track hand or otherwise on said alleged line of railroad. They deny that while under their employment the said Griggs was being carried on one of defendants' cars or trains to or from his place of daily work. They deny any obligation on part of defendants to carry said Griggs safely or otherwise over said road. They deny that defendants negligently and carelessly allowed a flat-car or certain flat-cars to be and remain on the railroad track in front of the said train on which the said Griggs was riding. They deny that defendants negligently and carelessly caused or permitted said train on which the said Griggs was riding to collide with said flat or cars. They deny any failure to observe the statutory precautions on their part when said flat car or cars were and should have been discovered,
15 caused the said Griggs, without any fault or negligence on his part, to be mashed, mangled, injured, wounded, and violently thrown from the said train upon which he was riding. They deny that by reason of any wrongs of defendants plaintiff and her children were robbed of a husband and father, a protector and support, and the enjoyment and comfort of his society.

The defendants R. G. Houston & Co. for further plea aver that if said J. L. Griggs was upon any cars under the control of defendants at the time alleged, he was there as a trespasser and in violation of positive orders and instructions, & was by his own utter disregard of the rights of others & orders, and by his own negligence & carelessness injured, hurt, &c., and by no fault of defendants.

CLIFT & CLIFT,
Att'ys for Def'ts.

WHEELER & MARSHAL,
Of Counsel.

(Endorsed:) Filed July 17, 1880. A. R. Humes, U. S. cir. c't cl'k.

Be it remembered that at a circuit court of the United States began and held for the eastern district of Tennessee at the Federal court-room in the city of Knoxville, within said district and the sixth circuit on the second Monday, it being the 12th day of July, A. D. 1880—
16 present and presiding the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit—the following proceeding were had, to wit:

SATURDAY MORNING, *July 17th*, 1880.

Court met pursuant to adjournment; present and presiding the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit.

MARY JANE GRIGGS *vs.* R. G. HOUSTON & Co. } No. 688.

In this cause the defendants, R. G. Houston & Co., move the court to dismiss plaintiff's suit for the following among other reasons:

1st. Because no bond for prosecution is filed by plaintiff or any one for her, the papers upon their face showing that she is a non-resident of the State of Tennessee, and under the law not entitled to prosecute her suit under the pauper's oath. 2nd. Because the widow is not entitled to prosecute suit for injuries to the husband, the administrator or representative alone in this court being entitled to prosecute suits for rights that would have to deceased. Which motion, after argument of counsel and being understood by the court, is overruled and disallowed.

On the same day, July 17, 1880, the following order was made, to wit:

MARY JANE GRIGGS *vs.* R. G. HOUSTON & Co. } No. 688.

Came the plaintiff by her attorney and moved the court to
17 strike out defendants' 2nd, 3rd, and 4th pleas; and the same having been considered by the court, the said motion is sustained and said pleas are stricken out, the court being of the opinion that all the defenses pleaded may be made under the first plea; to which action of the court, in striking out said pleas, defendants except.

Be it remembered that at a circuit court of the United States began and held for the eastern district of Tennessee at the Federal court-room in the city of Knoxville, within said district and the sixth circuit on the second Monday, it being the 12th day of July, A. D. 1880. Present and presiding the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit, the following proceedings were had, to wit:

MONDAY MORNING, *September 13th*, 1880.

Court met pursuant to adjournment. Present and presiding the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit, and the honorable D. M. Key, judge of the United States district court for the districts of Tennessee.

MARY JANE GRIGGS
vs. } No. 688.
R. G. HOUSTON & CO.

This case is continued by consent until the next term of this court.

18 Be it remembered that at a circuit court of the United States began and held for the eastern district of Tennessee at the Federal court-room, in the city of Knoxville, within said district and the sixth circuit, on the second Monday of January, it being the 10th day of said month A. D. 1881—present and presiding the honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

SATURDAY MORNING, *January 15th*, 1881.

Court met pursuant to adjournment. Present and presiding the honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

MARY JANE GRIGGS
vs. } No. 688.
R. G. HOUSTON & CO.

This case is continued until the next term of the court as upon affidavit of plaintiff.

19 *Subpœna.*

The President of the United States of America, to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded to summon, G. B. Burleson, Matt. Franklin, Sam Toms, if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the eastern district of Tennessee, at the Federal court-rooms in Knoxville, in said State, on the 22nd day in July inst., at 9 o'clock, a. m., then and there to give evidence on behalf of the pl'ff in a suit pending in said court, wherein Mary Jane Griggs is pl'ff & R. G. Houston & Co. are def'ts, & that this they shall not fail to do under penalty, &c., and have you then and there this writ.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 21 day in June, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States, the 105th.

[SEAL.] A. R. HUMES, *Clerk.*

(Endorsed:) No. 688. Mary Jane Griggs, versus R. G. Houston & Co. Subpœna. This subpœna was issued on the 21 day of July, 1881. A. R. Humes, clerk. Knox County. Marshal's costs; Officer R. T. Dearmond, 3 summons, at 50 c., $1.50—total $1.50. Filed July 22, 1881, A. R. Humes.

Executed in full in Knoxville, Knox Co., July 22, 1881.

R. T. DEARMOND,
Dept. U. S. M.

20 Be it remembered, that at a circuit court of the United States, began and held for the eastern district of Tennessee, at the Federal

court-room in the city of Knoxville, within said district and the sixth circuit upon the second Monday, it being the 11th day of July A. D. 1881—present and presiding, the honorable D. M. Key, of the United States district court for the eastern and middle districts of Tennessee, the following proceedings were had, to wit:

FRIDAY MORNING, *July 22nd*, 1881.

Court met pursuant to adjournment.

Present and presiding, the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit, and the honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO. } No. 688.

Came the parties by their attorneys, and came also the following jury, to wit, J. K. P. Hall, S. D. W. Lowe, S. J. Couch, J. G. Reeves, J. F. Grisham, J. B. Cummins, C. Mays, John W. Boreing, J. F. Hicks,
L. S. Keener, J. M. Erwin and Benjamin Peck, good and lawful
21 men, citizens and freeholders of the northern division of the eastern district of Tennessee, who, being duly elected, tried and sworn to try the issue joined between the parties, are from rendering a verdict respited until to-morrow.

SATURDAY MORNING, *July 23rd*, 1881.

Court met pursuant to adjournment—present and presiding, the honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit, and the honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO. } No. 688.

Came the parties by their attorneys, and came also the following jury, heretofore sworn in this case, to wit, J. K. P. Hall, S. D. W. Lowe, S. J. Couch, J. G. Reeves, J. F. Grisham, J. B. Cummins, C. Mays, John W. Boreing, J. F. Hicks, L. S. Keener, J. M. Erwin, and Benjamin Peck, good and lawful men, citizens and freeholders of the northern division of the eastern district of Tennessee, who upon their oath do say that they find the issue in favor of the defendants; whereupon it
is considered by the court that the defendants go hence and re-
22 cover of the plaintiff all the costs of the cause, for which an execution is awarded. Thereupon the plaintiff entered a motion for a new trial, which was overruled; to which action of the court in overruling motion for a new trial plaintiff excepts. And thereupon the plaintiff presented her bill of exceptions, which is signed and sealed, and is hereby ordered to be made a part of the record in this case.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO. } No. 688.

In this case it is ordered by the court that the action of the clerk in

sustaining the exceptions to the depositions taken upon behalf of both the plaintiff and defendants be vacated, and set aside and that said exceptions he and they are hereby overruled.

This order was made on the 22nd day of July, 1881, and before this case was submitted to a jury, and is entered now for then.

23 *Bill of exceptions.*

MARY JANE GRIGGS }
vs.
R. G. HOUSTON & CO. }

Be it remembered that, upon the trial of this case, the following proceedings were had, to wit:

The plaintiff read her declaration, and the def'ts read their plea, and thereupon the following evidence was introduced: The plaintiff read in her behalf the depositions of Mary Jane Griggs, Burton Brown, Wm. R. Murray, W. C. Champion, C. D. McGuffey, John B. Neely, J. R. Steele, W. J. Clift, & George McDonald.

Depositions of Mary Jane Griggs, Burton Brown, & Wm. R. Murray.

In the Federal court for the eastern district of Tennessee, U. S. circuit court.

MARY JANE GRIGGS }
vs.
R. G. HOUSTON & CO. }

24 The depositions of Mary Jane Griggs, William Murray, and Burton Brown, witnesses for the plaintiff in the above cause, taken upon notice, on the 10th day of August, 1880, in Ashville, N. C., before the clerk of the United States circuit & district court for the western district of North Carolina, at his office.

The said witness, MARY JANE GRIGGS, being called and sworn to tell the truth, the whole truth and nothing but the truth, deposed & said:

Interrogatory 1. State your age, and residence and name.

Answer. Name, Mary Jane Griggs; age, twenty-nine (29) years; I live on Bent Creek, Buncombe County, North Carolina, ten miles from Asheville.

Int. 2. Is your husband living or dead?

Answer. My husband is dead.

Int. 3. When did he die?

Ans. He died on the 25th of last June, a year ago.

Int. How long were you married?

Ans. Eleven years, lacking from the 25th June to the 11th of July.

Int. 5. If he left any children surviving him, how many? Their names and ages?

Ans. There were two at first; three now; names, Matilda Ruth, aged (7) seven years, the 13th of July last; Robert Cooper, aged (3) three years, the 6th of last March; Mary Florence, aged one year the 29th of this month (August, 1880).

Int. 6. Where did your husband die?

Ans. He died in Hamilton County, East Tennessee

25 Int. 7. From what cause, if you know?

Ans. He died of wounds received on the railroad from the engine.

Int. 8. State the nature of the wounds.

Ans. He was mashed in the bowels, and had some flesh wounds on his legs. He had no bones broken that I could tell.

Int. 9. How long after he was hurt before he died?

(Wm. M. Cocke, jr., esq., counsel for defendant, objects to interrogatories No. 6, 7, and 8, on the ground that witness was not present with her husband at the time he was hurt.)

Ans. 9. Three days. He died on the third day. He was hurt on Sunday and died on Wednesday morning before day. (Defendant's counsel aforesaid objects to interrogatory 9, on same grounds.)

Int. 10. State the age of your husband at the time of his death, and whether he was a strong or a weakly man.

Ans. He was (29) twenty-nine years old in December before he died. He was a stout man. He never was sick more than a day at a time from the time he was married.

Int. 11. How long had he been working on the railroad, and what wages was he getting?

Ans. He commenced work there on the 6th day of May previous to his death. (Defendant's counsel objects to this statement for reasons above given.) He was getting a dollar a day. (Defendant's
26 counsel objects also to statement.) I know he received money, for I got it from him. (Defendant's counsel objects because witness admits she was not present and does not know that there was any contract for wages at all.)

Int. 12. Please state what your husband's habits were.

Ans. His habits for three or four years before his death were good. Previous to that time he had been dissipated.

Int. 13. State whether or not he went from North Carolina to Tennessee in search of employment.

Ans. We went (he and I) on the 25th day of April, 1879, I accompanying him to Athens, Tennessee. He went purposely to go to the road where he was killed, to work there. I followed him from Athens about three weeks after he left me.

(Defendant's counsel objects to witness stating the object for which deceased went to Tennessee.)

Int. 14. Did he lose any time from work after you got to him?

Ans. He only lost one day.

Int. 15. Did you ever see him actually at work on the railroad?

Ans. I saw him several times carrying water to the hands where they were drilling. That was his business. He was crippled in one hand and could not do farm work was why he went to the railroad.

Int. 16. Please state whether or not you had any other means of support than his labor.

Ans. I had not.

27 Int. 17. What means of support, if any, have you now?

Ans. I have none at all.

Int. 18. Please state whether or not the county of Buncombe has made any provisions for your support.

Ans. The county gave me three dollars last Monday.

Int. 19. How much have you been able to do towards supporting yourself since your husband died?

Ans. I have not been able to do much. My youngest child was born about two months after his death, and I have had it to take care of ever

since. I am a woman of just moderately good strength and health; am unable to do heavy work.

Int. 20. State the name the railroad was known by if you know it.

Ans. I knew it as the "Cincinnati Southern Railroad."

Int. 21. Please state whether the road was completed at that time.

Ans. No; they were building it then.

Int. 22. State, if you know, the names of any of the head contractors who were building that road.

Ans. I know Mr. John B. Neely, R. G. Houston, and Thomas O'Connor as head contractors on the road.

Int. 23. Please state if you saw any of these men on the day your husband was hurt and before he died.

Ans. I saw Mr. Neely on the day my husband was hurt and also the next day, and I saw Mr. Houston the same week after my husband was buried. I saw Mr. Neely in the tent after my husband was hurt
28 on the evening of the same day, sitting by my husband talking to him.

Int. 24. Did your husband have any medical attendants; if so, what doctor or doctors?

Ans. There were three doctors, Dr. Henry, Dr. Lewis, and Dr. Champion.

Int. 25. Who was Dr. Henry.

Ans. I understood he was paid by the railroad company to attend the railroad hands.

(Defendant's counsel objects to this statement as hearsay.)

Int. 26. Please state if you or your husband sent for either of these doctors.

Ans. I did not, and to the best of my knowledge my husband did not.

Int. 27. Did you ever hear Mr. Neely say anything as to how the accident happened?

Ans. I did not.

Int. 28. How long after your husband's death till you left Tennessee?

Ans. One week to the day.

Int. 29. How did you get back to North Carolina?

Ans. A young man from Neely's house, whose name I do know, gave me a paper which brought me here.

Int. 30. Where did you first stop when you left the works?

Ans. I went first to Chattanooga with Mr. Sanford, who paid me the money due my husband. He handed me the money and said "Here is the balance due your husband." He didn't say who it was from.
29 He accompanied me from the junction to Chattanooga, and went with me to Neely's gate in Chattanooga. I remained at Neely's till 7 o'clock that evening.

Int. 31. Please state whether or not you were received at Mr. Neely's as if you were expected; and if so, why you thought so.

Ans. Mrs. Neely told me the evening before to come on the next morning's ten-o'clock train. By Mrs. Neely, I mean tbe wife of John B. Neely.

Int. 32. Did you see Mr. Neely while you were at his house?

Ans. I did.

Int. 33. Did he say anything to you about your coming there?

Ans. He did not. I do not know that he knew that I was coming.

Int. 34. Did you hear him instruct any one to get you the ticket or pass?

Ans. I did not.

Int. 35. Do you know of your own knowledge who sent the doctors to wait on your husband?

Ans. I do not. Mr. Mays, who keeps a boarding house there, went after Dr. Lewis, but he did not know who it was that was hurt.

Int. 36. Were you and your husband boarding then at Mr. Mays'?

Ans. No; we were boarding ourselves about a half mile away from there.

Int. 37. Do you know if any one else was hurt in that same accident?

Ans. I do not know of my own knowledge. I understood
30 two others were killed at the same time, one instantly, and another who died that evening. I heard them singing and preaching the funeral over one of them, and saw the congregation but did not see the dead body.

(Defendants' counsel objected to this statement.)

Int. 38. What was your husband's name?

Ans. James La Fayette Griggs was his name. He usually signed his name J. L. Griggs.

Int. 39. Are you the plaintiff in this suit?

Ans. I am.

Int. 40. Are you and was your husband white?

Ans. I am; he was.

Cross-examined.

X-int. 1. When were you married?

Ans. On the 11th July, 1868.

X-int. 2. Who married you, and where?

Ans. William Murray, a justice of the peace, on the Four Mile Branch in Buncombe County.

X-int. 3. Do you know how your husband received the wounds that killed him?

Ans. I do not, for I was not present. I saw the cow-catcher of the engine torn up.

MARY JANE GRIGGS.

BURTON BROWN, a witness on behalf of plaintiff, is called and sworn.

Int. 1. Are you acquainted with the plaintiff, Mary Jane Griggs, and did you know her husband?

31 Ans. Yes.

Int. 2. State, if you know, whether they were man and wife at the time of his death.

Ans. I do not know.

Int. 3. State, if you know, if they were ever married?

Ans. I know they were; I saw them married.

Int. 4. About when was it, and where was it?

Ans. I can't give the exact date. It was at my house on the Four Mile Branch in this county, from ten to twelve years ago.

Int. 5. How long did you know J. L. Griggs?

Ans. I knew him from boyhood up.

Int. 6. Please state, if you know, how Griggs provided for his wife during their married life.

Ans. I do not know. I do not remember ever being at their house but once.

Int. 7. What was Griggs' occupation?

Ans. He was a farm laborer.

Int. 8. State, if you know, what were his habits generally.

Ans. I never saw him drink. He worked for me before he was mar-

ried, and was industrious while with me. He worked for me about four months, as well as I can remember.

Int. 9. State, if you know, what his habits were aside from the time he was with you.

Ans. He worked well when hired, but was not hired all the time.

Int. 10. Was he a strong, healthy man?

32 Ans. He was, so far as I know.

BIRTIN BROWN.

The further examination of witnesses was then continued till to-morrow (Wednesday) morning at nine o'clock.

WEDNESDAY MORNING, *Aug. 11th*, 1880.

The examination of further witnesses is again postponed till 12 m. to-day.

WILLIAM R. MURRAY, a witness for plaintiff, is presented at said time and being duly sworn, the counsel for both parties being present as on yesterday.

Int. 1. Are you acquainted with Mary Jane Griggs?

Ans. I am not.

Int. 2. Were you acquainted with J. L. Griggs in his lifetime?

Ans. I was acquainted with Marcus Griggs.

Int. 3. State, if you know, whom Marcus Griggs married.

Ans. I have understood that his wife's maiden name was King. I performed the marriage between them.

Int. 4. When and where was that marriage performed?

Ans. It was performed at the house of the witness, Burton Brown, on the 11th July, 1868.

Int. 5. Do you remember having performed any other marriage ceremony on that day at Burton Brown's between a Mr. Griggs and a Miss King.

Ans. I performed no other ceremony there between any such parties.

Int. 6. Do you know whether or not that Mr. Griggs is alive or dead?

33 Ans. I do not know of my own knowledge, but I understand he is dead.

(Defendants' counsel objects to answer to interrogatory 6.)

Int. 7. During what period and how long were you acquainted with him?

Ans. I knew him before he was married, and saw him after his marriage a short time previous to the time when I understand he left this county.

Int. 8. Within your knowledge, what kind of a man was he physically?

Ans. He seemed to be a healthy, strong man.

Int. 9. What were his habits for industry when you knew him?

Ans. He worked a good deal in my community. He never worked for me. I never hea'd any complaint against him for idleness from his employer. I do not know of my own knowledge whether he was industrious or not.

Int. 10. Where do you live, and what office did you hold at the time of the marriage spoken of?

Ans. I live seven miles south of Ashville at the post-office called Burbee, one mile beyond the Four Mile Branch, in this county. I was at that time a justice of the peace.

Cross-examined by WM. M. COCKE, Esq.:

X *ex*-int. 1. Was it not M. L. Griggs, instead of J. L. Griggs, that you married to Mary Jane King?

Ans. The license so shows.

Re-ex-int. 1. Do you know that M. L. Griggs is not the same
34 man as J. L. Griggs?

Ans. I never knew but one. He was called Mark. I never knew any J. L. Griggs.

W. R. MURRAY.

STATE OF NORTH CAROLINA.
Buncombe County:

The foregoing depositions were taken before me, as stated in the caption, and were reduced to writing by Lawrence Pulliam, my regular deputy, in my presence, and I certify that I am not of kin or counsel to either of the parties, nor interested in the cause; that I sealed them up and placed them in the post-office in Asheville, North Carolina, addressed to A. R. Humes, clerk of the circuit court of the United States for the eastern district of Tennessee, at Knoxville, Tennessee, and that the same were not out of my possession nor altered after they were taken.

Given under my hand and seal, at office in Asheville, this 11th day of August, A. D. 1880.

[SEAL.]

J. E. REED,
Cl'k U. S. Cir. & Dist. Court,
West'n Dist. N. C., at Asheville.

Bill of costs.

Writing depositions, 24 folios, @ 20c. ea	4 80
Certificate, 15c.; seal, 20c	35
Administering oath to 3 witnesses, 10c. ea	30
	$5 45

35 Received of W. M. Baxter, esqr., atto. for plaintiff, five & $\frac{45}{100}$ dollars, in full of above bill of costs.

J. E. REED,
Cle'k U. S. Circuit Court.

(Endorsed:) United States circuit court, eastern district of Tennessee. No. 688. Mary Jane Griggs vs. R. G. Houston & Co. Depositions for pl't'ffs. Filed Sept. 13, 1880. A. R. Humes, clerk.

Depositions of W. C. Champion, Chas. D. McGuffy, & J. B. Neely.

In the circuit court of the United States for the eastern district of Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO.

The depositions of Dr. W. C. Champion, witness for pl'ff in the above cause, taken upon notice on the 24th day of August, 1880, at the office of R. M. Barton, in Chattanooga, Tenn.

The said witness, W. C. CHAMPION, being duly sworn, deposed & said:

I am a physician and surgeon, and have been practicing for twenty-

one years. In June, 1879, I resided at Melville, Hamilton County, Tennessee. About the 15th of June—I don't recollect the exact date, but some time in June, 1879—I was called to see a man by the name of Griggs, so said to be. A colored man came after me, and said Neely had sent for me; this man's name was John Peepick. Griggs had been injured; he had been struck with some wooden or iron instrument. He was struck in the perineum, and was much lacerated and torn; the ureth'a was cut in two; the pubic bones were
36 broken. I saw him only once. I don't know how long he lived afterwards. I saw him, I think it was, between ten and eleven o'clock in the morning. There were a No. present when I saw him. Col. Jo. Clift was there; a man by the name of Bowers, Dr. Henry and Dr. Lewis, and others that I didn't know. There might have been others there that I knew that I don't call to mind just now. Griggs' wife was present when I first went, but she went off, I think. Neely was there in the evening; he went up on the train and came back in the evening. Dr. Lewis was there when I went, and had given Griggs morphine, so he told me, before I came, and kept him easy with morphine. Dr. Henry gave more morphine after he came. I did not give him anything. He seemed easy when I was there. Such an injury as he had, I am satisfied, was obliged to cause death. I don't know whether it would be so very painful or not. Bowers and some other man told me to file my claim, for my services in waiting on Griggs and others that were injured in the same accident against R. G. Houston & Co., with the commissary there. I made out my account against R. G. Houston & Co., and filed it at the commissary. It was not paid. I then placed the account against R. G. Houston & Co. in the hands of Milo Brown, constable, who collected and paid me the money.
37 Dr. Henry was the physician of *of* R. G. Houston & Co., whom they had employed to wait on their hands. Dr. Lewis was a practising physician in that neighborhood. He was the first one to see the wounded man. He was there when I got there. There were several hurt at the same time—one killed outright, and one died in about half an hour after I saw him and Grigg' mortally wounded.

Cross-examination by M. H. Clift:

I looked to R. G. Houston & Co. for the payment of my bill, in consequence of the message I rec'd to attend the men. And further sayeth not.

Witness claims 1 day & 42 miles.

W. C. CHAMPION.

Sworn to and suscribed before me, Aug. 24, 1880.

R. M. BARTON, JR.,
U. S. Com'r.

C. D. MCGUFFEY, next witness for plaintiff, being duly sworn and examined, deposes and says:

My name is Chas. D. McGuffey; residence, Chattanooga; profession, lawyer and attorney and agent for Tennessee for the Cincinnati Southern Railway; have been in the service of the railway for over five years, first with style of attorney for Tennessee, afterwards of attorney and agent for Tennessee. Held the latter position during the recent contract of R. G. Houston & Co. for completing railway to Boyce, Tenn. So far as I know during that time the cars used (that is during the said

38 construction, were under control of R. G. Houston & Co. I mean on that part of the railway embraced in their contract. This included that part of the railway from Boyce to the Rhea County line. I rode on the cars or locomotives at various times by permission of said firm. That firm was composed of R. G. Houston, John B. Neely, and Thomas O'Conner.

Cross-examined by M. H. Clift, attorney for R. G. H'uston & Co.:

I do not know to whom the locomotives used in said construction belonged, except I heard of one of them, as I now recollect, that it was hired from the Nashville and Chattanooga Railway. I do not know who employed the locomotive engineers.

CHAS. D. McGUFFEY.

Sworn to & subscribed before me, Aug. 24, 1880.

R. M. BARTON, JR.,
U. S. Com'r.

The next witness, JOHN B. NEELY (examined by consent), being duly sworn, deposed and said:

I am John B. Neely, of the firm of R. G. Houston & Co., who are sued in this case. I was present when the accident happened in which Griggs lost his life. I don't remember the date of the affair. It was in the month of June, 1879. The accident occurred by the engine running into the flat-car. This was about or near twelve miles from
39 Chattanooga. I was on the engine at the time of the accident. Besides myself, there were in the engine-cab Col. Joe Clift and his wife, the engineer, and fireman. There may have been some one sitting on the tender, but I don't remember it at this time. The accident occurred on Sunday. The engine was going up to meet the upper engine that ran on the upper end of the line. I don't remember what point we were to meet at. There was one unloaded flat-car attached to the engine at the time. I don't remember that there was or was not a brakesman on the car; my impression is there was not. Don't think there was any one else on the flat-car attached to the engine, if there was a brakesman there. There was a brakesmen on the engine. I can't think of the brakesman's name. There were two or three flat-cars standing on the track that we ran into. The cars that we ran into were unloaded cars. I think there may have been a little material left in some of them, but I would call them unloaded cars. These cars were standing on the main track. I presume we were about six hundred yards from these cars when I first saw them before we ran into them. The track was nearly straight, or with a slight curvature. We
40 had a clear sight of the cars. The curve gave a better sight of them than we would have had if the road had been straight, that is, it would to me in my position. I was standing right behind the engineer. I think I saw these cars as early as the' could have been seen. I presume the engineer saw them. I think there was not at that time anything said about the cars; there was nothing said about them at all before we struck them. An effort was made all the way from the time we first saw them to stop. The brakesman put on some six or eight hundred feet before we came to the point of the curve where we saw them. The engineer directed the brakes to be put on. He did it by the whistle. The engine, I would think, at the time it struck the cars was running at the rate of two and a half miles an hour. There were

four men, I believe, that were hurt; besides these, the brakesman had a slight wound. The men that were hurt were on the pilot. They must have gotten on at Boyce's Junction, as we didn't stop anywhere else; we stopted out from Boyce's Junction. Of the men who were hurt two men only were in the employ directly of R. G. Houston & Co.—one white man named Griggs or Griggsby, I think, and one colored man. By saying directly in the employment of R. G. Houston & Co., I mean that
41 there were some men who were working for subcontractors under us, but these two were working directly for us. The man J. L. Griggs was working directly under R. G. Houston & Co.

Besides putting on the brakes, another effort was made to stop the train. When in about two hundred feet of the cars the engine was reversed as we approached the cars; the grade was slightly down; not a heavy grade, but down grade. The brakes were put on by the engineere's direction, because we were going down grade. I did not know these men were out on the cow-catcher. There must have been more than four men on the pilot when we approached the cars. When we were within one hundred or one hundred and fifty feet of the cars I saw a man jump off. This was the first intimation I had that there was anybody on the pilot. Then our brakesman, who had gone around on the pilot, jumped off. He jumped off after I saw the other man jump off. I don't know why the brakesman had gone around on the pilot, he being under the instruction of the engineer. I often rode up and down the road in the cab with the engineer. It was not a fact known to me that men fre-
42 quently rode up and down the road on the pilot of the engine. The camps of the men were at Cave Springs, right on their work. The employees frequently rode on the train. When they rode with my knowledge or permission they rode on the flat-cars. I have frequently permitted outside people, superintendents, or visitors to ride in the engine. The engine was reversed just before the man jumped off the pilot. I think it was not reversed in consequence of any signal that the brakesman who went out there gave to the engine. The injured men were carried around to quarters in that neighborhood—such as they had; we were at the camps. I sent for the physicians that waited on them. I don't remember how long Griggs lived. I presume Griggs died from the effects of this injury. I was not at the funeral. His wife left for North Carolina; that's what she said. She came to Chattanooga and remained part of the day before going. I remember seeing her here. A collection was made on the line which furnished her money to go home on. We all contributed. R. G. Houston & Co. had a low ticket-rate for our laborers over the E. T. & Va. & Ga. Road. She was furnished one of these tickets. I don't remember whether the ticket was paid for at the time or not. I do not recollect how
43 long Griggs had been working for us; not long. He was a middle-aged man. He was not a strong man; not able to do heavy work. We made a water-carrier out of him. (The reason I knew Griggs and knew he was not strong was because I saw him on the work carrying water and asked the foreman why he had a man carrying water. He told me who he was, and said he was a poor fellow he knew from North Carolina, and he was not able to do heavy work, or a day's work; he gave him this job to enable him to help support his family.) (The above matter in parentheses objected to by plaintiff.) I could not tell you whether he lost any time, or rather the extent of time he lost in doing such work as he did do. I saw him idle. I presume he lost some time. Men were only allowed time when at

work. So far as the accident and the way in which it occurred is concerned I presume I have related all the material facts.

Cross-ex. by M. H. Clift, att'y for def't:

This man Griggs had left his place of work, and was not, at this time, on business for R. G. Houston & Co. These men, including Griggs, were ordered that morning before we left Boyce's not to ride on the pilot of the engine. While the engineer was at breakfast, I saw
44 the men on the pilot, and getting on. I made them get off, and ordered them back to the car behind the engine. I told them there was a car there they could get on. Mr. Steele, the engineer, also went around and told them everybody must get off that pilot. I heard him order them. They got off when I ordered them. They must have gotten back. They got back without my knowledge, and contrary to my orders. We had a box-car standing on the siding, right opposite the engine. The only way I could see how they could have gotten on without my seeing them was to go around the car and step from behind it on to the pilot, which I am satisfied they done. At the time of the accident there was a light mist of rain falling and the track was slick. When the engineer reversed the engine my impression is he sanded the track. He used every effort he could, so far as I know, to stop the engine. I could see nothing to the contrary. I knew nothing of the cars being on the track before I saw them. The engine slipped forward after the action of reversal, and did not respond to the act of reversal by stopping. At the rate of speed the engine was travelling be-
45 fore the accident occurred, I could have stepped off the cars anywhere within a thousand feet of where the accident occurred with safety. The contribution made up for the widow of Griggs was by individual gifts, and R. G. Houston & Co. made up whatever balance was necessary. On the day of the accident, after the accident, I saw Mrs. Griggs, and said to her this was a hard thing, or unfortunate thing for her. She said "Yes; but nobody was to blame but her husband." She said she tried to keep him at home that morning, but could not.

(Plaintiff objects to this last.)

Re-examination:

Mrs. Griggs was not present when the accident occurred; she didn't see it. And further sayeth not.

J. B. NEELY.

Sworn to & subscribed before me, Aug. 25, 1880.

R. M. BARTON, JR.,
U. S. Com'r.

By consent, J. B. Neely, being further examined by M. H. Clift, att'y for def'ts, deposes and says:

We employed the engine, engineer, & fireman from the Western and Atlantic R. R. Co. The engineer & fireman were in the employ of the W. & A. R. R. Co., and the engine belonged to them.

Re-exam'n:

46 In doing the work on the road that was being built by us, the engineer received his orders from us, i. e., R. G. Houston & Co. We in'tructed him what we wanted done. R. G. Houston & Co. paid so much a day for the use of engine, engineer, & fireman. The amount paid for the use of the engine was a fixed sum, but whatever the W. &

A. R. R. Co. paid the engineer & fireman the bills were sent to us and the amount added to amount to be paid by us to W. & A. R. R. Co. The W. & A. R. R. Co. had no right to control the engineer & fireman in doing the work on our line. They had the right to give him instructions about his engine.

Recross-examined:

In constructing the C. S. Railway we (R. G. Houston & Co.) did not use it for any other purpose than for our use in doing the work. We did not carry passengers or freight for the public. R. G. Houston & Co. did not instruct the engineer how he should run his train when the same was in motion. We used to caution him to be careful, & more especially when he was handling our force. In hiring the engine from the W. & A. R. R. Co. we were obliged to take with it the engineer furnished by said company. The engineer was said to be a careful engineer & rather an overcautious engineer.

J. B. NEELY.

47 UNITED STATES OF AMERICA,
Eastern District of Tennessee:

The foregoing depositions have been taken by me as stated in their captions upon notice and by consent, and reduced to writing by myself or the witnesses in my presence, except the last re-examination of J. B. Neely, which was done by consent; and I certify I am not of kin nor counsel to either party, and in no way interested in the cause. These depositions have not been out of my possession or control since taken, nor in any way altered or changed since signed, sealed, and placed in the post-office by me.

R. M. BARTON, JR.,
U. S. Com'r.

Costs of R. M. Barton, jr., U. S. Com'r.

Issuing subpœna for witnesses	$ 25c.
Taking deposition, 2,660 words, at 20c. per fo.	$5 30
Postage	$0 15
	$5 60

(Endorsed:) United States circuit court. No. —. Mary Jane Griggs vs. R. G. Houston & Co. Depositions of W. C. Champion, Chas. D. McGuffey, & J. B. Neely. Filed Aug. 27, 1880. A. R. Humes, clerk.

48 *Deposition of J. R. Steele.*

In the circuit court of the U. S. for the eastern district of Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & OTHERS.

The said witness, J. R. Steele, being duly sworn, deposes & says:

Int. 1. What is your business or profession, and how long have you followed it as a calling?

Ans. I have been a railroad engineer a little more than four years.

Int. 2. Were you in charge of the construction train or engine be-

ing used by R. G. Houston & Co. in building the Cincinnati Southern Railway in 1879? If so, for how long?

Ans. I was running that train, but was employed by the W. & A. R. R. Co. I went in charge of that engine 19th May, 1879, and was there June 22nd, 1879, that being the day Griggs was hurt.

Int. 3. Please give in detail the occurrence of Griggs' injury.

Ans. He was on the front of the engine; I mean the bumper. I ran into some flat-cars standing on the main line. It happened at Cave Springs, in Hamilton County, on the railroad known as the Cincinnati Southern Railway.

Int. 4. How long before you ran into the flat-cars was it before you saw them, or could have seen them?

Ans. I rec'on it was about 1,200 feet from them when I got where I could see them.

Int. 5. How fast were you running when you first saw them?

Ans. I was running about 4 or 5 miles an hour.

Int. 6. What effort did you make to stop the train when you saw the flat-cars?

49 Ans. I reversed my engine; had the brake put on & gave her steam.

Int. 7. How many cars were attached to your engine, & how were they loaded?

Ans. There were two; one loaded with iron rails, and I don't remember what the other was loaded with.

Int. 8. How many brakesmen were there on the train, & where were they?

Ans. There was one; he was out in front of the engine to couple up to the flat-cars which we were approaching.

Int. 9. What was his name, and where is he now?

Ans. His name was Bill Gleaves; I don't know where he is now.

Int. 10. Was he hurt by the collision?

Ans. Yes; he got his knee sort o' mashed, I believe.

Int. 11. Didn't he jump off before you struck the flat-car, & hurt himself in the fall?

Ans. I can't tell whether he did or not. It was on the opposite side of the engine from me.

Int. 12. Who was in the engine-cab with you?

Ans. Mr. Neely, Col. Clift & his wife, and Mr. Terkes. I believe that was all.

Int. 13. What day of the week was it, as you remember?

Ans. It was Sunday; in the morning.

Int. 14. Please state whether or not you knew that there was anybody on the "bumper" that morning; if so, how many?

50 Ans. I didn't know there was but one man there, and I didn't know he was there until I got within about a quarter of a mile of the flat-cars.

Int. 15. Who put on the brake, & why was it put on?

Ans. The brake on the tender was put on by Dick Calhoun, who was on the train; and it was put on because I whistled for the brake.

Int. 16. There was no brake put on either of the flat-cars behind you, then?

Ans. No, sir; there was not.

Int. 17. Why did you reverse the engine and call for the brake when you first saw the flat-cars in front of you, if you were going to couple them?

Ans. I was rolling up a little faster than I wanted to, and I wanted to get slower.

Int. 18. How long after you called for the brake, reversed your engine and gave her steam, before you struck the flat-cars and collided?

Ans. It wasn't very long; only a short time; but I could say exactly how long.

Int. 19. Was it more than a minute or two?

Ans. No, sir.

Int. 20. Did you see Griggs after he was hurt? If so, tell how & where he seemed to be hurt.

Ans. Yes, sir; I saw him. He seemed to be hurt right through his bowels. He seemed to be tolerably badly hurt.

Int. 21. Do you know how soon after he died?

51 Ans. I believe, to the best of my recollection, he lived about a week.

Int. 22. Was anybody else hurt by the same collision and at the same time?

Ans. Yes, there were three others.

Int. 23. Please state whether, after you reversed your engine, called for brakes, & put on steam, you didn't run into the flat-cars almost immediately.

Ans. It was quite a short time, a minute or so. It couldn't have been more than a minute, I don't think.

Cross-ex. by sol. for def'ts:

Int. 1. Did not the engine you was running belong to the Western & Atlantic Railroad Co., & was you not in their employ?

Ans. Yes, sir.

Inter. 2. Did you not order the men, including Griggs, off of the engine before starting from the junction that morning on which the accident occurred, and did not also Col. J. B. Neely order them off, & did they not get off, & he told them they must not ride there, and did they not get off & slip back without your & his knowledge?

Ans. Yes; I ordered them off of engine, & so did Col. Neely; and we both told them they must not ride on the engine, and they got off when we ordered them and slipped back without our or my knowledge.

52 Inter. 3. Were these men on the engine against orders direct to them, & without your knowledge?

Ans. Yes, sir.

Inter. 4. State whether you are a competent & skillful engineer, and did all you could to prevent the collision or accident.

Ans. Yes, I am, and did all I could to prevent the accident.

Int. 5. If these men on the pilot or front part of the engine had obeyed the orders of yourself & Col. Neely & kept themselves off of the engine & been back on the flat-cars, would they have got hurt?

Ans. No, sir; they would not.

Inter. 6. Did not your engine slip after the brakes were put on & engine reversed & steam applied, & did you do anything else to prevent slipping &, if so, what?

Ans. Yes; she slip'ed, & sanded the track from sand-box on engine, and did all that could be done to stop her.

Inter. 7. State whether or no the man Griggs was not a crip'le, & weak man, unable to do much work, or earn much, & what sort of work he did for R. G. Houston & Co.; who was his foreman; & what was said by him as to his being unable to work.

Ans. He was not able to do anything but carry water. Bowers was his foreman; he said he was not able to do anything but carry water.

Re-examined.

53 How hard did you strike the flat-cars when you ran into them?

Ans. I don't how hard I struck them, but not powerfully hard, though.

Recro.:

Inter. 1. Could not a man step'ed off of the engine or train safely for 1,200 feet before you struck the flat?

Ans. Yes, sir; he could.

Inter. 2. Was any of these men at work on this day?

Ans. Not one.

J. R. STEELE.

Sworn to & subscribed before me January 3rd, 1881.

R. M. BARTON, JR.,
U. S. Com'r.

The above deposition taken before me by consent at the office of M. H. Clift, att'y, the answers being, by consent of parties, written by the att'ys present, Wm. M. Baxter, att'y for plaintiffs, and M. H. Clift, att'y for def't, being present. I certify that I am not *not* of kin nor counsel to either party, nor in any way interested in the cause. By consent and direction of M. H. Clift, att'y for def't, this deposition sealed up and placed in possession of Wm. M. Baxter, to be delivered to A. R. Humes, clerk of U. S. C. court.

R. M. BARTON, JR.,
U. S. Com'r.

54 (Endorsed:) No. 688. United States circuit court, eastern district of Tennessee. Mary Jane Griggs vs. R. G. Houston & others. Deposition of J. R. Steele, witness on behalf of plaintiff, received, sealed up at the hands of Wm. M. Baxter, esq., & filed this Jan'y 4, 1881. A. R. Humes, clerk.

Subpœna.

The President of the United States of America to the marshal of the eastern district of Tennessee, greeting:

You are hereby commanded to summon J. W. Clift and Mr'. J. W. Clift (of Chattanooga), J. W. Pickens, and W. B. Wright (of Knoxville), to appear before the circuit court of the United States of America for the eastern district of Tennessee, sitting at the Federal court-room in Knoxville, on Thursday morning, January 13th, 1881, to testify and give evidence on behalf of the plaintiff in the case of Mary Jane Griggs vs. R. G. Houston et al., and not depart the court without leave. Herein fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Knoxville, in said district, the 10th day January, 1881.

A. R. HUMES,
Clerk Circuit Court Eastern District of Tennessee.

(Endorsed:) Mary Jane Griggs vs. R. G. Houston & Co. No. 688. Subpœna. Issued 10' day of Jan., 1881. A. R. Humes, clerk. Costs, Officer J. M. Barton, jr., 112 miles going at 6c., $6.72; 1 wit's subp'd, at 50c. Total, $7.22. Hamilton & Knox Countys.

55 I hereby deputize J. M. Barton special deputy to execute this subpœna, this Jan'y , 1881.

S. P. EVANS, *U. S. M.*

Came to hand Jan'y 11th, 1881, and served on J. W. Clift, by reading the within to him at Chattanooga, Tenn., this Jan'y 11, 1880. Mrs. J. W. Clift not found; W. B. Wright & J. W. Pickens not found.

J. M. BARTON,
Special Deputy U. S. Marshal.

Deposition of W. J. Clift.

In the Federal court at Knoxville, E. Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO.

The deposition of W. J. Clift, witness for pl'ff, taken by consent, at Chattanooga, Tennessee, Jan'y 11th, 1881, at office of Clift & Clift, in the presence of Wm. M. Baxter, att'y for pl'ff, and S. A. Key, appearing for def'ts.

The said witness, W. J. CLIFT, being duly sworn, deposes as follows:

Int. 1. Please state if you are one of the attorneys for the def'ts in this suit, and whether you were on the engine at the time pl'ff's husband was injured by a collision. If so, when was it, where was it, how did it happen, and who else was present at the time? Give full account of all material facts.

Ans. I am one of the firm of Clift & Clift, who are attorneys. Was on the engine when the accident occurred, and when a man pointed out to me as Grigg was injured. I don't remember date of accident.

56 It was on C. S. Railway at Cave Spring, about twelve miles from Chattanooga, Tennessee. The engine I was on collided with a flat-car, loaded with rock, caused by the sliding or slipping of the engine when they went to make the coupling, and the man who was injured was riding on the pilot of the engine. There were on the engine at time with me, my wife, Mrs. Inez Clift, Col. Neely, J. S. Williams, the engineer, Mr. Steele, the fireman or coupler, Gleaves, and the names of the other parties I cannot give except from information.

Int. 2. Were all these parties named in the cab of the engine?

Ans. There were none of the parties named on the engine except Col. Neely, Mrs. Clift, engineer, fireman, & myself, that I remember.

Int. 3. How many cars composed the train, & how were they loaded?

Ans. The engine & two or three flats, to the best of my recollection, and one of the flats, at least, had some railroad-iron on it.

Int. 4. Were there any brakesmen; if so, how many?

Ans. I cannot answer as to brakesmen, except on the engine; Gleaves did the breaking on the engine.

Int. 5. How long before you reached the flat-cars, with which the engine collided, before you saw them or could have seen them?

Ans. I cannot state the distance with any certainty. I think about three hundred yards.

57 Int. 6. Had you not come around a curve before coming in sight

of these flat-cars? If so, how far was this curve from the flats ahead of you?

Ans. Yes; and I think the curve ended about three hundred yar's from place of accident. I am not certain of this, however.

Int. 7. How long after you saw these flat-cars before the engineer called for brakes, & what brakes were put on?

Ans. The engineer whistled and called for brakes before I saw the flat-cars. I cannot say how many brakes were put on—I know the one on the engine was put on.

Int. 8. How long after you heard the whistle for brakes before the collision occurred?

Ans. This question I cannot answer. I can only say that the call was made for brakes in neighborhood of three hundred yards from flats & the train checked up and moved slowly on down to make the coupling.

Int. 9. Was there anything done in the way of coupling? If so, who did it?

Ans. Yes; the boy Gleaves, after tight'ning up the brake, walked out along the engine for the purpose of making the coupling, and received an injury by the collision.

Int. 10. Was the engine reversed? If so, at what time?

Ans. Yes; I cannot give you the exact distance from flat, but
58 to best of my recollection when engine began to slip.

Int. 11 How far did the engine slip before striking the flat-cars?

Ans. I cannot say how far. I can't pretend to give you the exact distance.

Int. 12. Did it slip more that 10 feet, to the best of your recollection?

Ans. It did.

Int. 13. Was it as much or more than 15 or 20 feet?

Ans. It is impossible for me to give the exact distance.

Int. 14. Do you know if the track was sanded, or steam given to the engine on the reverse motion?

Ans. I can't state as to steam or sand; the engineer was working or pulling rods on right side of engine, but I am not familiar enough with an engine to say what all was done.

Int. 15. What day of the week was it, and what kind of a day was it?

Ans. It was on Sunday, and a gentle rain was falling at time.

Int. 16. What was the grade of the road approaching the flat-cars?

Ans. I' was down grade, but I cannot give the degree.

Int. 17. Do you know what steam lever or throttle of an engine is?

Ans. I think I do.

59 Int. 18. When the call for brakes was made, did you see it moved in any way? If so, how was it moved?

Ans. I did not, because at the time I was looking out on the opposite side, or left side of the engine.

Int. 19. Did you see any men get on the "bumper" or "cow-catcher," before leaving Boyce Station?

Ans. I did not.

Int. 20. State whether or not you heard Steele or Neely order anybody not to get on the front of the engine before leaving Boyce Station?

Ans. I did not.

Int. 21. Were you in the engine-cab, and how long were you there before leaving Boyce Station?

Ans. I was in the cab; but myself and wife were in house on side of track, & when we came out got in cab; the train started immediately.

Int. 22. Did you know anybody by the name of Sanders at that time; &, if so, do you know for whom he was working?

Ans. I do not, unless it was Dr. Sanders, a physician for def'ts, on the road.

Int. 23. After the engine was reversed, as you remember or understood it, did you see the lever of the throttle-valve moved until after the collision? If so, how was it moved?

Ans. I cannot state that I did or did not, from my recollection of the matter now.

Int. 24. Understanding that pulling out said lever meant put-
60 ting on steam, if it had been pulled out as indicated in the preceding question, don't you think it would have impressed you?

Ans. He may have pulled it out or shoved it in, and I may not have seen it, and I may have seen it, and still my recollection of the matter now would not permit me to state one way or the other.

Int. 25. Let me refresh your recollection. Don't you remember that before the collision occurred you saw some man's head out in front of the engine? If so, how long before the collision, i. e. how many yards?

Ans. I did not see the head of but one man on the pilot, and that only two or three times between Boyce Station and place where accident occurred. I do not remember to have seen his head within half mile or more of accident.

Cross-examination by def'ts:

1st X-int'y. Were defendants at this time engaged in carrying passengers for hire, or were they not engaged in constructing the road-bed and track of the Cin. S. R'y?

Ans. They were engaged in constructing track of said railway, and, so far as my knowledge extends, did not carry passengers for hire.

2nd X-int'y. Was there any passenger-car attached to or conductor on this train?

Ans. There was not.

3rd X-int'y. Please explain fully the cause of the collision, as you
61 now remember it. Was the collision caused by recklessness on the part of the engineer and other employees on the train, or from what cause?

Ans. The collision was caused by the engine slipping or sliding on the track. I saw no fault upon part of engineer or other employees.

4th X-int'y. Was the train moving fast or not at the time of, and for some time before, the collision? Give the rate of speed as nearly as you can.

Ans. When the engineer called for brakes the train was checked up and was moving slowly on down to make the coupling, and if the slipping of the engine had not occurred, there would have been no trouble about making the coupling. I can't give the precise rate of speed.

5th X-int'y. Was there not ample room upon the two or three flat-cars attached to the engine upon which the persons on the pilot could have obtained seats? And if they had been on the flat-cars would any injury have been done to them by the collision?

Ans. There was room enough on the flats, and they would not have been injured if they had not been on the pilot of the engine.

6th X-int'y. Was any one hurt except those who were on the pilot?

Ans. There were not.

7th X-int'y. Was not the train and engine for some distance before the engine struck the flat-car running slow enough to allow those on the pilot to jump off without danger to them?

62 Ans. Yes. I could not then and can't now see why they did not jump off.

8th X-int'y. Were any persons riding on the flat-cars at the time of and before the accident?

Ans. My impression is there were; but I couldn't now say how many or who they were.

Re-examined:

You are a lawyer and not a R. R. engineer?

Ans. That is my profession.

Int. 2. What you mean this, that so far as your knowledge of the management of an engine goes, you saw no fault in the engineer's management, etc.?

Ans. Yes, sir; that is what I mean.

Int. 3. How hard did the engine seem to strike the flat-cars when the collision occurred?

Ans. I can only say from jar of engine; it was not very great.

Int. 4. Did you know or suppose that the engine was going to slip or that you were going to have a collision, until the engine slipped?

Ans. I did not.

Further deponent saith not.

W. J. CLIFT.

It is agreed that the foregoing may be read in evidence with the same effect as if regularly sworn to.

This Jan'y 11th, 1881.

WM. M. BAXTFR,
Att'y for Pl'ff.
M. H. CLIFT,
Att'y for Def'ts,
By S. A. KEY.

63 (Endorsed:) United States circuit ct., eastern district of Tennessee. Mary Jane Griggs vs. R. G. Houston & Co. Deposition of W. J. Clift, witness for plaintiff. Filed Jan'y 12, 1881. A. R. Humes, clerk.

64 *Deposition of Geo. McDonald.*

Circuit court of the U. S. for the eastern district of Tennessee.

MARY J. GRIGGS
vs.
R. G. HOUSTON ET AL.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Be it remembered that on the 30th day of March, A. D. 1881, at Boston, in said district of Massachusetts, before me, a commissioner of the circuit court of the United States for said district of Massachusetts, personally appeared GEORGE MCDONALD, a witness for the pl'f in the above-entitled suit, and the said witness being by me first carefully

cautioned & sworn to testify the whole truth relative to the issue, did depose & say as stated in the annexed deposition.

I certify that notice of the taking of said deposition was duly given to the adverse party by the notice hereto annexed.

I further cerify that by the assent of counsel appearing before me, viz, W. M. Baxter, esq., in behalf of the pl'ft, and Thomas Weston, junior, in behalf of the def'ts, the said deposition was taken by me, acting in place of John G. Stetson, clerk of the U. S. C. C. for said district of Mass.

I further certify that I am not of counsel & have no interest in said suit.

65 [SEAL.] HENRY L. HALLETT,
Commissioner of the Circuit Court of the United States for the District of Massachusetts.

Commissioner's fee		$9 75
Witness	"	2 50
Marshal's	"	3 30

Circuit court of the U. S. for the eastern dist. of Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON ET AL.

Deposition of George McDonald, taken in behalf of the pl'f, at Boston, in the district of Massachusetts, on the 30th day of March, A. D. 1881.

In answer to interrogatories proposed by WM. M. BAXTER, counsel for pl'f:

My name is George McDonald. I reside at present in Lynn, Massachusetts. I am twenty years old. I am a morocco dresser. In 1879 I resided in Rock Creek, Hamilton County, Tennessee. I was in the employ of the Keystone Bridge Company; they were then working on the Cincinnati Southern R. R. at that time—that's what I think they called it. The road was then being built. The principal contractors for that end of the road were R. G. Houston & Co. I was present at an accident which occurred on that road on the 22nd of June, 1879.

66 We left Chattanooga on the 22d of June, 1879, to go up home, to Roaring or Rock Creek, I forget which they called it. Twelve miles outside of Chattanooga, at a place they call Cave Springs, about half a mile this side of there, there was a flat-car on the track; there was seven of us sitting on the pilot to the engine. The engineer threw back his brake, & being wet the engine slipped, and, as far as I could see, gave it full force, and of course we run into the flat-car that was on the track. Three of the seven men on the pilot were killed, one jumped off, and one run back on the foot-board of the engine; that, of course, gave the rest of us no chance to get away. Besides the seven men on the pilot there was the engineer, the fireman, & two other men. I believe Mr. John B. Neely was in the cab of the engine.

There were two cars in the train, both flat-cars. They were loaded with railroad-iron for laying the track. The flat-cars were not very good ones, they didn't have brakes on either of them. We saw this flat-car that was on the track about half a mile before we struck it. I believe the road at that point was pretty nearly level. It was a wet, misty day. I should say our train was running about ten or fifteen miles an hour when we struck it. The flat-car that we struck was unloaded. I

got on the train at the junctoin of the W. & A. road & the Cincinnati Southern.

67 The names of the seven men on the pilot were, as far as I know, Mike Kannard, a Mr. Davis, I think—this is all I knew that was on the pilot. All the seven got on at the junction. We had Mr. Neely's permission to ride on the pilot. I don't remember seeing a man with a crippled arm on the pilot that day. I was hurt by the accident. I have brought suit for damages against R. G. Houston & Co

The construction trains were usually made up of flat-cars; there were no box or passenger cars attached while I was there. I suppose employees were expected to ride on the flat-cars. I had seen employees riding on the pilot before that day. I had ridden there myself. I have seen others riding on the pilot pretty much every day I have been there. I have ridden there, I believe, three or four different times. I don't know as I ever saw Mr. Houston on the road; I saw Mr. Neely most every day on the road. Mr. Neely most generally rode in the cab. I don't know that I have ever seen Mr. Neely in the cab when men were on the pilot before this day. I don't remember the engineer's name.

1. Int. Do you remember whether or not the whistle of the engine was blown as the train approached this flat-car on the track?

Ans. It was not.

68 2. Int. Do you know what is meant by the terms reversing an engine?

Ans. Well, I suppose that is to stop it.

3. Int. Do you know whether or not any attempt was made to reverse the engine as it approached this flat-car on the track?

Ans. Yes, sir; I believe there was.

Int. 4. In what way were you made conscious of it?

Ans. She slacked up, and afterwards started ahead again faster than before.

5. Int. How far was the engine from the flat-car on the track when it slacked up?

Ans. I should say it was about a quarter of a mile.

6. Int. How close was the engine to this flat-car when the man you speak of jumped off?

Ans. I should say about ten rods.

7. Int. How soon thereafter before the collision took place?

Ans. I should say about thirty seconds.

8. Int. Could any of the men on the pilot see the engineer or fireman in the cab?

(Objected to.)

Ans. I could see the fireman but not the engineer.

9. Int. Please state whether or not within your own knowledge either the engineer or Mr. Neely was under the influence of liquor at the time of the accident.

Ans. I couldn't say.

10. Int. Were you sitting facing the flat-car with which you collided?

69 Ans. No, sir; I was sitting sideways but looking at the flat-car.

11. Int. How were the other men on the pilot sitting, if you know?

(Objected to.)

Ans. They were facing the flat-car.

12. Int. What warning did you first have that an accident was about to occur?

Ans. When the train slacked up, & started ahead again.

13. Int. Please state whether or not you made any attempt to jump off the train?

(Objected to.)

Ans. I did, but didn't have time; they didn't give me a chance, at least.

14. Int. Please state whether or not the engine left the track.

Ans. No, sir; it did not.

15. Int. Were the two flat-cars behind the engine loaded heavily, or not?

Ans. Well, they were loaded quite heavy.

16. Int. What day of the week on which the accident occurred, if you remember?

Ans. Sunday.

17. Int. Do you know of your own knowledge whether or not the sand-box of the engine was supplied with sand at the time of the accident?

Ans. It was not.

18. Int. If you can, will you give the names of the man who jumped off, & the man who saved himself by going back on the running-board of the engine?

70 Ans. Mike Kennard jumped off. I forget the name of the man who ran back.

19. Int. Please state whether or not Mr. Neely or the engineer ordered you not to get on the pilot before the engine left the junction.

(Objected to.)

Ans. No, sir; they did not.

20. Int. Please state whether or not you heard either of them order either of the other six men on the pilot to get off the pilot, or not to get on the pilot, before leaving the junction.

Ans. No, sir; I did not.

21. Int. Please state whether or not you heard either of them request anybody that was on the pilot, before leaving the junction, to get back & ride on the flat-cars.

(Objected to.)

Ans. No, sir; I didn't.

22. Int. Was there anybody riding on the flat-cars that morning?

Ans. No, sir; there was not.

23. Int. Which was the safer place to ride; on the flat-cars, or on the pilot of that train, on that morning?

(Objected to.)

Ans. I thought the pilot was.

24. Int. Why?

(Objected to.)

Ans. As there was no breaks on the flat-cars, and they were loaded with iron.

25. Int. Was the iron loose iron railroad-rails?

Ans. Yes, sir.

26. Int. Did you ever see the flat-car with which the engine

71 collided after the collision?

Ans. I did, directly after.

27. Int. What was its condition?

Ans. I believe it was the same as before it was struck. I don't believe it was damaged any.

28. Int. Did you see either of the other men that were hurt?

Ans. No, sir, I did not.

And in answer to cross-interrogations proposed by THOMAS WESTON, Junior, of counsel for d'f'ts:

1. X. You have a suit for damages against these same d'f'ts?
Ans. Yes, sir.
2. X. Has it been decided?
Ans. No, sir.
3. X. You are, then, some interested in this case?
Ans. Well, I don't know as I am much now.
4. X. Why not?
Ans. Well, I gave up my case.
5. X. Why did you give up your case?
Ans. I didn't think there was anything in it.
6. X. How long since you gave it up?
Ans. Last July.
7. X. Did you know the pl'f's husband?
Ans. No, sir; I did not.
8. X. Had you ever seen him before that morning of the accident?
72 Ans. I had seen him at Cave Springs.
9. X. How often?
Ans. Three or four dozen times.
10. X. Had you ever spoken with him?
Ans. No, sir.
11. X. Do you know what was his business at the time of the accident?
Ans. I believe he was carrying water for Houston & Co.
12. X. Are you positive of this?
Ans. Yes, sir.
13. X. Carrying water, how, & for what purpose?
Ans. For the men to drink.
14. X. Do you mean to say that this was the purpose for which Mr. Griggs was employed by the d'f'ts?
Ans. Yes, sir.
15. X. That employment was only for week days, when the men were at work?
Ans. Yes, sir.
16. X. Were you employed by the d'f'ts at the time of the accident?
Ans. No, sir.
17. X. How far from Chattanooga was the place where Mr. Griggs was employed?
Ans. I should say about seventeen miles, at Cave Springs.
18. X. How far from Cave Springs was the place of the accident?
Ans. Right close to Cave Springs.
73 19. X. Did you & he board at Cave Springs while you were at work?
Ans. No, sir; I boarded at Roaring Creek. I don't know where he boarded.
20. X. Did you go down to Chattanooga on any business of the d'f'ts on the Saturday before the accident?
Ans. Yes, sir.
21. X. What?
A. I went down to South Chickamauga, to load lumber for them.
22. X. What day did you go down there?
Ans. On Saturday.
23. X. I thought you was not employed by the d'f's, but by some other party?

Ans. I was not employed by d'f'ts. I went down to load lumber for the Key Stone Bridge Company.

24. X. Did you stop over Saturday night in Chattanooga?

Ans. Yes, sir.

25. X. What time did you reach Chattanooga, & when did you leave there?

Ans. I reached there about seven o'clock Saturday evening. I left at a quarter of seven the next a. m.

26. X. Did Mr. Griggs go down with you?

Ans. No, sir; he did not.

27. X. When did he go down?

Ans. That I couldn't say.

28. X. Did you see Mr. Griggs Saturday night?

Ans. No, sir; I did not.

74 29. X. Did you recognize him when he got on to the pilot. Sunday a. m.?

Ans. Yes, sir.

30. X. Do you know when Mr. Griggs went down to Chattanooga?

Ans. I suppose he went down Saturday night.

31. X. For what purpose?

Ans. I couldn't say.

32. X. Did you hear him say anything about where he had been or what he did Saturday night?

Ans. No, sir; I did not.

33. X. Did you hear him say anything Sunday a. m.?

Ans. Yes; he was speaking to one of the other fellows, but I didn't pay any attention to what he said.

34. X. Who was that fellow?

Ans. Mike Kennard.

35. X. Where did you spend Saturday night?

Ans. At a hotel. I forget the name and don't know who kept it. I don't know what street it was on.

36. X. Who went there with you?

Ans. A man by the name of Charley Miller, no one else.

37. X. Did you drink anything that night?

Ans. No, sir; I did not.

38. X. Did you Sunday a. m. before you took the train?

Ans. No, sir; I did not.

39. X. Are you in the habit of drinking any?

(Objected to.)

Ans. Yes, sir; once in a while.

75 40. X. Do you say under oath that you had not drank anything Saturday night, or Sunday a. m., prior to the accident?

Ans. Yes, sir.

41. X. Did you pay for your fare on getting on to the cars at Chattanooga?

(Objected to.)

Ans. Yes, sir.

42. X. To whom, how much, & to what place?

Ans. To the conductor; forty cents to the junction, from the junction to Cave Springs we didn't have to pay our fares.

43. X. Do you know whether Mr. Griggs paid his fare to the junction?

Ans. I know he did.

44. X. Why did he, if he was at work for the d'f'ts?

Ans. He was working for Houston & Co. & that had nothing to do with the W. and A. Road.

45. X. Do you know whether Griggs was in the habit of drinking any?

(Objected to.)

Ans. No, sir; I do not.

46. X. Before the train started for Cave Spring from the junction, Sunday a. m., had not you and others got on the pilot & been ordered off by some one?

Ans. No, sir.

47. X. Did you not get off after you first got on to the pilot?

Ans. Yes, sir.

48. X. How came you to get off then?

76 Ans. Got off to get something to eat.

49. X. Did you not get off again before the train started?

Ans. No, sir.

50. X. Did you see Mr. Griggs when he got on?

Ans. Yes, sir.

51. X. Was he not ordered off?

Ans. Not to my knowledge.

52. X. Did Mr. Griggs sit or stand while riding up?

Ans. He sat upon the front; I was on the front too.

53. X. How many cars were the' attached to the engine on this train?

Ans. Two flat-cars.

54. X. How many layers of rail were there on these cars & how long were the rails?

Ans. Well, I ain't certain; I think there were two layers on each car. They were 36 feet rails.

55. X. Had you been on the flat-cars would you have been injured?

Ans. Yes, sir; I believe I would.

56. X. Did you not know that to ride on the pilot was attended with great danger?

Ans. No, sir; I did not.

57. X. Do I understand you to say under oath that neither Col. Neely or any one else ordered you off of the pilot either before the train started or at any time that a. m.?

Ans. I do say so; I heard no one speak of it.

77 59. X. When the engineer reversed the engine, why did not you jump off?

Ans. I did not have a chance.

60. X. Did Mr. Griggs attempt to jump off?

Ans. No, sir.

61. X. Do you know Charles A. Miller?

Ans. Yes, sir.

62. X. Do you know E. F. Hair?

Ans. Yes, sir; I believe I do.

63. X. Were not these men on the train?

Ans. Yes, sir.

64. X. Where were they at the time of the accident?

Ans. Hare, I think, was the one that run back on the foot-board; Miller, I think, was on the tender.

65. X. Please recall the circumstances & then say if Mr. Miller was not on the flat-cars & was not injured and Mr. Hare jumped off and was not injured?

Ans. No, sir; I believe Miller was not on the flat-car, he was not injured; Mr. Hare did not jump off, he was not injured.

66. X. Did you see either Mr. Miller or Mr. Hare in Chatanooga the Saturday night before?

Ans. Yes, sir. Mr. Miller slept with me that night in Chatanooga; I did not see Mr. Hare.

67. X. Are you familiar with an engine?

Ans. No, sir.

68. X. How do you know that there was no sand in the sand-box that a. m.?

78 Ans. Because if there was, I suppose, he would give her sand.

69. X. Is that the only reason you have for saying that there was no sand in the sand-box?

Ans. No, sir; I have been told by several parties that there was none.

70. X. Then you know nothing of your own knowledge about it except what some one has told you?

Ans. Nothing, only if we had sand I suppose he would not have let her slip so fur.

71. X. Do you know that he did not use sand?

Ans. Yes, sir.

72. X. How do you know it?

Ans. I saw no sign of it.

73. X. Had you ever ridden on the pilot that distance before, & when?

Ans. Yes, sir; I couldn't say when; some time before that.

74. X. How many times?

Ans. Once.

75. X. When you got on to the pilot you know that there were no brakes on the flat-cars behind?

Ans. Yes, sir.

76. X. Of the seven men on the pilot, how many were killed, and who were saved; give their names?

Ans. There were three killed; two I know, Mr. Griggs & Mr. Davis, the third man I didn't know; Mike Kennard, Frank Hare, my-

79 self, and another, whose name I don't know, were saved.

77. X. You say in your direct examination, Mr. Neely gave you and Mr. Griggs permission to ride on the pilot; when was this permission given?

Ans. There was no express permission given by Mr. Neely to ride on the pilot that day, but it was in the contract the we should be carried free of charge.

78. X. Was it not unusual for men to ride on the pilot?

Ans. No, sir.

79. X. Could you not have sat on the flat-cars just as conveniently as on the pilot that a. m.?

Ans. I suppose I could, but it was not as pleasant.

80. X. Why did not that train come through Saturday night instead of stopping at Chattanooga?

Ans. The train of the W. & A. Road went no further in our direction than the junction.

81. X. How were you injured at the time of the accident? Describe your position when the train first struck.

Ans. I was sitting sideways; I was caught between the boiler-head of the engine & the flat-car; I was wedged in; they got a jack and raised the flat-car & released me.

82. X. What more could the engineer have done to prevent the accident than he did do?

Ans. Well, I don't know; I'm sure he didn't keep her shut off.

83. X. How do you know he didn't keep her shut off?

80 Ans. Well, because she went with more force afterwards than she did before.

84. X. He sounded the whistle, didn't he?

Ans. No, sir.

85. X. He put the brakes on to the engine, didn't he?

Ans. That I don't know.

86. X. Do you know how that car came to be on the track?

Ans. The train that we went on the night before left it there.

87. X. If you were sitting on the pilot how could you see what the engineer did at the time of the accident?

Ans. I could not see him; I was told by men in the cab what he did.

88. X. Then what you said in your direct examination as to what the engineer did at the time of the accident is what was told you & not what you saw?

Ans. Yes, sir.

Direct resumed:

1. Add. Direct. As to what the engineer did, isn't it more an inference from the effects that you observed than from what was told you?

Ans. Yes, sir.

GEORGE McDONALD.

Notice to take depositions.

In the U. S. circuit court at Knoxville, Tennessee.

MARY JANE GRIGGS }
vs.
R. G. HOUSTON & CO. }

81 On Wednesday the 30 day of March, 1881, at U. S. circuit court clerk's office in Boston, Mass., the deposition of George McDonald will be commenced and continued from day to day until completed, and when finished, will be read as evidence upon the trial of the above cause on behalf of the pl'ff.

This 7 day of March, 1881.

WM. M. BAXTER,
Att'y for Pl'ff.

To M. H. CLIFT,
Att'y for Def'ts.

(Endorsed:) Notice. Mary Jane Griggs vs. R. G. Houston & Co. Service of within notice acknowledged this 9th day of March, 1881. M. H. Clift, att'y for def's.

Subpœna.

MASSACHUSETTS DISTRICT, *ss:*

The President of the United States of America to the marshal of the district of Massachusetts or either of his deputies, greeting:

You are hereby required to summon George McDonald (who re-

sides in Canterbury, st., Rosendall, West Roxbury, Boston) of Boston, in said district, if he may be found in your district, to appear before John G. Stetson, esquire, a United States commissioner duly appointed by the circuit court of the United States for said district of Massachusetts, at his office, 140 Fremont street, Boston (room 9 U. S. court-
82 house), on Wednesday the thirtieth day of March, current, at ten o'clock in the forenoon of the same day, in his own proper person to testify and give evidence of what he know relating to a certain cause now depending in the circuit court of the United States for the eastern district of Tennessee, wherein Mary Jane Griggs is plaintiff, against R. G. Houston & Co., defendants, then and there to be heard and tried between them; and warn the said witness that for default and non-appearance he will have to abide the pains and penalties of the law in that behalf made and provided. Hereof fail not, and make due return of this writ, with your doings thereon, unto our said court as soon after the service thereof as may be.

Witness the honorable Morrison R. Waite, at Boston, aforesaid, the eighteenth day of March, in the year of our Lord one thousand eight hundred and eighty-one.

JOHN G. STETSON,
Clerk U. S. Circuit Court, Mass. Dist.

(Endorsed:) 1226. Mary Jane Griggs, versus R. G. Houston & Co. United States marshal's office, 140 Fremont st., Boston, Mass., March 18, 1881. Subpœna to witnesses. George McDonald to appear before John G. Stetson, U. S. com'r, March 30th, 1881, at 10 a. m. Wm. M. Baxter, att'y.

83 UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON & LYNN, *Mar. 19th*, 1881.

Pursuant hereunto I have summoned the within-named George McDonald to appear before John G. Stetson, esquire, a United States commissioner, &c., as herein directed, by delivering to him in hand this day a duly attested copy of this precept, and paid him for his travel and attendance the sum of two dollars and fifty cents.

WM. D. POOL,
Dep. U. S. Marshal.

Service: Copy, 1.00; tr. & expense, 2.30; paid wit's, 2.50—total, 5.80.

(Wrapper was directed:) To the clerk of the circuit court of the United States for the eastern district of Tennessee. Enclosed is the deposition of George McDonald, taken at the request of the pl'f to be used in the cause pending in your court entitled Jane Griggs vs. R. G. Houston et al. Taken & sealed by *by* me, Henry L. Hallett, U. S. commiss., Mass. dist. Received sealed up from the post-office at Knoxville by me & filed April 8th, 1881. A. R. Humes, clerk.

84 *Exceptions to deposition of Geo. McDonald.*

In the United States circuit court at Knoxville, Tenn.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & Co.

Exceptions and demurrer filed by defendants to the deposition of George McDonald, witness for plaintiff, filed in this cause April 8th, 1881.

1st. The certificate fails to show that the officer before whom taken, Henry L. Hallett sealed up said deposition and delivered it or put it in the post-office without its being out of his possession or altered after it was taken.

2nd. Because said certificate does not show that said deposition was reduced to writing by either the witness or the officer taking the same.

3rd. Because there is no such caption & certificate annexed to or made to said deposition as required by law.

XEN. WHEELER &
M. H. CLIFT,
Att'ys for Def's.

Exceptions sustained, July 20, 1881.

A. R. HUMES, *Clerk.*

(Endorsed:) Filed July 20, 1881. A. R. Humes, clerk.

85 The pl'ff by her counsel, and at the time when the answers to the questions were read to the jury, objected to the admission of the answers to the following questions in the deposition of George McDonald, to wit, the answers to cross-question 39, & the answer to cross-question 45, but the same were admitted in evidence to the jury over pl'ff' objection.

The pl'ff here rested.

The def'ts then introduced the depositions of A. E. Bowers & Chas. A. Miller.

86 *Notice to take depositions.*

In the U. S. circuit court at Knoxville, Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & Co.

On Tuesday the 5th day of April, 1881, at U. S. circuit court, clerk's office in Cincinnati, Ohio, the deposition of A. E. Bowers will be commenced, and continued from day to day until completed, and when finished will be read as evidence upon the trial of the above cause on behalf of the defendants. This 5th day of March, 1881.

M. H. CLIFT,
Att'ys for Def't.

To WM. M. BAXTER,
Att'y of Pl'tiff, Knoxville, Tennessee.

(Endorsed:) Notice. Service of the within notice acknowledged this 7 day of March, 1881. Wm. M. Baxter, att'y for pl'ff.

Deposition of A. E. Bowers.

In the U. S. circuit court at Knoxville, Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO.

Deposition of A. E. Bowers, witness for defendant in the above case, taken upon notice, on the 5th day of April, 1881, at U. S. circuit court clerk's office, Cincinnati, Ohio, in the presence of counsel for plaintiff and counsel for defendant.

87 The said witness A. E. BOWERS, aged 44, being duly sworn, deposed as follows:

Ques. Please state your name, age, residence, and occupation.

Ans. A. E. Bowers; age, 44; at Cincinnati, Ohio; foreman on the Cincinnati Northern Railway.

Ques. State your occupation during the month of April, May, June, & July, 1879.

Ans. I was on the Cincinnati Southern Road, in the employ of R. G. Houston & Co. I was superintendant and had charge the camp and men employed at the crushers at Cave Springs, in Hamilton County, Tennessee, on the Cincinnati Southern Railroad, about seven miles north of the junction which is commonly known as Boyce's Station.

Ques. State whether or not you had charge at this time of the employment and discharge of men employed in performing labor at the crushers at this place, and state generally what your duties were.

Ans. I did have charge of employing men and discharging them at the crushers. I had full charge of *of* this camp, and had full charge of the laboring men at this place.

Ques. State whether during this time James Griggs was employed to perform any work for R. G. Houston & Co.; state, as near as you can, when he was employed and all the circumstances in regard

88 to his employment.

Ans. I think he was there two or three pay-days; that was about two or three months before he was hurt. When I employed the man he wasn't able to do any laboring work. I *g*ive him water-carrying because he was destitute of everything.

Ques. State whether he was in any was physically disabled from performing manual labor, and what was the cause thereof.

Ans. When he came to me for the work he told me that he had fell and sprained his arm. That is why I put him carrying water.

Ques. Was he able to do any work with this arm which had been injured?

Ans. No, sir. He could not lift the weight of a bucket with it.

Ques. How long had this arm been disabled?

Ans. I do not know how long his arm had been hurt.

Ques. State what period he was employed and at what wages.

Ans. He was hired by the day. His wages was a dollar or a dollar and ten cents per day. I am not positive about the amount per day. All the men were employed by the day.

Ques. How often was he paid?

Ans. He was paid once a month.

Ques. For what time was he paid during each month?

Ans. He was paid for each day that he was at work.

89 Ques. What time during the month ware the hands usually paid off?

Ans. About the 20th of the month.

Ques. How long before Griggs received the injury from which he died had he been paid off?

Ans. The day before.

Ques. State the day of the week as near as you can recollect when he was paid off.

Ans. He was paid off on Saturday; I think it was in the morning.

Ques. State whether any work was done on the afternoon of this pay-day; and, if not, why not?

Ans. I don't think any work was done that afternoon. It was raining.

Ques. Did you or not see Griggs at any time on that day after he was paid off. And, if you did, state the circumstances.

Ans. I saw him in the evening late; he called me in the rear part of the tent while I was giving in my time to the clerk for that day. He asked me if I would have a drink of brandy with him. I refused him and told him I was busy. He had a quart bottle of brandy which was a little more than half filled.

Ques. What was his condition at the time he asked you to drink with him?

Ans. He was drunk. He was very full.

90 Ques. Where did he go after you refused to drink with him?

Ans. He told me he was going home, and left the tent. He lived about a half mile away from the work.

Ques. State whether any work was done the next day Sunday at the crushers?

Ans. No work done; it was Sunday, and no work was done at that place on Sunday while I was in charge. There was no work done on that particular Sunday; this I remember distinctly.

Ques. When did you next see Griggs?

Ans. I saw him next sitting on the cow-catcher of the locomotive which came into the camp the next day, Sunday, about ten o'clock in the morning. He with three or four others were riding on the cow-catcher and were jammed between it and a flat-car loaded with ballast. They had been riding on the cow-catcher.

Ques. State when you first saw the train.

Ans. About 1,200 feet south of the point where the accident occurred.

Ques. How fast was the train moving when you first saw it, and how fast did it continue to move until the accident occurred?

Ans. It was moving very slowly all this time. Several men
91 who were riding on the cow-catcher got off a little while before the accident; a man could easily step off. It was not going probably not more than two or three miles an hour; it was going very slow.

Ques. Were there any empty cars attached to the engine?

Ans. There was two or three cars without any person on them.

Ques. State whether there was any order or rule concerning the riding on the trains by the employees?

Ans. There was a standing order against riding on the trains without a permit, and no man would be permitted to ride on the cow-catcher at any time; this was understood by everybody.

Ques. State what Griggs said to you at the time of the accident.

Ans. When I first came to the men when they were caught between the cow-catcher and the cars, he asked me for "God sake to do something for him." I says, "What in the world were you doing riding on

this cow-catcher?" He said, "I had a little whiskey and we were on a little spree and thought we would ride on the cow-catcher for a 'lark.'"

Ques. What did you do to relieve him?

Ans. I had the men pry up the car and lift *if* off of him.

Q. What did you then do for him?

92 Ans. I had him carried to a tent; sent for two doctors who came to see him that day.

Ques. Did you have any further conversation with him on that day or the next day in regard to this accident? If so, state what was said by him.

Ans. I saw him that night after the accident and had a conversation with him in the tent. He told me that evening that if he had listened to Mr. Neely that he would not have been hurt. He said he himself was entirely to blame. He told me that when they first tried to ride on the cow-catcher, Mr. Neely drove them off and that they afterwards slipped around and stole a march on him and got on without his seeing them, and that it would not have occurred had he obeyed Mr. Neely.

Ques. State whether or not Griggs was in the employ of the defendants R. G. Houston & Co. on the day when this accident occurred?

Ans. He was not. It was Sunday, and we were not working. It was raining also; that is, there was a drizzling rain.

Ques. Was it a part of his duties at any time to ride on this train?

Ans. It was not. He was hired to carry water from Cave Spring up to the quarry while the men were at work. The men were not at work at that time and he had no duties to perform.

93 The further taking of this deposition is adjourned until Wednesday, April 6th.

The taking of this deposition resumed as per adjournment.

Ques. How long did Griggs live after he was injured?

Ans. He lived about three days. He was hurt Sunday morning and died on Wednesday.

Cross-examination by counsel for plaintiff:

Ques. In whose employ are you?

Ans. R. G. Houston & Co.

Ques. What are you now doing?

Ans. I am driving a railroad tunnel heading for R. G. Houston & Co.

Ques. Where do you now live?

Ans. At Cincinnati.

Ques. How long since you ceased working for R. G Houston & Co.?

Ans. I am working for them at the present.

Ques. How far did you come to give evidence?

Ans. From Walnut Hills; about two miles from here.

Ques. Who paid your expenses?

Ans. I paid my own expenses.

Ques. Who is to pay them?

Ans. If anybody is to pay them, I do not know it. Nobody told me they would pay them.

Ques. Were you summoned or did you come voluntarily?

94 Ans. I was brought down by Mr. Neely.

Ques. Were you present when Griggs was hurt?

Ans. I was, sir.

Ques. When did you first see him after he was hurt?

Ans. At the time the car had him fast, mashed up.

Ques. Why did you see him?

Ans. Because I was in charge of the work and it was my place to be there all the time.

Ques. At whose instance?

Ans. I saw the man immediately after he was hurt; I saw the train coming.

Ques. How badly was he hurt?

Ans. He was very badly hurt; he was broken across the hips.

Ques. Was he suffering much?

Ans. He suffered the first two days a great deal.

Ques. How did he happen to tell you it was his fault?

Ans. He said he was ordered off the train by Mr. Neely and he did not take his advice.

Ques. Who commenced the conversation?

Ans. I disremember now who did, I or him. I took care of him all the time after he was hurt.

Ques. Was he kept under the influence of morphine?

Ans. I could not state about that.

Ques. How long before he died did you have this talk with him?

Ans. I don't remember now.

Ques. How much wages did he get from R. G. Houston & Co.?

95 Ans. It was $1.00 or $1.10 per day, I disremember.

Ques. Didn't the employees of R. G. Houston & Co. frequently ride on the pilot?

Ans. It was positively against orders to ride on the engine at all, or ride on the train without a permit.

Ques. Haven't you frequently seen them riding there?

Ans. I have seen some men riding there.

Ques. Hasn't the engineer and Neely known it?

Ans. I couldn't say about that.

Ques. Isn't John B. Neely addicted to the use of liquor?

(Objected to as irrelevant.)

Ans. I have known Mr. Neely to drink liquor.

Ques. Isn't Steele, the engineer, subject to the same habit?

Ans. I never saw Mr. Steele under the influence of liquor in my life.

Ques. Weren't they both drinking on that day, the day of the accident?

Ans. I don't think they was, sir.

Ques. Haven't you heard one of them say so?

Ans: No, sir; I did not.

Ques. How many men were killed or injured in that accident?

Ans. There were three, or they died from the effect of it.

Ques. How many cars composed the train that day?

Ans. They had two or three cars behind the engine.

Ques. Were they loaded or not?

Ans. I disremember, I could not be positive about it.

96 Ques. How many cars were run into?

Ans. They only jammed one car, there was others behind that car, but were not coupled to it, loaded with ballast.

Ques. How much down grade is it at the place of the accident, how many feet to the mile?

Ans. I think it is about 14 inches to the hundred feet.

Ques. Did you hear anybody order Griggs off the pilot that day?

Ans. I did not, sir.

A. E. BOWERS.

Certificate.

The foregoing depositions were taken before me, as stated in the caption, and reduced to writing by me. And I certify that I am not interested in the cause, nor of kin or counsel to either of the parties, and that I sealed them up, and put them in the post-office without being out of my possession, or altered after they were taken. Given under my hand and official seal the 6th day of April, 1881.

[SEAL.] CHAS. H. JONES,
Notary Public in and for Hamilton County, Ohio.

Notary fees, $5.25, paid by R. G. Houston & Co.
(Endorsed:) Bowers.

97 *Notice to take depositions.*

In the United States circuit court at Knoxville, Tennessee.

MARY JANE GRIGGS
vs.
R. G. HOUSTON & CO.

On Thursday, the 23rd day of June, 1881, at U. S. circuit court clerk's office, in Montgomery, Alabama, the deposition of Charles A. Miller will be commenced, and continued from day to day until completed, and when finished, will be read as evidence upon the trial of the above-stated cause on behalf of the defendants. This 10th day of May, 1881.

M. H. CLIFT,
Att'y for Def'ts.

To W. M. BAXTER,
Att'y for Compl't.

(Endorsed:) I hereby acknowledge due & legal service of the within notice this the 10th day of May, 1881.

WM. M. BAXTER,
Atto. for Pl'ff.

Deposition of Chas. A. Miller.

In the U. S. circuit court at Knoxville, Tennessee.

MARY J. GRIGGS
vs.
R. G. HOUSTON & CO.

Depositions of Charles A. Miller, witness for the defendants, taken in the office of the clerk of the United States circuit court, at Montgomery, Alabama, notice of the time and place having been duly given
98 before Jno. S. Jemison, notary public, ex-officio justice of the peace, in and for the county of Montgomery, and State of Alabama.

CHARLES A. MILLER, being duly sworn, deposes and says as follows:

No. 1. How old are you, and where do you reside, and how long have you resided there? Where did you reside during the year 1879?

Ans. Twenty-two; I reside in Montgomery, Ala.; have lived here about 15 months; I resided in Tennessee during the year 1879.

No. 2. In whose employ were you in June, 1879?

Ans. Keystone Bridge Co., of Pittsburgh, Penna.

No. 3. Do you know anything of an accident that occurred on the line of the Cincinnati Southern R'w'y near Cave Springs, on or about the 22nd of June, 1879; were you on the train at the time?

Ans. I do. I was.

No. 4. Was any one injured by the accident above referred to; and, if so, who was it?

There was several hurt—George McDonald, John Davis, a man by the name of Griggs, and two negroes whose names I did not know.

No. 5. State how the accident you have referred to occurred.

Ans. The engine run into a flat-car on the main track loaded with ballast, and platform of the flat-car slided up the guards on the
99 front of the engine, and crushed them between said flat-car and the smoke-box of the engine.

No. 6. On what part of the train were those who were injured riding?

Ans. On the front or pilot of the engine.

No. 7. Were there any cars attached to the engine on which they were riding?

Ans. Two empty flat-cars.

No. 8. Were the cars you have just mentioned attached to the rear or front of the engine?

Ans. Rear.

No. 9. By whom were the men who were injured employed?

Ans. Two, McDonald and Davis, by the Keystone Bridge Company, and the others by R. G. Houston & Co.

No. 10. Were all those who were riding the pilot injured by this collision?

Ans. No, sir; not all of them.

No. 11. Why were they not all hurt?

Ans. One jumped off and another went back on the running-board of the engine.

No. 12. Was there plenty of room on the flat-cars in rear of and attached to the engine for those who were riding on the pilot to have ridden on the said flat-cars, if they had wished so to do?

Ans. I suppose there was, as there was only four or five persons on both cars.

100 No. 13. On what part of the train were you riding?

Ans. On the rear end of the rear car. I was sitting down there.

No. 14. Were you or any of those riding on the flat-cars injured in any way?

Ans. We were not.

No. 15. Would any one have been hurt by the collision if they had been back on the cars attached to the engine?

Ans. I guess not, as none who were there received injuries.

No. 16. Is it dangerous to ride on the pilot of an engine?

Ans. I consider that it is.

No. 17. Was it or not against the orders of R. G. Houston & Co. for anybody to ride on the pilot of an engine pulling their trains?

A. It was.

No. 18. Did R. G. Houston & Co. or their agents ever make any objections to the men riding on the pilot of their engines?

Ans. They did, frequently.

No. 19. Did you ever hear them make any such objection yourself?
Ans. I have.
No. 20. Were these orders against riding on the pilot generally known to men in the employ of the bridge company and of R. G. Houston & Co.?
Ans. They were.
No. 21. At what point on the road did those riding on the
101 train get on?
Ans. At Black Jack Station.
No. 22. Is that the junction of the W. & A. R. R. & C. S. R. R.?
Ans. It was.
No. 23. On what day of the week did the accident occur?
Ans. On Sunday.
No. 24. Where had you all been the night previous?
Ans. Chattanooga.
No. 25. Did the husband of plaintiff Griggs go there, or did you go there, on any business connected with the Keystone Bridge Co. or of R. G. Houston & Co.?
Ans. I did not know the husband of plaintiff until after the accident. I then heard his name was Griggs. I did not go there on business for the Keystone Bridge Company or for R. G. Houston & Co.
No. 26. Did you see the husband of plaintiff in Chattanooga while you were there?
Ans. I don't remember ever seeing him to know him before the accident above mentioned.
No. 27. At what rate of speed was the train running when this accident occurred?
Ans. I suppose 4 or 5 miles an hour.
No. 28. At what rate of speed had it been running before it reached the scene of the accident?
Ans. I suppose 18 miles an hour was a' fast as they ran that morning.
102 No. 29. At what distance from the place where accident occurred was the speed of said train reduced from 18 to 4 or 5 miles per hour?
Ans. One hundred yards or one hundred and fifty as well as I can remember.
No. 30. What effort did the engineer make to stop said train?
Ans. He reversed the engine and sanded the track. I guess he sanded the track as I afterwards saw sand on the track.
No. 31. Do you know whether there was any sand in the sand-box of the engine?
Ans. There must have been.
No. 32. How do you know that the engineer reversed his engine?
Ans. I felt the shock, there being only two cars attached.
No. 33. Was the shock of the collision of great force or only a slight shock?
Ans. Well, it was not so great. It bumped the back of my head a little against the car.
No. 34. In what condition was the track?
Ans. Wet.
No. 35. Was the train which struck going up or down grade?
Ans. Down grade slightly.
No. 36. Was it necessary for the men to go to Chattanooga on Saturday night in order to get some place to sleep that night?
103 It was not, as Mr. Millegan had accommodated us frequently previous to that time.

No. 37. Where did Mr. Millegan live?

Ans. He lived at South Chickamauga Bridge.

No. 38. Is that at or near the point at which you were at work Saturday?

Ans. It was.

No. 39. Could those on the pilot have jumped off before the collision?

Ans. They could a minute or so before, but they could not a second before, because they were then right over a trussel.

No. 40. Could they have seen the car in time to have jumped off without injury to themselves?

Ans. They could if they had known the engine could not be stopped in time.

No. 41. Do you know George McDonald?

Ans. I do know him.

No. 42. Were you and he together in Chattanooga the night before the accident?

Ans. We were.

No. 43. Did McDonald drink anything that night?

Ans. He did.

No. 44. At what time did you leave Chattanooga?

Ans. Very early on the morning of the accident.

No. 45. Did he drink any spirituous liquors on the morning of the accident, or the night before?

104 Ans. He did the night before. I am not positive about his drinking that morning.

No. 46. Were you with him all the time while he was in Chattanooga?

Ans. Pretty much all the time.

No. 47. Was he drunk or under the influence of intoxicating liquor on the morning of the accident?

Ans. No more so than the others.

No. 48. Was he at all under the influence of liquor at the time the accident occurred?

Ans. Must have been from the am't drank the night before.

No. 49. Was McDonald in the habit of drinking?

Ans. He never refused when he could get it.

No. 50. Did you see him take any drinks of liquors on the night you say *his* was drinking, or did you just suppose from his looks and actions that he was drunk?

Ans. He took liquor with me.

No. 51. Do you know why those who rode on the pilot did not get on the flat-cars in rear of the engine?

Ans. I do not.

No. 52. Do you know whether or not they were told not to get on the pilot?

Ans. I think they were.

No. 53. Do you know of any negligence on the part of R. G. Houston & Co. that could have caused this accident?

Ans. I do not.

105 No. 54. Are you familiar with engines and their working, and do you know what is meant by the term "reversing an engine."

Ans. I have been railroading 4 or 5 years, and was around railroads and can reverse one myself.

CHAS. A. MILLER.

STATE OF ALABAMA,
Montgomery County:

I, Jno. S. Jemison, notary public, ex officio justice of the peace, in and for said county and State, hereby certify that, pursuant to notice herewith attached, and dated May 10th, 1881, I caused Chas. A. Miller, a witness for the defendants, to be summoned before me in the office of the clerk of the circuit court of the United States at Montgomery, at 3 o'clock, on the 23rd day of June, 1881. And after being duly sworn according to law to speak the truth, testified as above, which was written down by me, and after reading over the same, duly subscribed his name to the same in my presence this 23' day of June, A. D. 1881.

[SEAL.] JNO. S. JEMISON,
Notary Public, ex officio Justice of the Peace.

(Endorsed:) United States circuit court, eastern district of
106 Tenn., Mary Jane Griggs vs. R. G. Houston & Co. Deposition of Charles A. Miller, witness for defendants, received by me, sealed up from the post-office at Knoxville, & filed this June 29, 1881. A. R. Humes, clerk.

Exceptions to deposition of Chas. A. Miller.

In the United States circuit court at Knoxville, Tennessee.

MARY JANE GRIGGS }
vs.
R. G. HOUSTON & Co. }

Exceptions taken by plaintiff to the deposition of Charles A. Miller, witness for defendant, filed in this cause June 29, 1881.

1st. The certificate fails to show that Jno. S. Jemison, the officer by whom said deposition was taken, was not interested in the cause, nor of kin or counsel to either of the parties.

2nd. Said certificate also fails to show that the said Jemison sealed up said deposition and delivered it or put it in the post-office without its being out his possession, or altered after it was taken.

W. M. BAXTER,
Att'y for Pl'ff.

Exceptions sustained this 7th day of July, 1881.

A. R. HUMES, *Clerk.*

(Endorsed:) 688. Mary Jane Griggs vs. R. G. Houston & Co. Exceptions to deposition of Chas. A. Miller. Filed Jul. 7, 1881. A. R. Humes, U. S. cir. c't cl'k.

107 The pl'ff, by her counsel, at the time said depositions were being read to the jury, objected to the following answers being admitted in evidence, to wit, the answers to questions 17, 18, 19 & 20, & 49 & 52, in the deposition of Chas. A. Miller; also, the answers to questions in direct examination, number 23, in the deposition of A. E. Bowers; but the answers to all of said questions were read to the jury over pl'ff's objection.

Def'ts then introduced W. J. CLIFT, who deposed and said:

There was no side track at the place where the accident occurred. I am the same W. J. Clift whose deposition has been read in this case.

Def'ts here rested.

The pl'ff then introduced G. BURLESON, who, being duly sworn, deposed & said:

I am a locomotive engineer; have been for 8 years. Upon the supposition that a train composed of an engine, a tender, two flat-cars loaded with iron & running down grade (78 feet to the mile) at the speed of 5 miles an hour, upon a reversal of the engine, at the same time giving her steam and sanding the track, the train ought to
108 come to a stop within 100 feet after such reversal, &c.

Cross-examined:

The pilot is a dangerous place on which to ride. Sometimes engines slip after being reversed; but it ought to have stopped within 100 feet, in my judgment.

SAM. TOMS, next sworn by pl'ff, deposed & said:

Have been a practical locomotive engineer for over eleven years; have heard the questions put to Mr. Burleson. I think the engine and train should have been stopped within 75 or 100 feet after the reversal, &c.

Cross-examined:

Engines will sometimes slip after being reversed; will when the track is wet. If sand had been used, it ought not to have slipped; an engine with small driving-wheels will slip further than one with large ones. The pilot is a dangerous place on which to ride—more dangerous than in the rear of the engine in case of collision in front.

MATT. FRANKLIN, next witness for pl'ff, deposed & said:

Have been an engineer for 20 years; have heard the questions
109 put to Mr. Burleson & Mr. Toms. I agree with them. The engine ought to have stopped within 100 feet after reversal, &c.

Cross-examined:

I agree with them in what they said on cross-examination.

This was all the evidence introduced in the case by either side.

The pl'ff then requested the court to instruct the jury as follows:

The pl'ff, by her att'ys, asked the court to charge the jury as follows:

1st. That if you are satisfied from the proof that the engineer and engine were hired from the Western & Atlantic Railroad Company by the def'ts, and were under the control of the def'ts, and being run on the track they were then constructing, subject to their orders, then the def'ts would be responsible for all damages resulting to the pl'ff's husband, by reason of the negligence of the def'ts, or their agents or employees.

2nd. That if you find that the def'ts failed to comply with the statutory requirements, by failing to keep the engineer or fireman or some other person upon the locomotive constantly on the lookout ahead; and that upon an obstruction appearing upon the track, they
110 failed to sound the alarm whistle, put down the brakes, and use every possible means to stop the train and prevent an accident, then the def'ts would be liable, absolutely & at all events; and any

negligence the pl'ff's husband may have been guilty of, if he was guilty of any, can only be looked to in mitigation of damages.

3rd. If you find that the deceased got upon the bumper of the engine without the knowledge or consent of the def'ts, or their agent, but that he rode there after it came to the knowledge of the def'ts, or their agent, the engineer, that he was so riding, then it became the duty of the def'ts to so run their train as not to injure the deceased; and if they were guilty of negligence after they knew the deceased was riding on the bumper, which negligence caused deceased's death, def'ts would be liable.

4th. In determining the question of negligence on the part of the deceased, you may look to the custom of the employees in riding on the train; whether or not they were in the habit of riding on the bumper or front part of the engine, with the consent or knowledge of the def'ts; if they were in the habit of riding on the bumper, with the knowledge of def'ts, or their agent, such negligence on the part of the deceased would not defeat a recovery in this case.

111 5th. If, from the evidence, it appears that both the deceased and the def'ts were guilty of negligence, this would not necessarily preclude the pl'ff from recovering. If you find that the negligence of the def'ts was the direct and proximate cause of the injury, then they would be liable, and the negligence of the deceased can only be looked to by you in mitigation of damages.

6th. If you find that def'ts, or their agents, at the time the engine ran into the flat-cars, were running said engine and train at a rapid or violent rate of speed, then they would be guilty of negligence, and would be liable; or, if you find that their engine or cars were out of repair, or in such condition as that it was impossible for them to stop in time to prevent the accident, this would be such negligence as would render the def'ts liable to this action. In arriving at this you must look to the proof to see if, when the flat cars were first seen on the track, the whistle was sounded, the brakes were put on, and every possible means used to stop the train and prevent the accident; if not, the def'ts are liable.

112 7th. In estimating the damages, you may take into consideration the mental and bodily suffering of the deceased, the loss of time, the necessary expenses resulting to the deceased, and the damages resulting to the parties for whose benefit this action is brought, such as the loss of the society of the deceased, his protection and support, &c.

8th. If you find that the deceased was guilty of contributory negligence, this will not preclude a recovery in this case, unless the negligence of deceased was such that but for such negligence on his part the injury would not have been sustained; but if you find that the def'ts might, by the exercise of care on their part, have avoided the consequences of the negligence of the deceased, then I charge you to find for the pl'ff. For instance, where a man negligently left his horse, in a public highway, tied by the forefeet, and another man carelessly drove over it with his horse & wagon, in broad daylight, and killed it, the horse being unable to get out of the way, the misconduct or negligence of the owner of the horse, in leaving him in the public highway, would be no answer to an action for damages; for although the horse may have been wrongfully in the highway, the owner & driver of the

113 wagon was bound to go along the road with care, and at such a pace as would be likely to prevent mischief; & not having done

so, he would be liable, notwithstanding the negligence of the owner of the horse in leaving him tied in the public highway.

But the court refused to give said instructions to the jury, to which action pl'ff then and there excepted. The def'ts requested the court to charge the jury that under the proof in the cause they should return a verdict for def'ts.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: In my opinion, following the last decision of the supreme court of Tennessee, which is authority in this case, and in consonance with my own opinion, I charge you that the statutes of the State relating to railroad, do not apply to this case, and therefore they must not be looked to by you as controlling the decision of this case. That will leave the case under the common law. Following the decision, as I think, of the Supreme Court, in 5th Otto, which
114 has been read to you, I am of the opinion that under the facts established by the evidence in this case the pl'ff is not entitled to recover anything; and I therefore instruct you to return a verdict for def'ts.

D. M. KEY,
District Judge.

And to this charge the pl'ff, by her attorney, then and there excepted.

The pl'ff then moved the court for a new trial, which said motion was overruled, to which action of the court in overruling her motion for a new trial pl'ff excepts.

And thereupon the pl'ff tenders this her bill of exceptions, and the same is signed, sealed, and made a part of the record in this cause.

This July 23rd, 1881.

D. M. KEY, [SEAL.]
Judge, &c.

(Endorsed:) Bill of exceptions, &c. Griggs vs. Houston. Filed Jul. 23, 1881. A. R. Humes, U. S. cir. c't cl'k.

Bond.

Know all men by these presents that we, Mary Jane Griggs (who sues in her own right and for the benefit of her minor children,
115 Ruth Matilda Griggs, Robert Cooper Griggs, and Florence Jane Griggs) and Wm. M. Baxter, are held and firmly bound unto R. G. Houston, John B. Neely, & Thomas O'Conner, comprising the firm of R. G. Houston & Co., in the full and just sum of two hundred and fifty dollars, to be paid unto the said R. G. Houston & Co., or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, & administrators jointly and severally by these presents. Sealed with our seals & dated this 23rd day of June, A. D. 1881.

Whereas lately at a regular term of the United States circuit court for the eastern district of Tennessee, in a suit pending in said court between Mary Jane Griggs (who sues in her own right & for the benefit of her minor children, Ruth Matilda Griggs, Robert Cooper Griggs, & Florence Jane Griggs) & R. G. Houston & Co., a firm composed of R. G. Houston, John B. Neely, & Thomas O'Conner, a judgment was rendered against the said Mary Jane Griggs (for herself and her mi-

nor children), having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse said judgment in the aforesaid suit, and a citation directed to said R. G. Houston,
116 John B. Neely, and Thomas O'Conner, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Mary Jane Griggs shall prosecute said writ of error with effect, and answer all damages & costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force & virtue.

MARY JANE GRIGGS, [SEAL.]
By W. M. BAXTER, *Att'y.*
WM. M. BAXTER, [SEAL.]

Sealed and delivered in the presence of—

Approved by—

D. M. KEY, *Judge, &c.*

(Endorsed:) United States circuit court, eastern dist. of Tennessee. No. 688. Mary Jane Griggs vs. R. G. Houston & Co. Bond. Filed July 23, 1881. A. R. Humes, clerk.

117 UNITED STATES OF AMERICA,
Circuit court, clerk's office, eastern district of Tennessee, ss:

I, A. R. Humes, clerk of said court, do hereby certify that the foregoing contains a full, true, and correct transcript of the record and proceedings in the case mentioned in the caption, viz, Mary Jane Griggs vs. R. G. Houston & Co., in said court, as the same now appear of record and on file in my office.

In testimony whereof I have hereunto signed my name officially and affixed the seal of the said court at the city of Knoxville, within said district, this the 30th day of August, A. D. 1881.

[SEAL.] A. R. HUMES, *Clerk.*

Cost of transcript, certificate, & seal, $29.35.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, in a suit between Mary Jane Griggs, who sues in her own right & for her three minor children, Ruth Matilda Griggs, Robert Cooper Griggs, & Florence Jane Griggs, and R. G. Houston & Co. (a firm composed of R. G. Houston, John B. Neely, & Thomas O'Conner), a manifest error hath happened, to the great damage of the said Mary Jane Griggs & her three minor children, Ruth Matilda Griggs, Robert Cooper Griggs, & Florence Jane Griggs, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in

the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 23d day of July, in the year of our Lord one thousand eight hundred and eighty-one.

(SEAL.]

A. R. HUMES,
Clerk of the Circuit Court of the United States for the East'n Dist. of Tenn.

Allowed by—

D. M. KEY, *Judge, &c.*

119 The United States of America to R. G. Houston, John B. Neely, & Thomas O'Conner, composing the firm of R. G. Houston & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of Octo. next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Tenn., wherein Mary Jane Griggs, in her own right, & for the benefit of her three minor children, Ruth Matilda Griggs, Robert Cooper Griggs, & Florence Jane Griggs, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

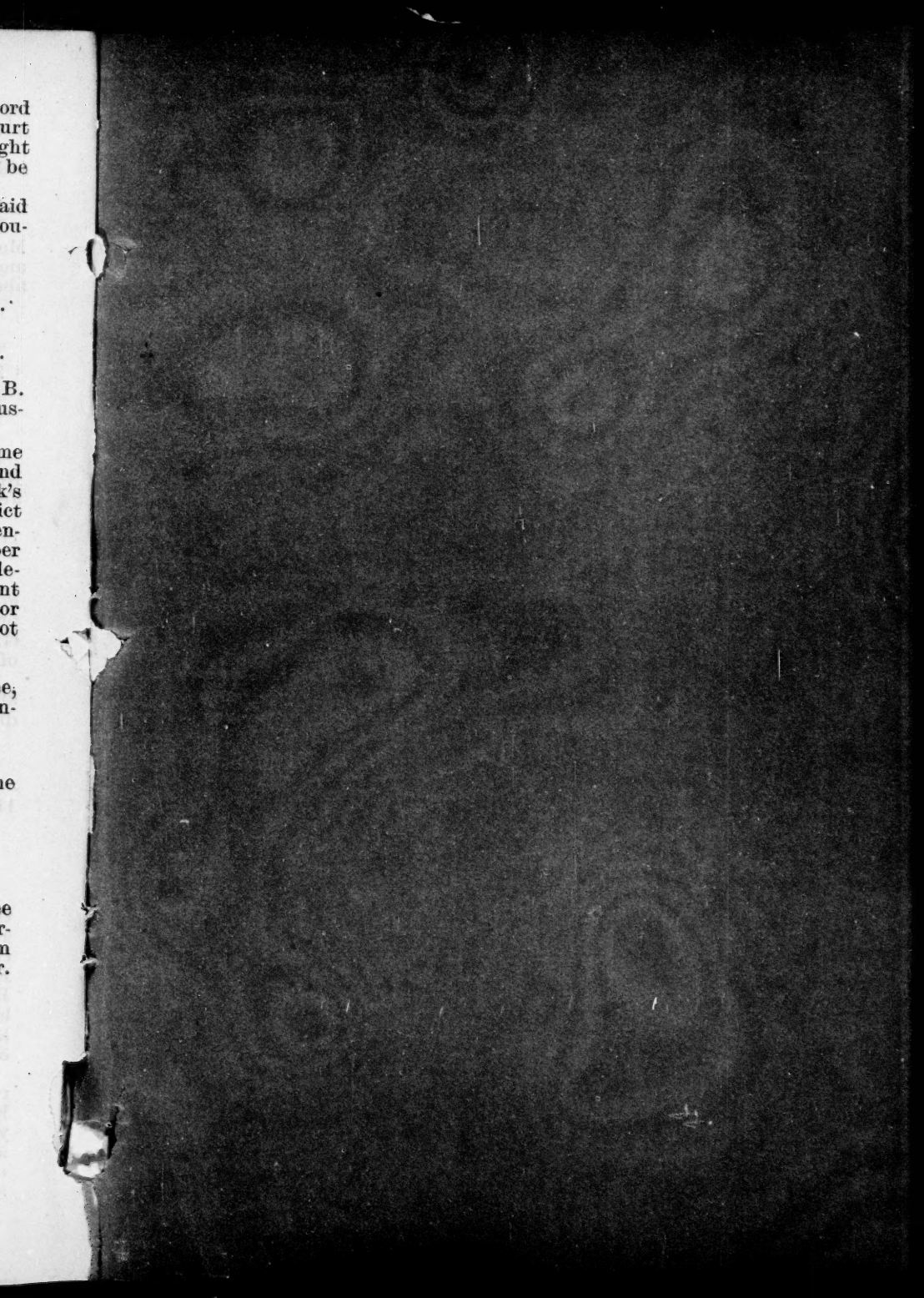
Witness the honorable D. M. Key, judge, &c., of the district of the United States for the eastern & middle districts of Tennessee, this 23d day of July, in the year of our Lord one thousand eight hundred and eighty-one.

D. M. KEY, *Judge, &c.*

120 Due and legal service of this citation acknowledged for all the def'ts named therein this July 23d, 1881.

R. G. HOUSTON & CO.,
By M. H. CLIFT AND
XENOPHON WHEELER,
Their Att'ys.

(Indorsement on cover:) No. 897. Mary Jane Griggs and her three minor children, Ruth Matilda Griggs, Robert Cooper Griggs, and Florence Jane Griggs, pl'ffs in error, vs. R. G. Houston & Company, a firm composed of R. G. Houston, John B. Neely, and Thomas O'Conner. E. Tennessee C. C. U. S. Filed 12th September, 1881.



SUPREME COURT U. S.
FILED
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CLERK

IN THE

Supreme Court of the U. S.

MARY JANE GRIGGS,

vs.

R. G. HOUSTON & CO.

No. 897.

Writ of Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Argument submitted for the Appellant by

J. M. THORNBURGH.

In the Supreme Court of the U.S.

MARY JANE GRIGGS,

vs.

R. G. HOUSTON & CO.

THIS cause was tried by a jury at the July Term, 1881, of the Circuit Court of the United States, for the Eastern District of Tennessee. There was a verdict and judgment against the Plaintiff, who now prosecutes a writ of error to this Court. The action is for the killing of Plaintiff's husband by reason of a railroad collision. Under the Act of December 14th, 1871, (see Acts Tennessee, 1871, Chap. 78,) the widow may sue in her own name.

The facts, as established by the evidence, are these: The Defendants were a firm of railroad contractors, who had undertaken to build the bridges, cross-tie the road-bed, and lay the rails of the Cincinnati Southern Railway. While this work was being done, the Defendants hired from the Western and Atlantic Railroad an engine and tender, etc., the latter road furnishing an engineer and fireman. The contract of hiring was that Defendants should pay a certain rental per month, for said engine and tender, etc., and any amount that might be paid by said Western and Atlantic Railroad as wages to the engineer and fireman. The engineer and fireman were under the control and subject to the orders of Defendants. Plaintiff's husband, J. L. Griggs, was employed by Defendants as a day laborer, at one dollar per day.

On Sunday morning, June 22nd, 1879, in obedience to an order from Defendants, the engineer and fireman started from Boyce's Station with the engine and tender and two loaded flat cars, the latter being without brakes or brakesmen. They were to run to Cave Spring, about twelve miles distant. There were in the cab of the engine, the fireman, the engineer, J. B. Neely (one of the Defendants,) J. W. Clift and his wife, and a man named Calhoun. George McDonald, Mike Kennard, Plaintiff's husband and four others, were out in front upon the bumper or pilot. Charles Miller was (probably) on the rear loaded flat car. Whether these men who were riding on the pilot were there contrary to Defendant's orders, or by permission of Defendants, is a controverted fact.

Soon after crossing the Tennessee River, the road being down grade, the engineer whistled for brakes, and in response thereto, the brake on the tender was put on. *Before and about this time Griggs and his companions on the pilot were seen by Mr. Clift, their heads being visible now and then, and* A MAN *was also seen on the pilot by the engineer; yet the train was not stopped, nor were they ordered off.*

After running down this grade for some distance, the engine came round a curve, and *immediately* there came in view certain flat cars, *standing on the main track*, at a distance of 1,800 feet ahead. They were seen at this distance by Neely, who stood just behind the engineer. They were not actually seen by the engineer until within about 1,200 feet. The train was running 18 miles an hour (see Miller's testimony.) After this obstruction came in view, and after the engineer saw it, no whistle was sounded, no additional brake put on, and no effort made to stop the train until it came within 150 or 200 feet of the obstruction. These flat cars had been left standing on the track the evening before by the same engineer now in charge of the moving train. *They were plainly visible.* There was a gentle mist or rain falling and the track was wet and slippery.

When the train got to within 150 or 200 feet of the flat cars, the engine was reversed, steam put on the reverse action, and the track sanded (probably.) These things were not sufficient to stop the train, and consequently there was a collision, resulting in the death of Griggs and two others, and the injury of still another. Just before the instant of collision two men (one of them the fireman) jumped off. The others on the pilot had no chance to jump off.

There is a conflict of testimony as to how fast the train was running just before the collision and when the effort to stop was made; but, even upon the theory of the Defendants, that it was running at the rate of only four or five miles an hour, the testimony is *absolutely conclusive* that the means sworn to have been used *ought to have brought it to a stand-still within* 100 *feet after said means were resorted to.*

The facts relied upon by Plaintiff, as entitling her to a recovery, are:

1st. That there was no one on the lookout ahead, as required by the statute;

2nd. That there were no brakes or brakemen on the two loaded flat cars;

3rd. That the engineer knew of Griggs' position, *before he came in sight of the obstruction;*

4th. That the engineer knew of the obstruction; it was plainly visible;

5th. That the grade was a descending grade, and the track wet and slippery;

6th. That the necessary means to stop the train were not soon enough employed;

7th. Or, that the train was running at a violent and unsafe rate of speed, and the collision therefore carelessly and negligently brought about;

8th. That the whistle was not sounded, nor the brakes put down, and every possible means employed to stop the train and prevent an accident.

But, after the evidence was in on both sides and argument of counsel made, the Court instructed the jury, in substance, as follows:

1st. "That the statutes of Tennessee relating to railroads do "not apply to this case, and therefore must not be looked to by "you as controlling the decision in this case."

2nd. "That under the facts established by the evidence, the "Plaintiff is not entitled to recover anything, and I therefore in- "struct you to return a verdict for the Defendants."

The Plaintiff makes the following assignments as error:

1st. That the statutes of Tennessee, passed to prevent accidents upon railroads *do apply*, and *are binding* upon every person, agency or company that undertakes to run or manage an engine propelled by steam on a railroad.

2nd. *That it was error in the Court to refuse to allow the jury to pass upon the fact of whether or not, after the negligence of Griggs was known, the Defendants, by the exercise of reasonable and proper care, might have avoided the collision which resulted in his death.*

Very much might be said upon Plaintiff's first assignment of error. In *support* of his Honor's charge it is said, in the first place, that Defendants, being contractors only, (neither common

carriers nor railroad companies,) that the provisions of the Tennesse Code, Sec. 1,156, *et seq.*, were never intended to apply to them or to anybody in like situation. A reference to the Article relating to railroads, and to the specific Chapter bearing upon the statutory precautions that must be observed to prevent accidents, will convince the Court, we are sure, that no good reason can be assigned why the regulations therein prescribed do not apply to any agency or person operating a railroad; no matter for what purpose. The evil to be guarded against is always the same. The instruments that are likely to produce such accidents are as powerful for mischief in the one case as in the other; and the public policy of the statute is so apparent that the courts ought to enforce it against any and all persons, using these powerful engines of mischief in the prosecution of their business. The Circuit Court of the United States for the Middle District of Tennessee, in the foreclosure of the mortgage on the St. Louis and Southeastern Railway, in as many as three instances, held that *its* Receiver was bound to cause to be observed the requirements of the statutes of Tennessee relating to accidents on railroads; or failing to do so, the injured party should be compensated in damages out of the fund in the Receiver's hands arising from operating the road.

Code of Tennessee, Sec. 1166, et seq.
Acts 1855-6, Page 102,
Acts 1857-8, Page 54.

As further supporting his Honor's charge it is said that even if said statutes did apply to and were obligatory upon Railroad contractors engaged in building a railroad, still, under the construction placed by the Supreme Court of Tennessee upon Section 1166, Sub-Section 5, of the Code of Tennessee, said statutes would not apply in this case. This position is based upon the opinion pronounced in the case of *Patrick McKenna and wife* vs. *The Louisville and Nashville Railroad Company*, at Jackson, Tennes-

see, April Term, 1881. It is true that the majority of the Supreme Court, in that case, does hold that Sub-Section 5 of 1166 of the Code was not intended for the benefit of persons on board the train, but was intended only for the protection of persons or animals trespassing on the track.

The Section referred to is in these words: "Every railroad "company shall keep the engineer, fireman or some other person "upon the locomotive always on the lookout ahead; and whenever "any person, animal *or other obstruction* appears upon the road, "the alarm whistle shall be sounded, the brakes put down, and "every possible means employed to stop the train and prevent an "accident."

This statute was passed in 1856, and carried into the Code in 1858. It has been before the Courts for construction and application as many as a thousand times. The holding has been, heretofore, uniformly and invariably that the statute applied as well in favor of persons *on the train* as persons or animals *on the track*. No one for a moment ever doubted it. No other construction is reasonable. This one suggestion will demonstrate it: Suppose the obstruction on the track is an inanimate obstruction, such as an iron rail, a huge boulder or a fallen tree. Here there is no occasion for observing these precautions for the *protection* of such an obstruction. Yet the statute says that in such case the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent *an accident*. An accident to whom? Certainly the Legislature was not manifesting any solicitude for the safety of such inanimate obstruction as might thus be upon the track. The statute being in favor of *human life and property*, and intended for *its protection*, the only sensible or reasonable construction that can be given to this statute is that, *wherever human life or property is hazarded* (and no train can run except by human agency,) *then shall these precautions be observed, at the times and in the manner pointed out by the statute.*

And it must not be forgotten, that when this statute was passed the only means of signaling for the brakes to be put down was by souning the alarm whistle; and this is yet the only means upon freight trains. The construction herein contended for was the only one in force when Plaintiff's suit was brought, and it was this *settled* construction that the Plaintiff relied upon in

bringing her suit. In a case in 9th Heiskell, Page 841, (Collins vs. The East Tennessee Virginia and Georgia Railroad Company,) the Supreme Court of Tennessee, without division, expressly hold in favor of an employee *upon the train at the time of the accident*, that unless these statutory requirements are *strictly* complied with, when an obstruction appears upon the track, the Company is absolutely liable. In announcing that conclusion, they use this very emphatic language: "The injunctions of the "law upon the Defendant were *imperative* and *peremptory*. The "consequence of disregarding them, say this Court, IN NUMEROUS "CASES, is *absolute and unconditional liability. The statute makes* "*no exceptions and tolerates no excuses.* The law has not been "obeyed and the verdict must stand."

But should this Court, by reason of the rule announed in various cases, feel bound to follow the construction given to this statute by the Supreme Court of Tennessee, then it is insisted that the judgment below should be reversed and a new trial granted, because of the second error assigned by the Plaintiff, to-wit:

That it was error in the Court to refuse to allow the jury to pass upon the fact of whether or not, after the negligence of Griggs was known, the Defendants, by the exercise of reasonable and proper care, might have avoided the collision which resulted in his death.

In instructing the jury to return a verdict for the Defendants, the Court usurped the powers of the jury, and decided as a question of *fact*, established by the evidence, that the Defendants were guilty of no negligence, after Griggs' position was known, and that the collision was therefore unavoidable and without fault on their part. This, it is respectfully submitted, he had no right to do; and it was such error as this Court will reverse for.

It is not denied that the trial judge has and, in a proper case, ought to exercise the right of *instructing* the jury to return a verdict for either plaintiff or defendant.

Bank of Washington vs. Triplett, 1 Peters, 31,
Greenleaf vs. Birth, 9 Peters, 299,
Hickman vs. Jones, 9 Wall, 197,
Bevans vs. United States, 13 Wall, 63,
Merchant's Bank vs. State Bank, 10 Wall, 604,
Walburn vs. Babbitt, 16 Wall, 580,
Pleasants vs. Fants, 22 Wall, 121,
Hendrick vs. Lindsay, 3 Otto, 143,

Jones vs. R. R. Co., 5 Otto, 443,
R. R. Co., vs Fraloff, 10 Otto, 24,
Oscanyan vs. Arms Co., 13 Otto, 265,
National Bank vs. City Bank, 13 Otto, 668,
Commissioners vs. Clark, 4 Otto, 284.

But it is equally well settled that *the Court cannot legally give any instructions which shall take from the jury the right of weighing the evidence and determining what effect it shall have.*

In the case in 1 Peters, 31, where the Court was asked by Defendant to instruct the jury that upon the whole evidence the Plaintiff ought not to recover, this Court, speaking through Chief Justice Marshall, say, if such instruction "might properly have "been granted in *any* case in which *any* testimony was offered, it "certainly ought *not* to have been granted if *any possible con-* "*struction of that testimony would support the action.*"

And in the case of Railroad Company vs. Fraloff, 10 Otto, the Court say, referring to this right of the trial judge, "Had there "been *no serious controversy* about the facts, and had *the law upon* "*the undisputed evidence precluded any recovery whatever against* "*the Company,* such an instruction would have been proper." (See pages 27 and 28.)

The true rule on the subject seems to be that in every case where, if a verdict were rendered by the jury, the Court would feel bound to set it aside because contrary to the law and the evidence, then the trial judge may and should direct the jury how to find.

But where there is any evidence going to establish the claim or demand of a Plaintiff, whether weak or strong; or where there is a conflict of evidence, then it is the duty of the Court to submit the *facts* to the jury, under proper instructions, and allow them to say what weight is to be given to it, and to render a verdict thereon.

In Hickman vs. Jones, 9th Wallace, 197, the province of both judge and jury in such cases is clearly defined and emphatically laid down by this Court, in the following paragraph:

"The Court instructed the jury to acquit the defendants, J. W. "Clay and R. W. Coltart. There was *some* evidence against "both of them. Whether it was sufficient to warrant a verdict of "guilty *was a question for the jury*, under the instructions of the "Court. The learned judge mingled the duty of the Court and "jury, leaving to the jury *no discretion but to obey the direction of* "*the Court.* Where there is *no evidence, or such a defect in it that* "*the law will not permit a verdict* for the plaintiff to be given, such "an instruction may be properly demanded, and it is the duty of "the Court to give it. To refuse is error. In this case the evi- "dence was received without objection, and was before the jury. "*It tended to maintain*, on the part of the Plaintiff, the issue which "they were to try. *Whether weak or strong, it was their right to* "*pass upon it.* It was *not* proper for the Court to wrest this part "of the case, more than any other, from the exercise of *their* judg- "ment. The instruction given overlooked the line which sepa- "rates two separate spheres of duty. Though correlative, they "are distinct, and it is important to the right administration of "justice that they should be kept so. *It is as much within the* "*province of the jury to decide questions of fact as of the Court to* "*decide questions of law.* The jury should take the law as laid "down by the Court, and give it full effect. But its application "to the facts—*and the facts themselves—is for them to determine.* "These are the checks and balances which give to the trial by "jury its value. Experience has approved their importance. "They are indispensable to the harmony and proper efficacy of "the system. Such is the law. We think the exception to this "instruction was well taken."

In a case decided as late as October Term, 1880, where the question of the defendant's liability depended upon the *fact* of negligence, under the circumstances of the case, this Court say: "Did the Defendant, therefore, under the circumstances of the "case, exercise due care and diligence in storing this wheat in the "Corn Exchange Elevator?

"The judge took this question from the jury and decided it in "favor of the Defendant. We are of opinion that in this the

"Court erred. We do not decide here that the Defendant was "negligent. We think there was evidence on which that question "should have been left to the jury. We think it should still be "left to the jury."

National Bank vs. City Bank, 103 U. S., Page 671.

Other extracts might be given from the cases referred to above, but those given are sufficient. The holding of this Court has been uniform and unvarying; and by that holding, it is impossible to justify the action of the Court below in instructing the jury to find for Defendants. And for this reason:—there was evidence in the record and before the jury tending to establish and, as we think, evidence which *did establish* the fact that after the negligence of Griggs in being on the pilot was well known to the engineer, that he so negligently and carelessly managed and controlled his train that a collision was brought about, resulting in the death of Griggs; and further, that it was not possible for Griggs to have avoided the consequences of Defendants' negligence, by the exercise of reasonable care on his part, after the same was discovered or might have been discovered by him. To these facts may be added that the evidence shows that there were neither brakes nor brakesmen on the two loaded flat cars; that the obstruction on the track was known to Defendants' agents, and plainly visible for 1,800 feet; that it was seen by the engineer at 1,200 feet, and could have been seen by him at 1,800 feet; that no effort was made to stop until within 150 or 200 feet, and even as to this fact there is conflicting testimony; the evidence of experts showing that such a train, etc., could have been and ought to have been stopped within 100 feet, by applying the means sworn to have been used; that there was no sand in the sand-box, or if there was, it was not used; that the grade was a down grade as it approached the place of the accident, and that the track was wet and slippery, and on that account called for additional care. These facts are strengthened by the testimony offered, tending to show that it was customary for the employees of Defendants to ride on the pilot, and with the knowledge of Neeley, (one of the defendants,) and that upon this particular occasion Griggs and others were expressly permitted to ride there.

How all these facts were, it was the province of the jury to de-

termine. The issue was before them,and they had the right, under proper instructions, to say whether Defendants were liable or whether they were not.

The principle of law upon which Plaintiff rested her case is a principle as firmly established as any in the domain of jurisprudence, and is thus stated in a leading treatise on the law of negligence: "Contributory negligence, however, will not disentitle "the Plaintiff to recover damages, unless it be such that but for "such negligence the injury would not have been sustained; *nor "if the Defendant might, by the exercise of care on his part, have "avoided the consequences of the negligence of the Plaintiff.*"

Saunders on Neg., Page 58.

An illustration of this principle is found in the case of Davies vs. Mann, 10 Mee. & W. 549, where the facts were that the Plaintiff negligently left his donkey in a public highway, tied together by the fore feet, and the Defendant carelessly drove over it with his horses and wagon *in broad day-light*, and killed it, the animal being unable to get out of the way of the wagon, it was held that the misconduct of the Plaintiff, in leaving the ass in the highway, was no answer to the action, for *although the ass may have been wrongfully there, still the defendant was bound to go along the road with care*, AND AT SUCH A PACE AS WOULD BE LIKELY TO PREVENT MISCHIEF; "were this not so," as was said, "a man might "justify the driving over goods left in the public highway, or "even over a man lying asleep there, or the purposely running "against a carriage going on the wrong side of the road."

This principle is laid down clearly in all the text books, and reported decisions. See,

Sher. & Red. on Neg., 2d Ed., Sec. 36,
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How all these facts were, it was the province of the jury to de-

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The principle of law upon which Plaintiff rested her case is a principle as firmly established as any in the domain of jurisprudence, and is thus stated in a leading treatise on the law of negligence: "Contributory negligence, however, will not disentitle "the Plaintiff to recover damages, unless it be such that but for "such negligence the injury would not have been sustained; *nor* "*if the Defendant might, by the exercise of care on his part, have* "*avoided the consequences of the negligence of the Plaintiff.*"

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Carroll vs. R. R. Co., 6th Helsk., 366.

The case of Jones vs. R. R. Co., 5th Otto, 443, which the Court below expressly professes to follow, did not present the question that is presented in this record. Not questioning the correctness of the decision in that case, it is insisted that the judge delivering the opinion did not have before his mind the distinction, well recognized in the books, which takes this case out of the operation of the rule laid down in that case. An analysis of the facts of that record will show that *the engineer of the moving train had no knowledge, either of the cars in the tunnel,* with which his train collided, *or that the plaintiff was upon the pilot.* Therefore the Court was not called upon to apply the principle *that if, after the negligence of the plaintiff is discovered, the defendant might, by the exercise of care on his part, have avoided the consequences of the plaintiff's negligence, he is bound to do so.*

The very definition of negligence with which the Court starts out, demonstrates the correctness of the position herein assumed, and entitles the Plaintiff to recover. On pages 441 and 442, they say: "Negligence is the failure to do what a reasonable and pru-"dent person would ordinarily have done under the circumstances "of the situation, or doing what such a person under the existing "circumstances would not have done. The essence of the fault "may lie in omission or commission. *The duty is dictated and* "*measured by the exigencies of the occasion.*" It is therefore respectfully submitted that it *is* a very *material* and a very *essential* fact that the agents of the Defendants *knew* both of the obstruction on the track and the position of the injured person, long enough before the collision to have avoided an accident. And in so far as any expressions of the opinion in Jones vs. the R.R. Co. contravene the well settled law on this subject, they are *obiter dicta*, and can and should have no weight in the decision of this case.

If the proof shows, or tends to show, that in broad daylight, with an obstruction in full view for 1,800 feet, and with full knowledge that Griggs was riding on the pilot, the engineer carelessly and negligently brought about a collision, resulting in the death of Griggs, when by the exercise of such care as the exigencies of the occasion demanded, he might have avoided the consequences of Griggs' negligence in being upon the pilot, then the law is that he was bound to exercise such care; and failing to do

so, his superiors, (the Defendants), are liable in damages. How the facts were was for the jury to say. It was error in the Court to peremptorily instruct them to find for the Defendants. In so doing, the Court assumed to pass upon the fact, and, as a necessary result, to adjudge that the *negligence of Griggs* was the efficient and proximate cause of the injury, and that Defendants were without fault or negligence, and therefore not liable to the action. The jury *might* have returned a verdict to the same effect, but can it be said that the verdict must necessarily have been that way; or that if the jury had found for the Plaintiff, the Court would have been bound to have set the verdict aside, because contrary to the law and the facts? Do the facts, as contended for by the Plaintiff, and established by the evidence, as we insist, present such a case as that the law would not allow a verdict for the Plaintiff to be given? It certainly will not be so contended. The answers to these questions make manifest the error committed by his Honor, the trial judge, and establish the correctness of Plaintiff's proposition, that the instruction complained of *is error*. And under the decisions of this Court is such error as necessitates a reversal and a new trial.

No point can be made upon the admission of any of the depositions introduced in evidence, because the record fails to show that their introduction was objected to when they were offered in evidence before the jury.

A motion was made to dismiss the suit for want of a Prosecution Bond, &c., based upon an act of the Legislature of Tennessee, passed in 1879. (See Acts 1879, Chapter 94.) This act does

not pretend to and could not deprive the Federal Courts of their right to permit poor persons to sue therein, upon such conditions as they may, by rule, prescribe. The rule of the Court in the 6th Circuit was fully complied with in this case.

For the errors herein indicated, we ask for a reversal and a new trial.

J. M. THORNBURGH,
By W. M. BAXTER,
Attorney for Plaintiff In Error.

MARY JANE GRIGGS, *vs.* R. G. HOUSTON & CO. } In error from the Circuit Court of the Eastern District of Tennessee.

Argument of Xenophon Wheeler, Attorney for Defendants:

—STATEMENT.—

This action is brought by plaintiff in error for herself and minor children to recover damages received by her husband and the father of her children, J. L. Griggs, which injuries resulted in his death; and the facts shown in the testimony and about which there is no contention, are these:

The Cincinnati Southern Railway was in course of construction and defendants R. G. Houston & Co., were contractors for the completion of the southern division of the road and had hired from the Western & Atlantic R. R. Co. an engine and tender at a stipulated price per month. The latter Company sent an engineer of its own to run the engine and paid the engineer. This engine, with tender and two flat cars attached in the rear, one of which was loaded with railroad iron, left Boyce's station, four miles northeast of Chattanooga, on Sunday morning June 22d, 1879, headed northward. On the cab of the engine was J. B. Neely, one of the firm of R. G. Houston & Co., with several other persons besides the engineer. In rounding a

curve about twelve miles from Chattanooga the engineer and parties on the cab saw in front of them, and distant about twelve hundred feet, a car standing on the main line loaded with ballast. The train was moving at a low rate of speed and when it approached the standing car the engineer blew the whistle and the only brake, which was on the tender, was applied and the speed of the train was materially lessened. The engineer proposed to couple the car on the track to the engine, and for that purpose the brakeman went forward on the running board to make the coupling. At this time the train was moving very slowly, not exceeding, as the engineer and all the other witnesses, except one state, four or five miles an hour; but when close to the car the engineer finding he was still coming up too rapidly, reversed his engiue, but the rails were wet, the engine was on a down grade and slipped and the engine collided with the car. The shock does not appear to have been a severe one, as neither the engine nor the car suffered any injury; but the husband of the plaintiff and two other men riding on the pilot were caught between the engine and the car and so severely injured, that death ensued, plaintiff's husband dying the following Wednesday. It seems that at Boyce's station, seven men, including plaintiff's husband, without the knowledge, or consent of either the defendant Neely, or the engineer, or anyone else on the cab, got on the pilot and were riding on it at and just before the collision. One of these men jumped off before the collision and was uninjured, and another got back upon the running board of the engine and was also uninjured. Mr. Neely, whose deposition was taken by plaintiff, testifies that he was not aware that anyone was on the pilot until he saw the man who had jumped off, and the engineer, whose deposition was likewise taken by plaintiff, says he knew of but one man who was there and he only discovered his presence about a fourth of a mile from the place of the collision, and it is nowhere pretended that either Neely or the engineer was aware of the presence of anyone on the pilot, except as herein stated. Nor is it anywhere pretended that defendants were common carriers. They carried neither

passengers or freight for hire, but were simply running construction trains upon an unfinished railroad, carrying their own freight and employes in their business, as contractors in completing the road.

The plaintiff's husband was one of their employes, not engaged in running the train, but in another department of their work, was away from his place of work and paid nothing for his ride.

As to all these matters there is no contention. The plaintiff claims the defendants are liable in damages because the train was run carelessly and negligently, and thereby her husband lost his life.

Upon the trial of the cause below, the judge instructed the jury to return a verdict for defendants, and from this direction of the judge, and refusal to give other instructions asked by plaintiff's attorneys, the plaintiff has appealed to this Court.

——ARGUMENT.——

I.—The plaintiff bases her claim for a recovery upon §1166. Sub-section 5 and §1167 of the code of Tennessee, prescribing certain precautions to be observed by railroad companies in running their trains, as follows:

"When any person, animal, or other obstruction appears

"upon the road the alarm whistle shall be sounded, the brakes "put down, and every possible means employed to stop the train "and prevent an accident; and that every railroad company that "fails to observe these precautions, or cause them to be observed "by its agents or servants, shall be responsible for all damage to "persons or property occasioned by, or resulting from any acci-"dent or collision that may occur."

It is insisted by plaintiff's counsel that these statutory precautions were not observed by defendants in the present case, that every possible means were not employed to stop the train and prevent an accident, and that contributory negligence upon the part of the decedent, can only be looked to in mitigation of damages.

To this we reply.

First.—These sections of the code apply to railroad companies running trains for the accommodation of the public, and receiving hire for the transportation of freight and passengers. It is unreasonable to suppose that the General Assembly, in passing the law, had reference to companies or individuals operating trains on railroads for construction purposes only. The defendants were not a railroad company but were simply running trains on an unfinished portion of a railroad, carrying their own freight and employes and receiving no compensation for carrying freight or passengers from the general public. Obviously the same precautions are not required upon roads not open for traffic, and upon which, construction trains only are run at low speed, as upon lines upon which swift express, passenger, and freight trains are continually passing.

It is true the statute in terms makes no exception, but the Supreme Court of Tennessee, construing this statute in 9 Heisk. 276, holds that the statute does not apply as between the companies and their employes about the yards and depots of railroads, the Court in its opinion using this language.

"This statute in terms makes no exception, but it seems to

"us unreasonable and utterly impracticable to apply it strictly to "the running of engines and cars about the depots and yards of "railroads, and in relation to the hands or employes of the road "who are moving across the track in the discharge of their several "duties."

Second.—If, however, we are mistaken in supposing the statute does not apply to construction trains running on unfinished railroads, still, under the construction given of it by the Supreme Court of the State the plaintiff could not recover.

J. L. Griggs, the decedent, was an employe of the defendants, his business being to carry water at Cave spring on the road near the place of the accident. He got on the pilot of the engine at Boyce's station, eight miles from Cave spring, against positive orders—defendants claim—certainly without the knowledge or consent of defendants or their servants. He was away from the scene of his labors upon no business of defendants.

Now, the Supreme Court of Tennessee, in the case of the Louisville & Nashville Railroad Co. vs. Peter and Sarah McKenna reported in the Southern Law Journal, for May 1881, holds that §1166, sub-section 5 and §1167 of the code, apply only to the injury of persons or property while on the road bed, and has no application to the injury of a passenger caused by an obstruction on the road bed. The Court employs the following language in rendering its opinion.

"Our first inquiry is, was the statute necessary to the safety "or protection of property or persons being moved by, or travel- "ing on railroad trains? Was it given to such persons or property "a remedy or remedies more extensive and effective than already "existed by common law? If there were any statutes npon the "subject, and a person is injured or killed, or his property dam- "aged or destroyed, through the negligence of a railroad com- "pany, its agents or employes—for such wrong and injury there

"is at common law a complete and adequate remedy. The "statute has given the remedy no strength. The rule has always "been that common carriers are bound to the utmost care and "diligence in the transportation of persons and property and are "responsible in damages for the consequence of the failure of its "exercise. No statute has, nor could have made this obligation "more imperative. Our next inquiry is, was the statute necessary "to the protection of persons and property on the track of a rail-"way in front of an approaching train? * * * * "* * In case of passengers or property on trains the "common law implies an undertaking on the part of carriers that "its road is in the best order, its engines, trains and machinery, "perfect and road worthy, that its operatives are capable, faithful "and will use every possible means to prevent an injury to persons "or property it carries for hire. While as to persons or property "on its track, it is only bound to ordinary care and diligence. "Nor is it required to have its machinery, carriages and road in "better than ordinary care and repair. In our opinion the stat-"ute was passed to remedy these latter defects of the common "law. Even under the statute it has never been contemplated "that anything more should be done than is directly required by "it. There is nothing in the statute involving an inquiry as to "the condition of the road, machinery, or other appointments; "while at common law, these, together with the specifications of "the statute are open to investigation when passengers or prop-"erty on trains are injured, and it cannot be inferred that the "Legislature intended an abridgement of common law remedies. "We therefore conclude that as a sufficient remedy already "existed, a remedy more comprehensive than the statuary one, "the legislature remedy intended to enlarge rights and remedies "in the one case and to leave them in the other in full play and "without contraction."

J. L. Griggs was a passenger on the train, stealing his passage, and this decision of the highest Court of the State in the construction of a statute of the State is decisive of the question

as to the right of a recovery under the provisions of the statute.

If any remedy is given the plaintiff it is under the common law. The provisions of the common law give her no relief for many reasons.

First.—Assuming, for the sake of argument, that the defendants would be liable for the negligence or want of skill of the engineer whom they did not hire or pay, and who alone managed the train in its running, there is no negligence clearly shown on his part. His testimony is taken by plaintiff herself, and shows that he had been an engineer four years or more, and Neely, whose testimony is also taken by plaintiff, states that he was considered rather over cautious. The only brake upon the train—and one brake would seem to be sufficient for so small a train—was set at or about the time the obstruction was first seen. All of the witnesses except McDonald, state that the train was moving slowly at the time of the collision. McDonald, who was also riding on the pilot, thinks the train was moving at the rate of ten or fifteen miles an hour just previous to the collision, but in this he is contradicted by all the other witnesses—Clift, Neely and the engineer—Miller, who was riding on one of the flat cars, and Bowers, who was standing on the ground and witnessed the accident. None of the witnesses fix the state of speed as exceeding four or five miles an hour. The engineer intended to couple his engine with the car in front and approached the car slowly for that purpose. It is clear that when he got close to the car, he found—to use his own words—he was "rolling up" too rapidly, and he reversed his engine and sanded the track and used every means in his power to check the train, but the rails were wet and the engine slipped. Still the shock was not great, for neither the engine nor any of the cars of the train, nor the car in front, with which the engine collided, suffered injury.

The negligence on the part of the engineer—if there was

any—was very slight. All the persons in the cab were in ignorance of the presence of parties on the pilot. The engineer indeed says he saw the head of a man in front about one-fourth of a mile from the place of accident. He naturally would apprehend no danger to that man at the rate of speed he was going just previous to the collision, for he would think this man could jump off the engine in the event there was any danger of a collision, just as one of the men did; or go back upon the running board of the engine, just as another did, and escape all injury. He was not bound to foresee that the only man he knew was on the pilot, would sit still and be crushed, when escape was so easy.

Second.—But the immediate and proximate cause of the disaster, was the negligence of the decedent. His negligence in remaining on the pilot is a material element in the case. It is entirely clear that all the men on the pilot, by the exercise of ordinary discretion, would have escaped all injury. One escaped by getting back on the running board. Another by jumping to the ground. All could have jumped as well as one. A man cannot heedlessly await an approaching peril, which he can escape by the exercise of a reasonable diligence, and complain when overwhelmed by it. It is reasonable to suppose that Griggs, with the other men who remained with him on the pilot, supposed up to the last, that the train would be brought to a stand still before the engine collided with the car, and relying upon this, made no effort to escape. This amounts to such contributory negligence as we insist would bar any recovery in this action. It is true that the witness, McDonald, who has, or had a suit against defendants for injuries received in the same collision, says:

"Three of the seven men on the pilot were killed, one "jumped off and one ran back on the foot board of the engine;

"that of course gave the rest of us no chance to get away," but it is difficult to see where the "of course" comes in, and why the jumping off of one man and escape on the foot board of another gave the rest of the men "no chance" of escaping in the same manner. The jumping off of one man would hardly prevent another from doing the same thing, and the fact of the approaching danger, and his adopting measures of escape, would seem reasonable to suppose, would lead the others to follow his example, especially as the ground was large enough to receive them. But the negligence which contributed most directly to the death of the plaintiff's husband was his riding on the pilot. It does not need the testimony of experts—although such testimony is in this proof—to show that the pilot is a dangerous and improper place on which to ride. There was no occasion for the decedent and his comrades to ride on the pilot, for there were two flat cars in the rear of the train, one of which was empty—upon either of which they could have ridden with entire safety.

The witness, McDonald however, has an original idea upon this point. He is asked in his 23rd direct interrogatory, "which "was the safer place to ride, on the flat cars or on the pilot on "that train?" and his response is prompt, "I thought the pilot "was," and when asked "why?" the reason given in the answer is conclusive, "as there were no brakes on the flat cars and they "were loaded with iron." What could be more satisfactory? In his cross-examination (55th cross-interrogatory) he is asked, "Had you been on the flat cars, would you have been injured?" and he answers, "Yes sir, I believe I would." And again, (56th cross-interrogatory) "Did you not know that to ride on the "pilot was attended with great danger?" and he answers, "No "sir, I did not." In his answer to the 79th cross-interrogatory he gave his own reason, and doubtless the reason of the others, for riding on the pilot instead of on the flat cars. He is asked, "Could you not have sat on the flat cars just as conveni-"ently as on the pilot that A. M.?" and the answer is, "I suppose "I could, but it was not as pleasant."

Third.—The riding on the pilot was in direct disobedience of the orders of the defendants. Bowers, the foreman of Griggs, and apparently his best friend, in answer to the 23rd direct interrogatory of his deposition, says:

"There was a standing rule against riding on the trains "without a permit, and no man would be permitted to ride on the "cow-catcher at any time; this was understood by everybody."

If McDonald is to be believed, men did ride on the cow-catcher, but even he does not state that he ever knew either of the defendants to be on board when such riding was done.

Again, it is clear that both Neely and the engineer ordered Griggs, with others, off the pilot that morning at Boyce's station. McDonald indeed says, he was not ordered off, and he heard none of the others ordered off, and he may in this, have been telling the truth, as he seemed to have been absent a part of the time while the train was standing at Boyce's station—getting something to eat. But that Griggs, with others, was ordered off, admits of no question. Neely says he ordered some men off and told them to get on the flat cars. Steele, the engineer, says he ordered them off, and, that the decedent was one of those ordered off by Neely, is shown by the admission of Griggs after he received his injury. Bowers, who waited on Griggs till his death, says in his answer to the 27th direct interrogatory of his deposition:

"I saw him that night after the accident, and had a conver-"sation with him in his tent. He told me that evening that if he "had listened to Mr. Neely that he would not have been hurt. "He said he himself was entirely to blame. He told me that "when he first tried to ride on the cow-catcher, Mr. Neely drove "them off and that they afterwards slipped around and stole a

"march on him, and got on without his seeing them, and that it "would not have occurred had he obeyed Mr. Neely."

It would be hard lines indeed for the master, if, when in direct disobedience of orders, the servant incurs unnecessary danger, and receives injuries from his exposure, he, or his representatives, could sustain an action against the master.

Doubtless whisky was at the bottom of all the trouble. The day before the accident, was pay day. Griggs was paid off and Bowers, the foreman, states that the night before, he had a bottle of liquor, and was intoxicated. Neely says that his wife, the plaintiff, told him after the accident, that she tried to keep her husband at home that morning, but was unable o do so and Bowers answering the 24th direct interrogatory of his deposition, says:

"When I first came to the men when they were caught "between the cow-catcher and the car, he asked me 'for God's "sake to do something for him.' I says, what in the world were "you doing riding on the cow-catcher? He said, 'I had a little "whiskey, and we were on a little spree and thought we would ride "on the cow-catcher for a lark.'"

Briefly, these are all the material facts in the case. The witnesses all agree upon the material facts. McDonald disagrees with the remainder of the witnesses, but upon unimportant matters. He is contradicted upon many of them by Miller, and his testimony bears abundant internal evidences of its untrust-worthiness.

One example out of several. In his direct examination he states positively and without any qualifications—"We had Mr. "Neely's permission to ride on the pilot." His attention is drawn to this statement in his cross-examination and he is asked, (77th cross-interrogatory) you say in your direct examination "Mr. "Neely gave you and Mr. Griggs permission to ride on the pilot."

When was this permission given? The answer is, "There was "no express permission given by Mr. Neely to ride on the pilot "that day, but it was in the contract that we should be carried "free of charge."

Another example of same kind. In the 17th direct interrogatory, he is asked, "Do you know of your ówn knowledge "whether or not the sand box of the engine was supplied with "sand at the time of the accident?" The answer is, "It was not." His attention is called to his positive swearing on this point in his cross-examination. He is asked, (68th cross-interrogatory) "How do you know that there was no sand in the box at that "A. M.?"

Answer—"Because if there was I suppose he would give "her sand."

"Is that the only reason you have for saying that there was "no sand in the sand box?"

Answer—"No sir. I have been told by several parties that "there was none."

"Then you know nothing of your own knowledge about it "except what some one has told you."

Answer—"Nothing, only if we had sand I suppose he "would not have let her slip so far."

"Do you know that he did not use saud?"

Answer—"Yes sir."

"How do you know it?"

Answer—"I seen no sign of it."

Other instances of the same kind are found in his deposition

but we do not regard his testimony as touching the vital matters at issue.

We have purposely refrained from the citation of authorities, as the questions of law involved in the case have been settled by many adjudications.

Justice Swayne, in the case of the Railroad Co. vs. Jones, 95 U. S. 439, uses the following language.

"One, who by his negligence, has brought an injury upon "himself cannot recover damage for it. Such is the rule of the "civil and of the common law. A plaintiff in such case is "entitled to no relief. But when the defendant has been guilty "of negligence also in the same connection the result depends "upon the facts. The question in such case is; first, whether the "damage was occasioned entirely by the negligence or improper "conduct of the defendant? or second, whether the plaintiff "himself so far contributed to the misfortune by his own negli- "gence or want of ordinary care and caution, that but for such "negligence or ordinary care and caution on his part, the misfor- "tune would not have happened. In the former case, the "plaintiff is entitled to recover. In the latter, he is not."

We take it this embodies the whole law upon the subject.

Hardly could there be two cases so nearly alike in all their circumstances as that of the Railroad Co. vs. Jones and the one at bar. In that case Jones was a laborer, engaged in the construction and repair of the roadway of a railroad, and Griggs was similarly employed in the service of R. G. Houston & Co. In that case Jones was riding on the pilot of the engine, and while so riding, the train ran into certain cars belonging to defendant, loaded with ties. Those cars had become detached from another train of cars and were standing on the track of the Virginia Avenue tunnel in the city of Washington. Griggs was also riding on the pilot and his train ran into a car that had been

detached from another train. Jones had been warned against riding on the pilot and forbidden to do so. Griggs had been warned and forbidden to do the same thing. In the case of Jones there was a box car attached to his train and there was room for him in that car.

In the case of Griggs there were ~~three~~ flat cars, in which there was plenty of room for him.

In the case of Jones he and another riding with him on the pilot were the only ones on the train injured by the collision, those riding in the box car being unhurt.

In the case of Griggs, he and those riding with him on the pilot, who made no effort to escape, were the only ones injured. The five persons riding on the flat car were uninjured.

In the case of Jones, the Court says:

"All those in the box car where he should have been, were "uninjured. He must have escaped also, if he had been there. "His injury was due to his over recklessness and folly. He was "himself the author of his misfortune. This is shown with as "near an approach to a demonstration as anything short of "mathematics will permit."

Yet, in that case Jones had stronger claims for a recovery than Mrs. Griggs has in this. In that case it was the duty of the defendant, railroad, to carry Jones to and from his place of work. In this case no such duty ~~has~~ incumbent upon defendants. Griggs was away from home and work, upon no business of defendants, and upon a day on which no work was being done.

In the case of Jones, it was common for some of the men to ride upon the pilot or bumper, and this was done with the approval of the agent of defendant in charge of the laborers, of whom Jones was one, and with the approval of the conductor

who carried them both ways. No such custom existed in this case, and Griggs had the approval of no conductor or other superior officer.

In the case of Jones, when the party were about to leave on their return that evening the plaintiff was told by Van Ness, in charge of the caboose, to "jump on anywhere," that they "were "behind hand and must leave."

In the case of Griggs, he was told by one of the defendants that he must not ride on the pilot, and was made to get off, and was directed to get on one of the flat cars. He disobeyed, and without the knowledge of this defendant, or the engineer, got again upon the pilot.

In the case of Jones, the collision took place in a tunnel, and plaintiff could not see the approaching peril, and provide any means of escape.

In the case of Griggs, the collision took place in the day time—the detached car was seen for a long distance—the train was running at a low rate of speed and he had only to step off to be in safety. In every respect Jones had a stronger case for recovery than has the plaintiff. And yet, in that case, the Court says:

"If the Company had prayed the Court to direct the jury "to return a verdict for the defendant it must have been the "duty of the Court to give such direction and error to refuse."

In this case the defendants did pray the Court to direct the jury to return a verdict for the defendants and the Court complied with the request. It follows from the dicta of the Court